COVID-19:
Employment landscape and claims potential

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COVID-19:
Employment landscape and claims potential

Novel issues means each case will require careful consideration

Will COSHH 2002 apply?

Given perception of personal risks, is it reasonable to suppose employers can demonstrate prudence and compliance with extensive guidance?

Can claimants overcome the causation burden of proof?

Will all claimants be able to support evidence of actionable injury?

To date, there have been 300,000+ confirmed cases of COVID-19 in the UK. As caution over easing of restrictions seemingly gives way to economic demands and we begin to emerge from lockdown, this note looks at possible implications for inevitable employers' liability claims in the landscape of new normal workplace activities.

Control of Substances Hazardous to Health Regulations 2002

Hazardous substances include biological agents and the definition provided in regulation 2(1) is certainly broad enough to include viruses that may cause infection.

It is suggested in the ACoP, however, that the hazard to health must arise out of or in connection with the work activity at the workplace[1] such that exposure to an infectious disease from a co-worker falls outside the ambit of the regulations.

This rationale is understandable in the context of seasonal influenza and such like, but workers bringing infectious diseases into the workplace is a recognised hazard and this statement may be capable of challenge when considering the profound health risks that might arise from contraction of COVID-19 as a result of incidental exposure to a biological agent in connection with the recognised work activity.

This is particularly so when a virus becomes endemic.

The standard of care

The general approach of the courts is that an employer must act reasonably and prudently taking positive thought for the safety of its employees in the context of what it knows or ought reasonably to have known.

An employer is not necessarily under a positive duty to invent means of prevention, but it should know of HSE and other relevant guidance and literature in adoption of measures which are feasible to reduce risks. The greater the magnitude of the risk and the gravity of harm should it materialise, the higher the duty to take precautions.

The starting point is inevitably the requirement for a suitable and sufficient risk assessment in accordance with Regulation 3 of the **Management of Health & Safety at Work Regulations 1999.**

But this does not amount to a duty to wholly eradicate any risk as was aptly illustrated recently in *Wayne Bass v Ministry of Defence* [2020] EWCH 36 (QB) in which the defendant employer had not breached its duty of care to a soldier who contracted *Q fever* while deployed in Afghanistan.

Contraction of the disease was foreseeable; it was one of military significance for which preventative measures had to be taken. However, it was an intermediate risk disease and the test was not to concentrate on the actual disease contracted in isolation but, rather, to take a global view on chemoprophylaxis used to prevent the most prevalent disease and other hazards. Against that context, the risk assessment was as sophisticated as could be devised.

The Health & Safety Executive has issued helpful guidance[2] for employers in their efforts to manage and control risks arising from workplace exposure to COVID-19.

Where that guidance is faithfully followed, there must surely be prospects of a defence to breach of duty but issues will inevitably arise surrounding the feasibility of social distancing, rotation of staff and availability and suitability of appropriate facilities, protective equipment and instructions for use.

1 Regulation 2(2) of COSHH 2002

2 See for example Working safely during the coronavirus outbreak – a short guide and Talking with your workers about preventing coronavirus

Causation in infection cases

The onus is upon a claimant to prove causation[3] on the balance of probabilities and it cannot be assumed any infection arose from occupational exposure.

Bonnington Castings v Wardlaw [1956] AC 613 established that in cases involving "guilty" and "innocent" exposures to one agent[4] it is sufficient for a claimant to show the negligent exposure made a **material contribution to the injury.**

In *McGhee v National Coal Board* [1973] 1 WLR 1, HL, this was broadened out to a material contribution to the **risk of injury**. *Fairchild v Glenhaven Funeral Services Ltd* adopted this material contribution to risk of injury where multiple defendants had exposed the claimant to asbestos fibres and it can now be applied to single defendant claims[5] provided two pre conditions are met:

1 

It is impossible to prove any more stringent causation test such as material contribution to injury; and

2 

The condition is caused by a sole causative agent[6]

Infections cases are unique, however, in that they arise from a single infection, rather than a cumulative exposure; they invariably carry a short latency period and, more often than not, they involve a sole employer. As such, it is usually fairly easy for a claimant to establish the culpable party and the *Fairchild* exception[7] is unnecessary.

But the decision in *Sanderson v Hull* [2008] EWCA Civ 1211 illustrates a possible problem for claimants pursuing COVID-19 claims. In *Sanderson*, a turkey plucker contracted campylobacter after working without gloves or instructions to wash her hands.

What she failed to prove (breach of duty and infection being admitted) was that, but for the breach of duty, the infection would not have resulted anyway. The *Fairchild* exception was rejected because no evidence was presented that traditional causation tests were impossible to apply (pre-condition 1).

Claimants will, therefore, need to demonstrate it cannot be proved the occupational exposure made a material contribution to the injury but guilty exposure did materially increase the risk of infection.

This latter test of causation will be one of mixed fact and law[8] and, so, whatever the strength of a claimant's personal conviction about risk, defendants will require careful investigation *of environmental exposure* risks for each claimant which can be measured against the extent of possible occupational exposure and manifestation of symptoms[9].

While the onus firmly rests upon claimants to test these causation principles, and inevitably this will form the main battleground of respective experts, employers should be cautious about any detrimental body language.

3 But not necessarily exclusive causation

4 where exposure to brick dust from a grinder was negligent whereas dust generated from a pneumatic hammer that gave rise to much the greater proportion of noxious dust but was non negligent exposure

5 See *Barker v Corus (UK) plc* [2006] UKHL 20

6 It is clear this can be applied to COVID-19

For example, where employees contract the disease, a RIDDOR report tacitly accepts an occupational exposure is a likely origin for the condition and this might additionally bring about exposure to regulatory investigations as well as increase the likelihood of a civil claim.

