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The Coronavirus and Employers' Liability for PPE

Part 1: Introduction

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1. The Coronavirus pandemic is likely to lead to litigation in various forms¹; indeed, two doctors are reported to have already intimated a public law challenge to the lawfulness of the personal protective equipment (PPE) guidance published by the Department of Health and Social Care, and Public Health England.²
2. This is the first part in a series of articles that will consider the liability of employers in tort for alleged failings relating to the selection and provision of PPE to employees, and their potential liability to family members of those employees for any such failings.
3. The series will focus on the nature of the duty owed by employers to employees engaged in work likely to expose them to the novel coronavirus, and consequently the risk of injury and death from COVID-19. It will consider the potential avenues of liability open to claimants, and the arguments that might be raised by defendants. It will then consider whether employers might be liable to the families of their employees, for personal injury and death from COVID-19, as a result of secondary exposure.
4. Medical and legal causation, whilst obvious issues in such claims, will clearly be evidence specific, and will be left for consideration on another occasion.
5. The issues raised in these articles are likely to be most relevant to employers of frontline healthcare and social care workers, emergency services personnel, teachers, and prison workers, but also to those who employ cleaners, public transport workers, supermarket workers and delivery drivers, amongst others.
6. It is important to state at the outset that it will be for individual claimants to prove as a matter of fact that they lacked a particular item of PPE, or that they were provided with PPE that was inadequate, either by reason of its design, fitting, or the circumstances in which it was required to be used (e.g. over-use contrary to the manufacturer's guidance or contrary to official guidance etc.) These arguments are likely to raise technical points specific to individual items of PPE.³

¹ See for instance, 'Has the Government broken the law by putting NHS staff in harm's way?', Guardian Opinion piece, 25 April 2020, in which Stephen Cragg (Barrister, Doughty Street Chambers) and Emily-Jade Defries (Solicitor, Bindmans LLP) focus on PPE mainly in the context of Article 2 of the European Convention on Human Rights

² See 'Doctor couple challenge UK government on PPE risks to BAME staff', Guardian article, 24 April 2020; and 'Legal challenge against the UK government's guidance about personal protective equipment in hospitals', entry on Bindmans LLP website, 23 April 2020, from the solicitors representing the two doctors who have intimated the legal challenge.

³ See for instance: <https://www.kennedyslaw.com/thought-leadership/article/covid-19-healthcare-employers-obligations-to-protect-staff>

7. By way of introduction to the discussion of liability in tort, it is necessary to consider some recent changes to the law in areas that touch on this topic, and that may affect the way in which cases relating to COVID-19 are investigated in the first instance before a civil claim is intimated.
8. Parliament's initial legislative response to the pandemic was the Coronavirus Act 2020, which came into force on 25 March 2020 and introduced sweeping changes in many areas. Whilst the Act has not introduced any changes to the substantive law impinging on an employer's duty to provide PPE, it will nonetheless be of interest to lawyers practising in the fields of personal injury and clinical negligence in several respects.
9. Of particular interest will be Section 30 of the Coronavirus Act 2020, which suspends the need for a senior coroner to hold a jury inquest in respect of a COVID-19 death, by specifying that COVID-19 is not a 'notifiable disease' for the purposes of Section 7(2)(c) of the Coroners and Justice Act 2009.⁴ This amendment was motivated by the desire to avoid an overload of the coronial system, and to restrict the delay in closure for bereaved families.⁵
10. In civil claims, whether or not COVID-19 has been included on the Medical Certificate of Cause of Death (MCCD) is likely to be important evidence in the first instance. However, careful consideration of the relevant guidance will be needed as a positive swab test confirming the diagnosis is not a condition for inclusion of COVID-19 on the MCCD, and clinical judgment can be used:

Medical practitioners are required to certify causes of death "to the best of their knowledge and belief". Without diagnostic proof, if appropriate and to avoid delay, medical practitioners can circle '2' in the MCCD ("information from post-mortem may be available later") or tick Box B on the reverse of the MCCD for ante-mortem investigations. For example, if before death the patient had symptoms typical of COVID19 infection, but the test result has not been received, it would be satisfactory to give 'COVID-19' as the cause of death, tick Box B and then share the test result when it becomes available. In the circumstances of there being no swab, it is satisfactory to apply clinical judgement.⁶

11. In the context of deaths at work, the Chief Coroner has recently published Guidance No. 37 in respect of COVID-19 deaths relating to workplace exposure, which states that a death which is believed to be due to COVID-19 "may require a coroner's investigation and inquest in some circumstances...[for] instance, if there

⁴ Section 30 of the Coronavirus Act 2020

⁵ See Explanatory Notes to the Coronavirus Act 2020

⁶Guidance for doctors completing Medical Certificates of Cause of Death in England and Wales

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877302/guidance-for-doctors-completing-medical-certificates-of-cause-of-death-covid-19.pdf

were reason to suspect that some human failure contributed to the person being infected with the virus".⁷

There has already been some media focus on paragraph 13 of the guidance:

The coroner must consider the question of scope in the context of providing evidence to answer the four statutory questions. Coroners are reminded that an inquest is not the right forum for addressing concerns about high level government or public policy. The higher courts have repeatedly commented that a coroner's inquest is not usually the right forum for such issues of general policy to be resolved: see Scholes -v- SSHD [2006] HRLR 44 at [69]; R (Smith) -v- Oxfordshire Asst. Deputy Coroner [2011] 1 AC 1 at [81]. In the latter case, Lord Phillips observed that an inquest could properly consider whether a soldier had died because a flak jacket had been pierced by a sniper's bullet, but would not "be a satisfactory tribunal for investigating whether more effective flak jackets could and should have been supplied by the Ministry of Defence." By the same reasoning, an inquest would not be a satisfactory means of deciding whether adequate general policies and arrangements were in place for provision of personal protective equipment (PPE) to healthcare workers in the country or a part of it.

12. Unless Guidance No. 37 itself is subject to a public law challenge, this means inquests are likely to be most relevant as fact-finding investigations that might establish whether a particular item of PPE was lacking in a given case, but broader policy questions will have to wait for civil claims or potentially a public inquiry established under the Inquiries Act 2005, with appropriate terms of reference, for full investigation.
13. The Government also seems to have anticipated an excess of civil claims (apparently clinical negligence claims) arising out of the pandemic. In respect of health service activities in England and Wales, Section 11 of the Coronavirus Act 2020 empowers the 'appropriate authority' (which in England is the Secretary of State for Health and Social Care, and in Wales is the Health Ministers⁸) to indemnify a person in respect of a 'qualifying liability'. The relevant provisions are:

11 Indemnity for health service activity: England and Wales

(1)The appropriate authority may—

(a)indemnify a person in respect of a qualifying liability incurred by the person, or

⁷ Chief Coroner's Guidance No. 37: COVID-19 Deaths and Possible Exposure in the Workplace. <https://www.judiciary.uk/wp-content/uploads/2020/04/Chief-Coroners-Guidance-No-37-28.04.20.pdf>

⁸Section 11(7) of the Coronavirus Act 2020

(b) make arrangements for a person to be indemnified, in respect of a qualifying liability incurred by the person, by an authorised person.

(2) References in this section to a qualifying liability are to a liability in tort, in respect of or consequent on death, personal injury or loss, arising out of or in connection with a breach of a duty of care owed in connection with the provision, after the coming into force of this section, of a relevant service.

(3) "Relevant service" means a service which is provided by a person as part of the health service and which—

(a) relates to—

(i) caring for or treating a person who has, or is suspected of having, coronavirus disease, whether or not in respect of that disease,

(ii) caring for or treating a person (other than a person within sub-paragraph (i)) who has been, or is suspected of being, infected or contaminated, in respect of that infection or contamination or suspected infection or contamination, or

(iii) diagnosing or determining whether a person has been infected or contaminated,

(b) relates to diagnosis, care or treatment and is provided in consequence of another person who usually provides such a service (other than one within paragraph (a)) as part of the health service being unable to do so in consequence of providing a service within paragraph (a), or

(c) relates to diagnosis, care or treatment and is provided in consequence of another person who usually provides such a service as part of the health service being unable to do so because of a reason relating to coronavirus.

14. The Explanatory Notes to the Act describe this section as being intended to be a "safety net" giving indemnity coverage for "clinical negligence of health care workers and others carrying out NHS activities...connected to care, treatment or diagnostic services provided under the arrangements for responding to the COVID-19 outbreak". The provision apparently relates to those not already covered by a pre-existing indemnity arrangement. In the context of employers' liability claims, one would expect that

employers would already be covered as public bodies, or by a scheme of compulsory insurance, but that will depend on policy wording etc.⁹

15. It is worth noting also that Matt Hancock, Secretary of State for Health and Social Care, announced on 27 April 2020 that a life assurance scheme would be created to provide families of NHS and social care workers who have died after contracting the coronavirus in the course of their duties a payment of £60,000.¹⁰ This raises the question of the legal status of any apologies and offers of redress made by an employer or the Government in respect of inadequate PPE. There is currently no reason to think that an employer could not rely on Section 2 of the Compensation Act 2006, which provides that an apology (or offer of redress) shall not of itself amount to an admission of negligence or breach of duty.
16. Against this backdrop, in the coming days we will be releasing the following articles looking at the substantive law in respect of an employer's liability in tort for inadequate or missing PPE:
 - **Part 2:** Liability at common law;
 - **Part 3:** Liability for breach of statutory duty;
 - **Part 4:** Liability for breach of European Union directives;
 - **Part 5:** Liability of employers to family members of employees.

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⁹ Employers' Liability (Compulsory Insurance) Act 1969

¹⁰ See 'Families of health staff who die of coronavirus to get £60,000 payouts', Guardian article, 27 April 2020

Links to all the articles in this series are below:

- [Part 2: Liability at Common Law](#)
- [Part 3: Liability for Breach of Statutory Duty](#)
- [Part 4: Liability for Breach of European Union Directives](#)
- [Part 5: Liability of Employers to Family Members of Employees](#)