COVID-19: AN EPIDEMIC OF CLAIMS?

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Patrick West looks at the potential impact of the Coronavirus pandemic in employers' cases.

The COVID-19 pandemic has been described as the biggest challenge facing the world since World War II.

With thousands dead and dying from the virus, there is no vaccine and no cure (yet).

It is a frightening prospect for all those essential workers in the private and public sector who may be exposed to patients and other persons infected with COVID-19.

In Italy this week official figures confirmed that more than 60 doctors have died from COVID-19 and thousands of health workers have been infected with the virus since the outbreak began.

It may be that not all of them contracted the virus as a result of work but a significant proportion of them may have done.

Back here on 28 March 2020 the headline in the Lancet was: *"COVID-19 and the NHS: a national scandal"*.

The article highlighted complaints from doctors and other staff about a critical shortage of masks and other PPE and alleging a failure to implement adequate testing of staff.

After the notorious Coronavirus "curve" has been flattened, the Courts may face a wave of claims for personal injury due to infection with COVID-19 or related injuries (for example, psychiatric injury related to COVID-19 exposure).

It is not yet known how many patients who recover may suffer from long-term effects from the damage to their lungs caused by viral pneumonia and/or acute respiratory distress syndrome.

Some possible examples of potential claims might include:

- NHS staff who contract the virus due to inadequate provision of PPE and testing.

- Supermarket check out workers who are not adequately screened from customers.
- Delivery drivers whose employers fail to risk assess and warn them about the threat posed to them by contact with the public.

The starting point is that any claims will of course post-date the enactment of s 69 of the Enterprise and Regulatory Reform Act 2013 the standard of care is that imposed by common law negligence (or potentially the Occupiers' Liability Act 1957 e.g. construction of protective screens at supermarket check-outs).

However, in *Janice Cockerill v (1) CXK Ltd (2) Artwise Community Partnership* [2018] EWHC 1155 HHJ Rice held that in considering the nature of the modern common law employers' duty it is still permissible to have regard to the statutory duties, to understand in more detail what steps reasonable and conscientious employers can be expected to take to provide a reasonably safe workplace and system of work:

"18. Care is needed with this analysis. In removing the claimant's cause of action for breach of statutory duty, the 2013 Act did not repeal the duties themselves. Those duties continue to bind employers in law. So they continue to be relevant to the question of what an employer ought reasonably to do."

As to the specifics, the former Control of Substances Hazardous to Health (COSHH) Regulations 2002, SI 2002/2677 and its predecessors are likely to be material.

Since the coming into force of the COSHH Regulations 1988, SI 1988/1657 in 1989, and subsequent COSHH Regulations there has been little need to use the common law of negligence in civil actions for injuries caused by hazardous substances.

Common law precedents are also scarce because even before the implementation of the COSHH Regulations, civil liability for such injuries was often based upon breach of other statutory regulation, such as the Factories Act 1937, s 47 and Factories Act 1961, s 63 provisions relating to dust, fume and other impurity.

The familiar common law test of negligence remains that laid down by Swanwick J in *Stokes v Guest Keen and Nettlefold (Nuts and Bolts) Ltd* [1968] 1 WLR 1776 at 1783:

"… the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; … where there is developing knowledge he must keep reasonably abreast of it and not be too

slow to apply it; and where he has in fact greater than average knowledge of the risks he may be thereby obliged to take more than the average or standard precautions …''

"A good employer does not merely sit back and wait for official action or regulations."

What an employer is expected to know will change over time: there was no such thing as an unchanging concept of safety. It had to be judged according to the general knowledge and standards of the time (*Baker v Quantum Clothing Group Ltd* [2011] UKSC 17).

In *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 the Court held that under the modern common law a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees. Thus, the requirements of reg 3 of the Management of Health and Safety at Work Regulations 1999, SI 1999/3242 and within COSHH the requirement to risk assess imposed by reg 6 (from 27 October 2003).

However, in *Dugmore v Swansea NHS Trust*, [2002] EWCA Civ 1689 Hale LJ considered briefly the duty owed in negligence. It was difficult on the dermatological consensus in the literature to say an employer should have been aware of the risk of latex allergy being caused by gloves until 1996, but the case succeeded under the COSHH Regulations.

The state of employer's knowledge at the time of infection is likely to be a critical issue in EL cases involving COVID-19. Despite the outbreak having started in China in November 2019 guidance has proved patchy and sometimes contradictory (see for example the CDC's review of whether widespread wearing of masks is advisable or not).