But a RIDDOR report in respect of COVID-19 is required only where:

an **unintended incident at work has led to someone's possible or actual exposure to coronavirus** which must be reported as a dangerous occurrence;

a worker has been diagnosed as having COVID-19 **and there is reasonable evidence** that it was **caused** by exposure at work. This must be reported as a case of disease; or

a worker dies **as a result of occupational exposure** to coronavirus.

Unless these parameters are met there is no requirement to report. Therefore, where a notification of COVID-19 illness or death is made to comply with a reporting obligation under the policy, it would be wise to ensure policyholders are instructed to strictly follow the HSE guidance on RIDDOR and **only** make such a report where any of the pre-conditions above are satisfied.

7 *Karen Sienkiewicz (Administratrix of the Estate Of Enid Costello, Deceased) V Greif (UK) Ltd: Knowsley Metropolitan Borough Council V Willmore* [2011] UKSC 10. The exception in *Fairchild* governing attribution of causation in cases of mesothelioma following wrongful exposure to asbestos, applied in cases involving a single defendant. Accordingly, in cases of both single and multiple defendants, a claimant would succeed if he proved, on the balance of probability, that a defendant's breach of duty had materially increased the risk that he would develop the disease and there was no need for him to show that the breach had doubled the risk.

8 A material increase in risk of developing symptoms is one not so insignificant as to be disregarded *Valerie Bannister (Executrix of The Estate of Dennis Charles Bannister, Deceased) v Freemans PLC* [2020] EWCH 1256 (QB)

9 It is reported a food supplier to major supermarket brands reported 38 positive tests in ten days with 200 of the 1,500 workforce self-isolating. The circumstantial evidence on occupational exposure might then be overwhelming

Actionable injury

Compensable injury is required to complete a cause of action.

Globally, 98% of current infections result in mild conditions. There is also some anecdotal evidence potency is weakening, and the range of reported symptoms throws up an interesting argument about what constitutes actionable injury and how low level symptoms might inter-play with other common seasonal illnesses affecting the workforce.

The leading authorities on actionable injury are *Cartledge v Jopling* [1963] AC 758 (HL), *Rothwell v Chemical and Insulating Co Limited* [2008] 1 AC 281 (HL) and, most recently, *Dryden & Ors v Johnson Matthey PLC* [2018] 18 SC.

The concept of personal injuries includes a disease or an impairment of a person's physical condition which must be more than *negligible*. This has been described as more than trivial. The damage must be material[10].

In *Rothwell,* Lord Hope said:

> ***...In strict legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury, however slight. But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the lightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue. The policy does not provide clear guidance as to where the line is to be drawn between effects which are and are not negligible. ..."***

Jay J said in *Susan Saunderson & Ors v Sonae Industria (UK) Ltd* [2015] EWCH 2264 (QB):

> ***A transient, trifling, self-limiting, reversible reaction to an irritant is not "actionable injury" for the purposes of the law of tort. These could fairly be described as "normal physiological responses.***

Rothwell and asymptomatic pleural plaques was distinguished, however, in *Dryden* which involved workers' sensitisation to platinum salts. Although symptomless, any continued exposure would lead to allergy and thus the employer removed workers from that risk resulting in loss of employment capacity.

In those circumstances, personal injury could be regarded as a physical change making the sufferer appreciably worse off in terms of their health or capability, even if that change was "hidden and symptomless".

Ultimately, it is a question of fact and degree and it will be necessary to consider carefully the extent of symptoms which, based upon what we know, can range from asymptomatic or trivial to those which are far more profound and life threatening.

It is, however, also possible to foresee other mechanisms of claims that might be expected. Non-exhaustively, these might well include stress and anxiety related conditions among key workers or even musculo-skeletal claims arising from manual handling and lone working or social distancing rules for example.

10 Per Cartledge there must be real damage as distinct from damage which is purely minimal

11 At 18.06.2020, more than 87,000 people have been asked to self-isolate by the NHS Test and Trace team

Fraud

Statistics are available for confirmed cases only. It is reasonable to assume many thousands more have contracted the disease.

As claims management companies and claimant lawyers shift focus, the risk of fraud is obvious during times of economic turmoil. Guidance remains that those experiencing typical symptoms of COVID-19 should self-isolate[11] and they should not visit GP surgeries, pharmacy or hospitals. More than one in four people who test positive have not been reached by the NHS Test and Trace team.

The traditional threshold of contemporaneous reporting may be ripe for abuse in fabricated events.

Final thoughts

It is evident occupational claims for symptoms of COVID-19 are likely to throw up some novel considerations. Each case will need careful consideration.

Whether or not claims might be brought under COSHH 2002 is likely to be fact sensitive and may turn on the absence or presence of compelling evidence surrounding occupational causation. As far as we know, there is yet no authority on the point.

Given the state of knowledge and guidance issued, it is hoped breach of duty might be contested in (at least) non front line working environments where employers are acting prudently and taking their obligations seriously. Date of knowledge of risks may also become important for early onset disease.

Claimants will need to prove workplace exposure to the virus made a material contribution to the *risk of injury*. This doesn't require proof of doubling of the risk but, rather, a risk which is not so insignificant as to be disregarded. This is inevitably going to be fact sensitive and an issue for careful investigation and expert consideration.

It remains to be seen whether a certain threshold of symptoms will set the bar for *actionable injury* but there is an expectation claims farmers will look to pursue volume opportunities. Insurers will require to be adequately resourced and claims handlers suitably prepared to deal with the likely issues that will arise.

For more information

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