

# The Coronavirus and Employers' Liability for PPE

## Part 5: Liability of Employers to Family Members of Employees

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1. Cases regarding secondary exposure to risk by employees' family members have tended to focus on whether exposure of the *employee* was sufficient to place the employer under an obligation to act, and whether there was sufficient industry knowledge for the employer to appreciate the 'secondary exposure' risk.
2. In the case of *Hewett -v- Alf Brown's Transport Ltd*<sup>1</sup> the claimant suffered lead poisoning as a result of inhaling lead dust whilst cleaning and washing her husband's contaminated work overalls and boots. The claimant's husband was employed as a lorry driver, engaged in transporting waste from a gas works which was being dismantled. The duties under the Control of Lead at Work Regulations 1980<sup>2</sup> required employers to assess work which exposed persons to lead; to supply protective equipment; and to provide washing and changing facilities. The employers did not provide any service for cleaning overalls, washing or medical services for the lorry drivers. However, it was necessary for the claimant to prove that her husband had been *significantly* exposed to lead, about which Taylor LJ said:

*"As a driver, the [claimant's] husband was not so closely involved in the demolition processes. However, he had to climb on to the back of his lorry as it was loaded with waste and on to the waste itself to level off the load and then sheet it down. The load was very dusty and there was free dust in the air. This operation was, the judge found, dirty work. Dust would undoubtedly have settled on the driver's clothing and boots. Each load would take about 10 minutes to assemble and there would be up to three or four loads daily. Thus the exposure to the intense dust would be for no more than an hour a day."*

Taylor LJ went on to quote Otton J at first instance:

*"It follows in my judgment that given such a low level of exposure no duty of care to Mr. Hewett arose. For example, there was no duty to provide overalls or other protective clothing, respirators, washing facilities, laundry facilities, there was no duty to warn of any risk of taking his overalls and boots home with him."*

3. A prerequisite to a claim by a family member in 'secondary exposure' cases is that there would be liability vis-à-vis the employer and the employee.<sup>3</sup> Whether there will then be liability to the family member will depend upon the foreseeability of harm to the claimant.

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<sup>1</sup> [1992] I.C.R. 530

<sup>2</sup> It should be noted that these Regulations did not apply to the period of employment concerned in this case, but the court accepted that the Regulations effectively codified the common law duty, and so the requirements under the Regulations were considered.

<sup>3</sup> For a recent example where there was sufficient workplace exposure (to asbestos) by the claimant's husband, so as to make the defendant liable for the claimant's secondary exposure, see: *Carey -v- Vauxhall Motors Ltd* [2019] EWHC 238 (QB)

4. There is no liability where even a prudent employer could not be expected to have appreciated the risk of familial exposure. For example, in *Maguire -v- Harland & Wolff plc*<sup>4</sup> where the claimant was exposed to asbestos dust when washing her husband's dusty work clothes in the early 1960s, which was before the risk of secondary exposure became recognised in 1965:

*"It does not necessarily follow that an employer who should have appreciated the risk of harm to his employees, and taken precautions for their safety, should simultaneously have appreciated, and addressed, a familial risk arising from secondary exposure."*<sup>5</sup>

This was so notwithstanding that the claimant's husband had been exposed to asbestos to a negligent degree.

5. Familial claims, given that infection by the coronavirus usually occurs through close contact with somebody else with the virus, may come to be mooted alongside claims by the employees themselves, who have also contracted the coronavirus, allegedly whilst at work.
6. It is not currently known how long the coronavirus can remain infective on, for example, clothing. When more is known, there may well also be scope for claims where a family member claims to have contracted the coronavirus having come into contact with items contaminated from the employee's place of work.
7. That said, defending claims by family members will entail the same arguments as would be made if a claim were brought by the employee;<sup>6</sup> if the employer would not be liable to the employee then it will not be liable to the family member. Analysed by reference to COSHH, for example, can it be said that the exposure to the harmful biological agent – here COVID-19 – arose out of, or in connection with, the work or that it was incidental to it – for example, exposure on the bus going into (or from) work?
8. In addition, in defending claims against family members, one may expect a focus on the information and instruction provided to employees regarding the spread of the coronavirus; and in turn that which is available to employees. For example, was work guidance issued regarding the storage / cleaning of clothing worn in the workplace?
9. Even in the event that some breach of duty can be proved, causation is likely to be tricky for 'family member' claimants; indeed given the infection rate of the coronavirus and the likelihood of other sources of infection, the hurdle of proving causation in such cases may be high. Claimants who have remained at home and had

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<sup>4</sup> [2005] EWCA Civ 1

<sup>5</sup> Ibid, per Judge LJ at [51]

<sup>6</sup> Potential liability of employers to their employees is examined in depth in Parts 2 – 4 of this series

limited contact with persons other than the employee are going to be better placed to prove causation on the balance of probabilities.

10. One may also expect, again given the well-known risks of contamination and infection, to see employers seeking to allege that the family member and/or the employee were negligent, with potential additional claims being brought against employees and allegations of contributory negligence being made against claimants.

#### Conclusion to Part 5 and This Series

11. Part 5, as with Parts 2 – 4, has considered the areas that will be particularly contentious in respect of employers' liability for coronavirus exposure. This part, as much as the others, has shown that there is still ample scope for arguments as to liability depending on the facts of each case.
12. The purpose of this series was to examine the various ways in which employers might find themselves liable regarding the provision of PPE. The authors of this series will continue to watch, with interest, developments in the areas that have formed the subjects of Parts 1 – 5, and endeavour to make any necessary changes to the articles to keep them up-to-date. We hope you have found them useful.
13. Further, as we write, the Government is producing guidelines relating to employees' exposure to the coronavirus in workplaces that have, or may soon, come out of 'lockdown'. Once more is known about the final state of any guidance, further articles may follow. Thank you for reading.

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