It is important to note that previously strict liability cases based upon, for example sudden failures of containment equipment may fail without proof of fault and duties based upon 'reasonable practicability' under the Regulations have generally place the burden of proof upon the employer. That may switch back now to the claimant.

So in old case law as in *Coleman v Harland and Wolff Ltd* [1951] 2 Lloyd's Rep 76, the onus was said to be on the claimant to show that a material was dangerous and that a risk of disease existed.

There have been many examples of cases where claimants failed to show the employer ought to have known about the risk of disease e.g. *Graham v Co-operative Wholesale Society Ltd* [1957] 1 All ER 654 where mahogany wood dust caused dermatitis.

Unsurprisingly, if it is incumbent on an employer to take protective measures he must also ensure his workers comply in using them In *Clifford v Charles H Challen & son Ltd* [1951] 1 KB 495, Denning LJ stated that when an employer:

"asks his men to work with dangerous substances, he must provide proper appliances to safeguard them, he must set in force the necessary system by which they use the appliances … and he must do his best to see that they adhere to it."

So in *Clifford* the employer was under a duty to supervise staff to see that barrier cream was used.

Of particular relevance in respect of COVID-19 and testing of medical staff, it was held in *Sorman v Royal Scottish National Institution Board of Management* [1961] SLT 217 that periodic checks by X-ray were required by normal practice where nurses were in close contact with active tuberculosis patients but not for occasional contacts in a mental institution.

A testing regime to provide regular screening may be required in other cases, and certainly in the context of a COVID-19 hospital ICU would seem to be vital.

Where the employer is an emanation of the state (as the NHS is likely to be), then the employer has been held liable for breach of the EU Directive rather than the UK Regulation which implemented the Directive. Since the start of the outbreak in the UK the country has no longer been an EU member state (from 31/01/2020) but remains temporarily governed by EU law under the Withdrawal Agreement. Even before that it was not clear whether the direct effect principle survived the removal of civil liability by s 69 of the Enterprise and Regulatory Reform Act 2013 (the COSHH Regulations implement Directive 80/1107/EC which at Articles 4–11 contains similar provisions to the COSHH Regulations).

The main effect of the COSHH Regulations is to require work with dangerous substances ("hazardous to health": includes biological agents and very broadly defined

by the catch all provisions in the COSHH) to be planned and carried out so as to either avoid risk, or if that cannot be attained, minimise risk.

The definition of 'biological agent' under reg 2(1) probably covers viruses like COVID-19:

"a micro-organism, cell culture or human endoparasite, whether or not genetically modified, which may cause infection, allergy, toxicity or otherwise create a hazard to human health."

The ACOP is also clear that, under COSHH at least, contractors, sub-contractors and all self-employed people all have the same duties of an employer.

Regulation 6(1) requires that an employer make a suitable and sufficient risk assessment and implements the steps recommended by it. Regulation 6(2) provides a list of matters which the assessment must take into account. Regulation 6(3) provides the circumstances in which it must be reviewed which becomes relevant if the hazards change or develop as may be the case with COVID-19 (e.g. *Naylor v Volex Group plc* [2003] EWCA Civ 222 in which the defendant was found in breach of what is now reg 6(3)(a) for failing to review a risk assessment when it had information which suggested that an earlier assessment was no longer valid: easy to see how similar scenarios may occur with COVID-19).

Duties under the COSHH Regulations were sometimes strict and often subject to reasonable practicability. These will now be subject to tort principles of reasonable foreseeability and reasonableness of the standard of care.

Reg reg 7(1), requires so far as is reasonably practicable, that exposure to substances hazardous to health be prevented. If total prevention is not reasonably practicable, then exposure shall be adequately controlled. Principles of good practice are set out in Schedule 2A.

By reg 7(3) the employer must first make use of work processes, systems and controls to control exposure and, only to the extent that such measures do not provide adequate control, should personal protective equipment be provided (reg 7(3)(c)).

Once a control measure is provided, the employer must ensure that it is properly used or applied (reg 8(1)) and that any equipment is maintained (reg 9). The strict duty in

respect of plant and equipment (including engineering controls and PPE) will no longer apply.

Employees are under a duty to make full and proper use of any control measures by reg 8(2).

