

COVID-19 and PPE: date for "guilty knowledge"

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Published on 11th June, 2020

As the end of lockdown (at least in its present form) now looms large on the horizon, the process of unpicking what went wrong with the UK's experience of the virus has begun.

At the same time as millions prepare to return to shops and businesses their staff will look to their employers for proper protection from the residual threat of COVID-19.

In the context of employer's liability claims, there are already sadly cases of staff both in the NHS and in other sectors (notably Transport for London staff) who have died from the virus during the period when many staff were not being routinely protected in the way they are now.

Should a claim be brought, a key factor for succeeding against Defendants will be establishing what provisions they ought to have made in terms of PPE and other social distancing measures at what point in the crowded chronology of the outbreak.

In respect of a "cut-off" point for guilty knowledge (as it is some time expressed in other EL disease cases) it is likely to be a complex question with different considerations in different cases depending on role and working conditions.

As I set out in my previous article on this issue, these cases will (pursuant to *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17) turn on when companies ought reasonably to have taken certain steps given what companies in their situation generally ought to have known at the time and that will in large part (as in NIHL and asbestosis cases) turn on what the relevant Government department's guidance was at any given point.

There is the knotty question of causation which may be a difficult hurdle in some cases in respect of whether the infection was through workplace/work exposure or through community exposure generally. The earlier the likely infection the less likely it is from general community exposure, the later it is diagnosed the greater the chance of community infection.

This factor has a knock-on effect on breach of duty considerations too as the greater the risk the greater the need to take steps to protect employees. So again, cases very early on during the outbreak may arguably (except for say nurses in A&E or ICUs) struggle to show that the risk was severe enough to require PPE or increased PPE.

The Government's guidance on COVID-19 was first issued according to www.gov.uk on 25 February 2020.

As late as 7 March the Prime Minister was still sending out signals that social distancing was not necessary and that shaking hands was safe: <https://news.sky.com/story/coronavirus-boris-johnson-was-shaking-hands-as-some-scientists-were-calling-for-it-to-stop-11983606>

We know now that this appears to have contradicted what the Government was being told by scientists but it seems very unlikely to me that Courts will criticise ordinary businesses for following the lead of the Prime Minister.

The HSE's first press release is relatively late on and dated 3 April (joint press release with TUC and CBI: <https://press.hse.gov.uk/2020/04/03/coronavirus-a-joint-statement-between-hse-the-tuc-and-the-cbi/>) they seem to have been given the job of deregulating the manufacture of hand sanitiser first (the very first COVID-related press release).

The HSE press release here (https://www.hse.gov.uk/news/social-distancing-coronavirus.htm?utm_source=pressrelease&utm_medium=hse.gov.uk&utm_campaign=coronavirus&utm_term=pressrelease&utm_content=social-distancing) makes it clear that by 3 April the following measures should have been taken:

- Social distancing of 2 m (note this is twice that suggested by the WHO)
- Handwashing with soap for 20 seconds
- Self-isolation for "shielded cases"
- Working from home

It relies largely on Public Health England's guidance. It is not clear when provisions such as screens and floor markings to ensure social distancing were advised as again the documents are updated regularly and it is not possible to access the originals at this point.

The following chronology give some insight:

Wednesday 22 January

Amid an explosion of coronavirus cases in Wuhan, the Chinese city where the outbreak began, Public Health England (PHE) announces it is moving the risk level to the British public from "very low" to "low". [Heathrow begins screening all arrivals from Wuhan.](#)

There are as of now no confirmed cases in the UK, and just nine official coronavirus-related deaths in China.

Wednesday 29 January

The UK's first two patients test positive for Covid-19 after two Chinese nationals from the same family staying at a hotel in York fall ill. One was [studying at the University of York.](#)

A plane evacuating Britons from Wuhan arrives at RAF Brize Norton. Passengers go into a 14-day quarantine at a specialist hospital on Merseyside.

Thursday 6 February

Britain's third patient tests positive for coronavirus, having contracted the illness at a conference in Singapore. The 53-year-old so-called "super spreader" is later linked with 11 other cases, five of which are in the UK.

Monday 10 February

*After the confirmed number of patients in the UK hits eight, health secretary Matt Hancock announces **new regulations** giving doctors "strengthened powers" to forcibly quarantine people for their own safety.*

Sunday 23 February

*Four British nationals repatriated from a cruise ship moored off the coast of Japan **test positive for the virus**, bringing the total number of cases in the UK to 13. The Diamond Princess is home to the largest outbreak outside of mainland China after hundreds on board are infected.*

Friday 28 February

*Coronavirus claims its **first British victim** after Japanese authorities confirm the death of a tourist who was onboard the Diamond Princess. UK authorities also confirm the first case of the illness to be passed on inside the country.*

Friday sees the end of the worst week for global stock markets since the 2008 financial crash.

Wednesday 4 March

Cases of COVID-19 begin to surge in the UK. Officials announce the biggest one-day increase so far as 34 cases bring the total to 87. Emergency discussions take place in Westminster over a possible shutdown of parliament.

