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The Coronavirus and Employers' Liability for PPE

Part 2: Liability at Common Law

24 The Ropewalk, Nottingham, NG1 5EF | **Tel:** +44 (0) 115 947 2581 | **Fax:** (0115) 947 6532
DX: 10060 Nottingham 17 | Email: clerks@ropewalk.co.uk | **www.ropewalk.co.uk**

The duty of care

1. Employers owe a personal or non-delegable duty of care to their employees at common law, which extends to the provision of PPE. *Neill LJ in Crouch -v- British Rail Engineering Ltd* [1988] I.R.L.R. 404 said that the extent of the duty in respect of PPE would depend on:

> *"the risk of injury, the gravity of any injury which may result, the difficulty of providing equipment … the availability of that protective equipment … and the distance which any individual workman might have to go to fetch it, the frequency on which the [claimant] was likely to need that protective clothing or equipment and, last but not least, the experience and degree of skill to be expected of the [claimant]."*

2. The existence of that duty is not altered by the fact the employees are engaged in dangerous work or work in an emergency situation. A succinct summary of the common law in this area was provided by Lord Carnwath in *Smith and another -v- Ministry of Defence (Justice and another intervening)* [2014] A.C. 52:

> *Negligence and the emergency services*
>
> *171. …the closest analogies [to soldiers engaged in combat] are to be found in cases relating to the duties owed by employers to their staff in the context of the delivery of emergency services. King –v- Sussex Ambulance Service NHS Trust [2002] ICR 1413 contains an authoritative exposition of the relevant principles. The Court of Appeal dismissed a claim related to injuries sustained by an ambulance technician, who was required in the course of an emergency call to help in carrying a patient downstairs. Hale LJ, giving the majority judgment, summarised the relevant law, at para 21:*
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> > *"The starting point is that an ambulance service owes the same duty of care towards its employees as does any other employer. There is no special rule in English law qualifying the obligations of others towards fire fighters, or presumably police officers, ambulance technicians and others whose occupations in the public service are inherently dangerous: see Ogwuv Taylor [1988] 1 AC 431. Such public servants accept the risks which are inherent in their work, but not the risks which the exercise of reasonable care on the part of those who owe them a duty of care could avoid. An employer owes his employees a duty to take reasonable care to provide safe equipment and a safe system of work, which includes assessing the tasks to be undertaken, training in how to perform those tasks as safely as possible, and supervision in performing them."*
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> *This was subject to two qualifications: first, at para 22, the "further dimension" identified by Denning LJ (Watt v Hertfordshire County Council [1954] 1 WLR 835 , 838):*

> *"It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved …"*

*and secondly [2002] ICR 1413, para 23 (citing Colman J in Walker v Northumberland County Council [1995] ICR 702 , 712): "what is *155 reasonable may have to be judged in the light of the service's duties to the public and the resources available to it to perform those duties …"*

Proving negligence (breach of duty)

3. The question of whether an employer has discharged (or breached) its duty to provide PPE in the coronavirus pandemic will inevitably involve a particularly close consideration of the balancing act mentioned in *Watt*, and in light of the nature of the defendant employer's duties to the public, and the resources available to employers to enable the performance of those duties (as per *Walker*).

4. In the context of resources, the national effort to procure and distribute PPE has been described by the Government as akin to a wartime situation. The comparison is not necessarily glib: shortages in PPE have been attributed to an unprecedented level of global demand in the context of global supply chain issues, and a national logistical effort to distribute PPE to 58,000 providers including hospitals, GP surgeries and care homes1 (which has in fact involved in the military).

5. For this reason, the case of *Smith and another -v- Ministry of Defence* warrants further attention. In *Smith*, the Supreme Court considered several claims by servicemen brought in negligence (and for breach of Article 2 of the European Convention on Human Rights), which all tested the limits of the MOD's liability at common law and the scope of combat immunity (either when viewed as a defence to liability, or as a factor negativing a duty of care). There were various negligence claims considered together in *Smith*: one set involved allegations that Snatch Land Rovers used for peacekeeping operations in Iraq had inadequate armour; another involved allegations of negligence relating to a 'friendly fire' incident between two British Challenger tanks.