Where indicated by the risk assessment or otherwise appropriate, the employer must monitor exposure at the workplace (reg 10 and Schedule 5) and maintain health surveillance over the employees (reg 11 and Schedule 6).

In addition, there is a mandatory duty to provide employees with suitable and sufficient information, instruction and training (reg 12).

Additional provisions relating to biological agents are dealt with in a separate schedule (Schedule 3).

Although ordinary flu infection from a co-worker was excluded under the COSHH, where disease becomes endemic in the workplace the principles of COSHH are likely to be material. COVID-19 may well see that situation developing in many instances.

In earlier cases, blood-borne viruses such as hepatitis and HIV posed a risk for health-care workers, prison officers and others and frequently, exposure to blood causes psychiatric injury only through fear of infection with a blood-borne virus (in *Stewart v The Home Office* (18 April 2001, unreported), Central London County Court, Mr Recorder Susman QC a similar claim succeeded under the common law). It is easy to see how psychiatric injury/primary victim cases might succeed in tort where an individual is exposed to the risk of infection by COVID-19.

As to causation of injury, COVID-19 cases are unlikely to fall within the cumulative damage cases. Infection usually derives from one exposure (although there is some thought that enclosed spaces/numbers of patients may increase the severity of infection due to increased viral shedding). Due to the short latent period between exposure and infection, the problems which occur in mesothelioma cases do not arise (where the latent period is 10 to 50 years or more). It should be straightforward to identify the defendant employer and arguments arising from *Fairchild v Glenhaven* [2003] 1 AC 32 exceptions to causation will likely be rare save where a claimant works for more than one employer simultaneously.

In *Sanderson v Hull* [2008] EWCA Civ 1211, the Court of Appeal rejected application of *Fairchild* and the material increase in risk principle as there was only one employer and expert evidence could have been called to assess whether but for the breaches of duty, the campylobacter infection of a turkey plucker would not have occurred. The traditional causation tests were possible. Only one defendant was involved. It was found that the exposure at that defendant's workplace caused the infection.

It is likely a claimant will not have to prove the precise cause of infection, simply to prove that the most probable cause(s) were negligent causes. Or, alternatively, that the breaches of duty increased the risks of infection by more than 50%. Microbiology or other expert advice will be critical.

In a recent example of an infection at work claim, a soldier deployed to field operations in Afghanistan contracted Q fever and brought a claim for personal injury against the MOD which was dismissed on appeal (*Wayne Bass v MOD* [2020] EWHC 36 (QB) Martin Spencer J 13/01/2020).

The case related to his deployment in 2011-2012 and so pre-dated the Enterprise Act and the old Six Pack regulatory regime applied. However, it remains relevant in respect of common law principles.

Q fever bears some significant similarities to COVID-19. It is transmitted to humans by animals such as cattle and symptoms are flu-like but can prove fatal. In more severe cases it can lead to victims developing pneumonia or life-threatening acute respiratory distress syndrome (which affected significant numbers of patients who succumbed to the Swine Flu H1N1 epidemic).

It was held that the MOD had not breached its duty of care. The Management of Health and Safety at Work Regulations 1999 were not applicable as deployment of soldiers abroad constituted work activity outside the UK notwithstanding that such decisions were taken by a UK employer.

The issue concerned only the MoD's duty at common law, *Smith v Ministry of Defence* [2013] UKSC 41 considered.

Given the foreseeability of the contraction of Q fever the MoD had to meet the standard to be properly expected of a reasonable and prudent employer to avoid being

found to be negligent, *Stokes v Guest Keen & Nettlefold (Bolt & Nuts) Ltd* [1968] 1 W.L.R. 1776 applied, *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17 followed.

The starting point was the duty on an employer in relation to the carrying out of various risk assessments. It was held the MOD was in a rather different position to ordinary employers as it had to conduct a risk assessment in relation to prophylaxis against disease for 20,000 troops a year who were deployed overseas.

The global risk assessment that senior army doctors had carried out was sophisticated and prioritised soldiers' health. An employer had to be continually alert to changing information and evidence.

The question was whether the MoD's approach and response to additional information received had necessitated a reassessment of the risk and a change of policy. However, the appellant conceded that it had not been incumbent on the MoD to consider the risk of Q fever in isolation.