Elsewhere, Italy announces it is shutting schools and universities amid what is developing into the worst outbreak in Europe. The virus has now reached 81 countries, with more than 90,000 confirmed worldwide cases and more than 3,000 deaths.

Thursday 5 March

A woman in her 70s becomes the first person to die in the UK after testing positive for coronavirus. The number of people infected with the disease in Britain surges past 100.

Tuesday 10 March

Nadine Dorries, a junior health minister becomes the first MP to test positive for COVID-19. Nottingham Forest owner Evangelos Marinakis also announces he has the illness.

Six people in the UK have now died of the illness, with 373 testing positive.

Wednesday 11 March

The Chancellor Mr Sunak announces a £12bn package of emergency support to help the UK cope with the expected onslaught from coronavirus. The World Health Organisation officially declares a pandemic.

Friday 13 March

Confirmed cases of COVID-19 rise by more than 200 in a single day, and a host of sporting events announce their postponement including the London Marathon. Premier League fixtures are suspended.

Sunday 15 March

The day after the confirmed number of cases passes 1,000, Health Secretary Matt Hancock says the elderly could be quarantined for a period of up to four months in the coming weeks as a precautionary measure to protect lives.

Major supermarkets warn the public against panic-buying and tell people to "be considerate in the way they shop" as alarm at the escalating crisis mounts.

Monday 16 March

During his first daily press briefing Boris Johnson urges everybody in the UK to work from home and avoid pubs and restaurants to give the NHS time to cope with the pandemic.

The UK's death toll rises to 55, with 1,543 confirmed cases, though it is believed 10,000 people have already been infected.

Tuesday 17 March

The Chancellor Mr Sunak unleashes the biggest package of emergency state support for business since the 2008 financial crash, unveiling £330bn-worth of government-backed loans and more than £20bn in tax cuts and grants for companies threatened with collapse.

The Government's chief scientific adviser Sir Patrick Vallance warns as many as 55,000 people in the UK may now be infected and says it would be a "good outcome" if the eventual death toll could be kept below 20,000.

Wednesday 18 March

The government announces most schools across England will be [shut down from Friday](#) until further notice. Wales and Scotland also say they will close schools by the end of the week.

Thursday 19 March

The government says the number of people who died after testing positive for coronavirus [has risen to 144 in the UK](#), an increase of 40 per cent in a day. The Department of Health and announces there are now 3,269 confirmed cases of Covid-19 in the UK.

Sir Patrick Vallance says everyone must now follow public health advice and socialising in pubs and clubs must stop.

Friday 20 March

The Prime Minister orders all pubs, restaurants, gyms and other social venues across the country to close their doors for the foreseeable future.

The Chancellor announces the government will pay up to 80 per cent of wages for workers' at risk of being laid off, and it is reported that overwhelmed doctors will be given new guidelines to help them decide which coronavirus victims should potentially live or die if they run out of intensive care beds or ventilators.

Saturday 21 March

A senior NHS boss tells panic buyers they should "be ashamed" over depriving healthcare staff of food supplies before the health service announces an historic deal with private hospitals, securing almost 20,000 additional staff and thousands of extra beds.

In the UK more than 230 people have died after contracting the virus, with infection cases surpassing 4,000. Worldwide the number stands at more than 270,000 cases and 11,000 deaths.

Bearing the above chronology in mind, it seems to me that any employer with public-facing staff should have been conscious they might foreseeably be exposed from March 19-20 (the same date as high risk social venues were closed by order of the Government).

However, it is arguable that date of guilty knowledge might be pushed back to somewhere around March 13 when large sporting venues were being closed.

An interesting snapshot of what one employer was doing by 10 March can be obtained by reading the following: <https://www.astonservicesgroup.co.uk/wp-content/uploads/2019/01/IMS-Guidance-on-CV19-v1-March-2020.pdf>

This particular company was entirely focused on dealing with reacting to known or suspected cases of COVID-19 and not in taking steps beyond that.

It seems to me that is consistent with most employers not having much knowledge of a significant risk of infection in general until after that date.

In my view, given the assumed incubation period of 2-14 days that suggests viable cases will be those where infection probably arose around 15 March but probably more likely from around 21-22 March shortly before the full lockdown came into effect.

It seems likely to me that any employer failing to social distance the public from staff or provide relevant PPE (masks/screens etc.) after 19-20 March may be vulnerable to a claim in negligence.

For those infected while working for the NHS there are likely to be strong arguments about Government inaction before COVID-19 even arrived.

In particular, it might be argued that the Government and the NHS negligently ignored the advice of the Nervtag (New and Emerging Respiratory Virus Threats Advisory Group) in June 2017 resulting in a failure to stockpile adequate amounts of PPE (<https://www.theguardian.com/world/2020/apr/19/government-under-fire-failing-pandemic-recommendations>).

In terms of coping with the outbreak on the front line it will be informative to see what cases arise out of any failure to protect staff from psychiatric sequelae, perhaps by failing provide counselling support or staff rotation when so many patients were dying in front of them with conditions akin to battlefield hospitals.

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