6. The majority of the Supreme Court (Lord Hope DPSC, Lord Walker, Lady Hale, and Lord Kerr) held the negligence claims could go to trial. The question of negligence would be for the trial judge. Lord Hope, who

[1] Covid-19: Personal Protective Equipment (PPE) Plan, Department of Health and Social Care, 10 April 2020, page 3

gave the single majority judgment, whilst allowing the claims to continue, cautioned that courts considering such claims ought to have regard to the public interest:

> *100. The sad fact is that, while members of the armed forces on active service can be given some measure of protection against death and injury, the nature of the job they do means that this can never be complete. They deserve our respect because they are willing to face these risks in the national interest, and the law will always attach importance to the protection of life and physical safety. But it is of paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the *132 threat of litigation if things should go wrong. The court must be especially careful, in their case, to have regard to the public interest, to the unpredictable nature of armed conflict and to the inevitable risks that it gives rise to when it is striking the balance as to what is fair, just and reasonable.*

7. Lord Mance (who dissented in respect of all sets of negligence claims) disagreed that it was sufficient simply to injunct courts against being too ready to find negligence:

> *128. The claims that the [MOD] failed to ensure that the army was better equipped and trained involve policy considerations of the same character as those which were decisive in Hill , Brooks and Van Colle.*[2] *They raise issues of huge potential width, which would involve courts in examining procurement and training policy and priorities over years, with senior officers, civil servants and ministers having to be called and to explain their decisions long after they were made. Policy decisions concerning military procurement and training involve predictions as to uncertain future needs, the assessment and balancing of multiple risks and the setting of difficult priorities for the often enormous expenditure required, to be made out of limited resources. They are only often highly controversial and not infrequently political in their nature. These may well also be influenced by considerations of national security which cannot openly be disclosed or discussed.*

8. Those two passages might equally be said to apply to decisions taken with regards to the UK Government's procurement of PPE as part of long-term planning for a future pandemic involving a novel virus.3

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[2] The principle of Police immunity was successfully challenged in respect of positive acts of negligence in *Robinson -v- Chief Constable of West Yorkshire Police* [2018] A.C. 736, but apparently still stands in respect of 'pure omissions' and thus the reference to this line of authority probably still has merit, but caution is needed.

[3] Exercise Cygnus has received considerable attention from the press, see for instance:
https://www.telegraph.co.uk/news/2020/03/28/exercise-cygnus-uncovered-pandemic-warnings-buried-government/

9. As was mentioned in Part 1 of this series, guidance from the Chief Coroner has already sought to caution coroners against investigating broader policy considerations relating to PPE in inquests relating to deaths at work.[4]

10. But in the context of civil claims, the principles set out by the Supreme Court in *Smith* can apply by analogy. Whilst the legal analysis in *Smith* focused on the existence and scope of the duty of care, in this case the existence of a common law duty is undeniable, and the real issue will be the standard of care required to discharge that duty. Nonetheless the guidance seems germane.

11. It is less clear how an individual employer (such as an NHS Trust) would be able to rely upon such arguments as a defence to an allegation of a lack of PPE, but it would seem highly artificial for a court to view individual employers in isolation, without reference to the wider context. In other words, can the micro situation with regards to PPE be isolated from the macro position?

12. The Courts have also been ready to recognise that those working in hospital settings are often operating under immense pressure, both in terms of available resources but also in respect of the time available to make decisions. In *Darnley -v- Croydon Health Services NHS Trust* [2019] A.C. 831, a case about the nature of the duty owed by an accident and emergency department when triaging patients, Lord Lloyd said this at 841:

> *22. …There is no reason to suppose that the factual context of an A & E department is likely to give rise to any unusual evidential difficulties. The burden of proof of the provision of misleading information will be on the claimant. Hospital staff will be able to give evidence as to their usual practice. So far as substantive liability is concerned, the requirements of negligence and causation will remain effective control factors. It is undoubtedly the fact that Hospital A & E departments operate in very difficult circumstances and under colossal pressure. This is a consideration which may well prove highly influential in many cases when assessing whether there has been a negligent breach of duty.*

13. There is further guidance as to the standard of care in negligence in hospitals against the backdrop of 'battle conditions', once again in a clinical negligence setting:

> *Again, I accept that full allowance must be made for the fact that certain aspects of treatment may have to be carried out in what one witness (dealing with the use of a machine to analyse the sample) called*

[4] See Chief Coroner's Guidance No. 37: COVID-19 Deaths and Possible Exposure in the Workplace, particularly paragraph 13. https://www.judiciary.uk/wp-content/uploads/2020/04/Chief-Coroners-Guidance-No-37-28.04.20.pdf

"battle conditions." An emergency may overburden the available resources, and, if an individual is forced by circumstances to do too many things at once, the fact that he does one of them incorrectly should not lightly be taken as negligence. Here again, however, the present case is in a different category, for none of those accused of negligence who were called to give evidence on their own behalf suggested that, if mistakes were made, this happened because their attention was distracted by having to do something else at the same time, or because they had to take a difficult decision on the spur of the moment.[5]

14. Closely allied to this, is the question of whether the common law will hold employers to the PPE standards set by either the UK Government or the World Health Organisation, where those standards are said to differ in a material way.6

