

Coronavirus and employer's liability, some likely issues

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Despite the major disruption to daily living and the emergency legislation that has been rushed into effect in response to the outbreak of coronavirus (SARS CoV 2) and the resulting disease (Covid 19), the duty of employers to ensure the health and safety of their employees has remained undiminished. It is at times like these, when the work of many health care workers and others who provide essential services involves exposure to a greatly increased risk of serious injury or death, that the protection of such employees becomes all the more important. The admiration and gratitude of the nation is little consolation if the entitlement to basic health and safety measures is reduced on the ground of *force majeure*. Tales of haphazard supply of inadequate and insufficient personal protective equipment (PPE) for frontline staff and the delay in implementing testing (health surveillance) to help identify individuals who pose or face a greater health risk than others and the disproportionate incidence of the disease among such employees mean that, while a variety of coronavirus related claims spring to mind, it is surely only a matter of time before claims for damages are made against employers by employees, or their dependents, who have been infected by the virus as a result of exposure to it at work or by employees who have been injured as a result of their employer's conduct in response to the pandemic (e.g. homeworking in an unsuitable workspace with unsuitable equipment or manual handling when setting up the workspace, all without the benefit of any risk assessment). The following summarises some of the issues that such coronavirus related litigation might involve.

Inevitable accident

Where a claim is made that an individual's Covid 19 has been caused by the employer's culpable acts or omissions, it would be a defence for the employer to prove that the damage claimed for would have been sustained regardless of that failure. Although historically this is an issue related to whether a breach of duty occurred,⁽¹⁾ it is easier to see the defence of inevitable accident as in substance a denial of causation.

Act of God

There is little if any practical difference between the defence of "Act of God" and that of inevitable accident.

⁽¹⁾ See *Clerk and Lindsell on Torts*, 22nd ed, para 3-172.

Reasonableness

Following the amendment of the Health and Safety at Work etc Act 1974 so as to prevent strict (fault free) liability being imposed on an employer for the consequences of his breach of duties imposed by health and safety regulations,⁽²⁾ liability for those consequences will now require proof of the employer's failure to take reasonable care. What degree of care is reasonably required of an employer is greatly influenced by the context in which the requirement is alleged to have arisen. The exigencies of a national emergency are a relevant feature⁽³⁾ and, along with the confused advice and guidance provided by central government (e.g. whether protective masks are advisable), may well be found to restrict the range of responses reasonably open to the employer to take in order to combat the risks. The question will be how much restriction?

Compensation Act 2006

When deciding what steps a person ought to have taken to meet a standard of care, the court may have regard to whether a requirement to take those steps might prevent a desirable activity from being undertaken in a particular way, to a particular extent or at all, and whether it would discourage persons from undertaking functions in connection with a desirable activity. These considerations can be relied upon when responding to emergency situations.⁽⁴⁾ The 2006 Act adds little if anything to the general law relating to employer's liability. The Act cuts both ways and so can require steps to be taken to protect a desirable activity.⁽⁵⁾

Social Action, Responsibility and Heroism Act 2015

When a court is deciding what steps a person ought to have taken to meet a standard of care, the court must have regard to whether that person was acting for the benefit of society or any of its members (s.2), whether he demonstrated a predominantly responsible approach towards protecting the safety or other interests of others (s.3) or whether he was acting heroically by intervening in an emergency to assist an individual in danger (s.4). Like the 2006 Act, this statutory statement of principle adds little if anything to the general law.

Limitation

Although of less concern at present, there will come a time (around the spring equinox in 2023) when it will be important to know when a particular claimant's "date of knowledge" was. This will involve consideration of what is "the injury in question" and when it first

⁽²⁾ s.47 Health and Safety at Work etc Act 1974, as amended by s.69 Enterprise and Regulatory Reform Act 2013.

⁽³⁾ Daborn v Bath Tramways Motor Co Ltd [1946] 2 All ER 333 (CA).

⁽⁴⁾ Humphrey v Aegis Defence Services Ltd [2016] EWCA Civ 11, [2017] 1 WLR 2937.

⁽⁵⁾ Reynolds v Strutt & Parker LLP [2011] EWHC 2263 (Ch)(HHJ Oliver Jones QC).

became “significant”. Knowledge that it is “attributable” to the employer’s conduct is likely to be acquired earlier than in many non-corona industrial disease claims.

De minimis

Covid 19 has a range of symptoms of varying severity from the barely noticeable to the disabling and fatal. Past experience suggests that claimants will include a number for whom no injury is too trivial to claim. The threshold of significance will need to be established. This is likely to involve consideration of what constitutes actionable damage.⁽⁶⁾

Contributory negligence

Allegations of contributory negligence are likely to differ widely between cases rather than raise generic issues of principle. The unique difficulties arising out of the special circumstances of the national emergency are more likely to be supportive of the employee than the employer in infection claims. On the other hand, in homeworking claims the employees’ share of the responsibility for their injuries may well be much greater.

Causation

Proving “but-for causation” is likely to be the single most difficult challenge to anyone claiming that a particular individual’s case of Covid 19 was caused by or materially contributed to by the exposure to coronavirus which is alleged to have been in breach of duty. This need to prove causation would be less daunting if causation could be established by proving merely a significant contribution to the likelihood of becoming infected.⁽⁷⁾ This would be an area likely to be laden with expert evidence from micro-biologists, epidemiologists, statisticians and others. In so far as Covid 19 is a dose related condition, then apportionment should be possible.

Homeworking

By the wonders of modern telecommunications, homeworking seems an ideal opportunity to minimise the disruption arising from the effective house arrest imposed by the requirement to stay at home. However, consideration needs to be given to the risks that homeworking creates. The requirement (under the Management of Health and Safety at Work Regulations 1999) for the employer to assess the risks faced by employees in the course of their work applies regardless of whether the place of that work is the employee’s home or the employer’s premises. Some regulations, such as the Workplace (Health, Safety and Welfare) Regulations 1992, do not apply to domestic premises⁽⁸⁾ whereas other

⁽⁶⁾ Rothwell v Chemical & Insulating Co Ltd [2007] UKHL 39, [2008] 1AC 281 and Dryden v Johnson Matthey plc [2018] UKSC 18, [2019] AC 403.

⁽⁷⁾ McGhee v NCB [1973] 1 WLR 1 (HL) and Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32.

⁽⁸⁾ see s.53(1) Health and Safety at Work etc Act 1974 and reg.2(1) Workplace (Health, Safety and Welfare) Regulations 1992.

regulations, such as the Health and Safety (Display Screen Equipment) 1992 Regulations and the Manual Handling Operations Regulations 1992 do apply. Equipment used for work purposes at home is still subject to the Provision and Use of Work Equipment Regulations 1998, even if it is the employees' own equipment and its use is not exclusively work related.

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