Ultimately, the MoD was principally concerned with malarial prophylaxis and the issue was whether it should have changed its stance to take account of other fevers. It was entitled to take as its starting point the fact that the existing regime of prophylaxis for malaria was apparently effective. It was also entitled to take a cautious approach and wait for more complete evidence. There had therefore been an appropriate risk assessment, which had been kept under review and the MoD was not in breach of its duty.

The case illustrates some of the problems claimants might face if their exposure/injury took place during the early stages of the pandemic when employers might not have all the information they would later on.

There do not seem to have been any EL cases involving the most recent comparable disease outbreak during the 2009-2010 Swine Flu epidemic. This is perhaps unsurprising as that outbreak was considerably less widespread and the disease itself less infectious (its RO factor was 1.4-1.6; COVID-19 is estimated at 2.0-2.5).

It is submitted that the following measures will probably be expected of employers where their staff are at risk: risk assessments, provision of information/training, working from home, identification of high risk groups (for underlying health conditions), hand

cleansing instructions, hand sanitiser provision, (PPE/masks/screens), testing, control of infected staff, adequate communication with staff. Other measures may be considered part of the duty of care such as meetings by internet (Zoom etc.), varying hours to avoid rush hour "crush" on trains/buses and so on.

No doubt courts will consider Government advice at the time of the alleged breach. At the time of writing this is as follows:

https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-coronavirus-covid-19

- businesses and workplaces should encourage their employees to work at home, wherever possible
- if someone becomes unwell in the workplace with a new, continuous cough or a high temperature, they should be sent home and advised to follow the advice to stay at home
- employees should be reminded to wash their hands for 20 seconds more frequently and catch coughs and sneezes in tissues
- frequently clean and disinfect objects and surfaces that are touched regularly, using your standard cleaning products
- employees will need your support to adhere to the recommendation to stay at home to reduce the spread of coronavirus (COVID-19) to others
- those who follow advice to stay at home will be eligible for statutory sick pay (SSP) from the first day of their absence from work
- employers should use their discretion concerning the need for medical evidence for certification for employees who are unwell. This will allow GPs to focus on their patients
- if evidence is required by an employer, those with symptoms of coronavirus can get an isolation note from NHS 111 online, and those who live with someone that has symptoms can get a note from the NHS website
- employees from defined vulnerable groups should be strongly advised and supported to stay at home and work from there if possible

It's good practice for employers to:

- keep everyone updated on actions being taken to reduce risks of exposure in the workplace
- ensure employees who are in a vulnerable group are strongly advised to follow social distancing guidance
- make sure everyone's contact numbers and emergency contact details are up to date
- make sure managers know how to spot symptoms of coronavirus (COVID-19) and are clear on any relevant processes, for example sickness reporting and sick pay, and procedures in case someone in the workplace is potentially infected and needs to take the appropriate action
- make sure there are places to wash hands for 20 seconds with soap and water, and encourage everyone to do so regularly
- provide hand sanitiser and tissues for staff, and encourage them to use them

- Limiting spread of coronavirus (COVID-19) in business and workplaces
- Businesses and employers can help reduce the spread of coronavirus (COVID-19) by reminding everyone of the public health advice. Posters, leaflets and other materials are available.

- Employees and customers should be reminded to wash their hands for 20 seconds more frequently than normal.

- Frequently clean and disinfect objects and surfaces that are touched regularly, using your standard cleaning products.

- Handling post or packages
- Staff should continue to follow existing risk assessments and safe systems of working; there are no additional precautions needed for handling post or packages.

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Baker v Quantum Clothing Group Ltd [2011] UKSC 17

Kennedy v Cordia (Services) LLP [2016] UKSC 6

Dugmore v Swansea NHS Trust, [2002] EWCA Civ 1689

Coleman v Harland and Wolff Ltd [1951] 2 Lloyd's Rep 76

Graham v Co-operative Wholesale Society Ltd [1957] 1 All ER 654

Clifford v Charles H Challen & son Ltd [1951] 1 KB 495

Sorman v Royal Scottish National Institution Board of Management [1961] SLT 217

Naylor v Volex Group plc [2003] EWCA Civ 222

Stewart v The Home Office (18 April 2001, unreported), Central London County Court, Mr Recorder Susman QC

Fairchild v Glenhaven [2003] 1 AC 32

Sanderson v Hull [2008] EWCA Civ 1211

Wayne Bass v Ministry of Defence [2020] EWHC 36 (QB) QBD (Martin Spencer J) 13/01/2020

Smith v Ministry of Defence [2013] UKSC 41

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