15. In those circumstances, does the reasonable and prudent employer follow the guidance of its government or the relevant international agency? It is difficult to imagine a court criticising an employer for choosing to follow the UK Government's guidance, even if it resulted in an identifiable risk arising from a lower level of protection in a particular situation. In *Baker -v- Quantum Clothing Group Limited* [2011] UKSC 17, Lord Dyson said this which may be of relevance7:

"101 There is no rule of law that a relevant code of practice or other official or regulatory instrument necessarily sets the standard of care for the purpose of the tort of negligence. The classic statements by Swanwick J in Stokes and Mustill J in Thompson v Smiths Shiprepairers (North Shields) Ltd [1984] QB 405 which have been quoted by Lord Mance at paras 9 and 10 of his judgment remain good law. What they say about the relevance of the reasonable and prudent employer following a "recognised and general practice" applies equally to following a code of practice which sets out practice that is officially required or recommended. Thus to follow a relevant code of practice or regulatory instrument will often afford a defence to a claim in negligence. But there are circumstances where it does not do so. For example, it may be shown that the code of practice or regulatory instrument is compromised because the standards that it requires have been lowered as a result of heavy lobbying by interested parties; or because it covers a field in which apathy and fatalism has prevailed amongst workers, trade unions, employers and legislators (see per Mustill J in Thompson at pp 419–420); or because the instrument has failed to keep abreast of the latest technology and scientific understanding. But no such circumstances exist here. The Code was the result of careful work by an expert committee. As the judge said, at para 87, the guidance as to the maximum acceptable level was "official and clear". He was entitled to accept the evidence which

[5] *Wilsher -v- Essex Area Health Authority* [1987] Q.B. 730, as per Mustill LJ at 748
[6] Those standards have been said to so differ in the legal challenge referred to in Part 1: Introduction.
[7] Consider for instance the judgment of Lord Mance in *Baker -v- Quantum Clothing Group Limited* [2011] UKSC 17, in particular at paragraph 9

led him to conclude that it remained the "touchstone of reasonable standards" for the average reasonable and prudent employer at least until the publication of the consultation paper on the 1986 draft Directive (para 48).

Statutory intervention in the standard of care

16. Section 1 of the Compensation Act 2006 saw Parliament attempt to soften the test for negligence where potential liability might have a deterrent effect on a 'desirable activity'. It is generally thought this provision adds little to the common law, as stated in amongst places the judgment of Lord Hoffman in *Tomlinson -v- Congleton Borough Council* [2004] 1 A.C. 46.[8]

17. If Section 1 of the Compensation Act 2006 genuinely added nothing to the common law, that did not deter Parliament from enacting the Social Action, Responsibility and Heroism Act 2015, which provides:

> *1 When this Act applies*
>
> *This Act applies when a court, in considering a claim that a person was negligent or in breach of statutory duty, is determining the steps that the person was required to take to meet a standard of care.*
>
> *2 Social action*
>
> *The court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members.*
>
> *3 Responsibility*
>
> *The court must have regard to whether the person, in carrying out the activity in the course of which the alleged negligence or breach of statutory duty occurred, demonstrated a predominantly responsible approach towards protecting the safety or other interests of others.*

[8] See for instance *Goldscheider -v- Royal Opera House Covent Garden Foundation* [2019] EWCA Civ 711 at paragraphs 43 – 44, citing *Clerk & Lindsell on Torts, 22nd Edition* at 8-180.

4 Heroism

The court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting heroically by intervening in an emergency to assist an individual in danger.

18. Section 2 is likely to apply to an employer seeking to assist members of the public in the pandemic. Section 3 will be more dependent on the facts of a given case. Section 4 appears to be more geared towards individual defendants rather than employers in a national emergency9, but this remains open to argument. Citation of this Act at the very least will require the Court to give express consideration to the factors in Sections 2 – 4 when setting out reasons as to whether an employer was negligent.

Conclusion to Part 2, and a look to Part 3: Liability for breach of statutory duty

19. The duty owed to employees under the common law is one of reasonable care. As such it can be said, even at this stage, that resources arguments and arguments citing the difficulties created by emergency conditions can properly be introduced by employers as a defence to allegations of negligence at common law.

20. It is partly for this reason that arguments relating to liability will inevitably turn to considering the more onerous duties imposed by health and safety regulations, particularly the Personal Protective Equipment at Work Regulations 1992 and the Control of Substances Hazardous to Health Regulations 2002, which will be considered in detail in Part 3: Liability for breach of statutory duty.

Jack McCracken and Sarah Hopkinson
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[9] The Explanatory Notes specifically state that the Act is of general application and could apply to employers

Links to all the articles in this series are below:

- Part 1: Introduction
- 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