A Look at Two US Cases on Potential Liability for COVID-19

Posted On: 17/11/2020
Authors: Jack McCracken, Sarah Hopkinson

Jack McCracken and Sarah Hopkinson revisit the question of liability for COVID-19 infections, this time from an American perspective.

In May 2020, we published a series of five articles exploring the potential liability of employers arising from exposure of employees to COVID-19. Whilst it is unlikely that any claims arising out of exposure to COVID-19 have yet been litigated in this jurisdiction, litigation moves faster in the US than in England & Wales. Two US cases can therefore usefully be examined to see the type of claims and defences that are being raised in another common law jurisdiction. This might provide some insight for when these claims come to be litigated in England & Wales. These cases would not, of course, have any precedent value in this jurisdiction.

The first case arises in an employer's liability context, where the claim has been litigated and subject to a motion to dismiss, which is yet to be adjudicated upon. The second is a public liability claim, which was summarily dismissed.

Ferdinand Benjamin, Individually and as the Personal Representative of the Estate of Enock Benjamin, Deceased v JBS S.A., et al., Civil Action No. 2:20-cv-02594-JP

This claim, commenced in the United States District Court for the Eastern District of Pennsylvania, arose following the death of Enock Benjamin, an employee at the JBS meat processing plant at Souderton, PA, on 3 April 2020 of respiratory failure caused by COVID-19. The allegations of negligence made against his former employer include:

1. intentionally ignoring the fact that other workers were infected with and/or were displaying symptoms consistent with COVID-19;
2. failing to provide appropriate PPE prior to 30 March 2020;
3. failing to close the plant, despite the fact that the Defendants knew, or should have known, that workers at the plant were suffering from COVID-19;
4. ignoring federal guidance from the CDC and OSHA in several respects; and
5. requiring workers to stand less than six feet apart.

By a (currently undetermined) motion to dismiss, the Defendants have set out their store in relation to breach of duty and causation. A summary of the Defendants' position of breach of duty can be seen from the following paragraphs, taken directly from the motion to dismiss:

> *"This is not a garden-variety negligence action, wherein a defendant could foresee potential injury from a known risk and failed to prevent the injury. Instead, Plaintiff contends Defendants should have done more to protect Enock Benjamin from an invisible, novel threat about which little was known and regarding which a great deal of conflicting guidance was offered within the space of a few weeks. For example, throughout March 2020, federal organizations and officials advised against the use of face masks for anyone other than healthcare providers in direct contact with sick individuals. …*
>
> "*The CDC changed its recommendation on April 3, 2020 based on "recent studies.*" Id. *Even then, however, the CDC said the general public should not wear "surgical masks or N-95 respirators" because those are "critical supplies that must continue to be reserved for healthcare workers and other medical first responders, as recommended by current CDC guidance.*" Id. *…*
>
> "*The WHO and CDC did agree on one point — medical masks and respirators should be reserved for healthcare*

workers. Id. *at pp. 1-2. And in Pennsylvania, the availability of PPE, such as surgical masks, remained critically low through April 2020. On April 8, 2020, Pennsylvania's Governor issued an Executive Order authorizing state agencies to commandeer PPE within the Commonwealth for use by hospitals and other healthcare facilities treating patients with COVID-19. …*

"*Plaintiff also alleges Defendants breached their duty of care by failing to close the JBS Souderton plant. Again, this allegation conflicts with the federal and state guidelines. On March 19, 2020, Pennsylvania ordered that life-sustaining businesses, including food processors, could remain open. The same day, the Cybersecurity & Infrastructure Security Agency of the U.S. Department of Homeland Security identified food processors, such as Defendants, as "critical infrastructure" with a "special responsibility" to continue normal operations.*"

Arguments raised by Defendant employers are likely to be similar within this jurisdiction. Of particular interest is JBS's reliance on conflicting guidance from different official sources, shortages of PPE, and the imposition of liability on employers of what we would term "*key workers*", as defences to the allegations of negligence.

In relation to causation, the Defendants have, perhaps unsurprisingly, argued that "but for" causation needs to established, and that the same is impossible in the midst of a global pandemic where COVID-19 is highly contagious and can spread by people who are asymptomatic:

"*All of Plaintiff's claims are premised on the assumption that Enock Benjamin contracted COVID-19 because of his employment at JBS Souderton. But Plaintiff fails to allege any facts that would establish such a causal link — i.e., that but for Defendants' alleged conduct, Enock Benjamin would not have contracted COVID-19. …*

"*First, Plaintiff's Complaint does not include any allegations about the manner in which Enock Benjamin contracted COVID-19 other than to allege transmission occurred "while working." (See generally Compl.) But Plaintiff does allege facts showing Enock Benjamin could have contracted COVID-19 through community spread. For example, Plaintiff alleges the first case of COVID-19 acquired by community transmission was reported on January 30, 2020 — more than two months before Enock Benjamin's death. (*Id. *at ¶20.) Plaintiff also admits COVID-19 is a global pandemic, that the virus "is highly contagious", and that it is "especially dangerous because it can be spread by people who are asymptomatic or pre-symptomatic." …*

"*More importantly, Plaintiff's allegations show there was extensive parallel community spread, which was just as likely — if not more likely — to be the source of Enock Benjamin's infection. …*

"*Second, Plaintiff fails to allege facts that plausibly show Enock Benjamin's COVID-19 infection would have been prevented by the use of PPE and other measures …*

"*Put simply, Plaintiff's argument, stripped of its labels and doctrinal couching, boils down to the assertion that Defendants should be strictly liable for any COVID-19-related injury or death of a JBS Souderton employee. That is not — and cannot be — the law.*"

The correct approach to causation in COVID-19 cases is likely to be the subject of legal argument within this jurisdiction. The above demonstrates the sort of arguments claimants are likely to face in response to COVID-19 claims i.e. that the legal test is "but for" causation: a high hurdle, which will be intensely fact specific.

Weissberger v Princess Cruise Lines Ltd, No. 2:20-cv-02267-RGK-SK (C. D. Cal. July 14, 2020)

This decision of the United States District Court for the Central District of California is available in respect of consolidated claims brought by several passengers of The Grand Princess cruise ship. These public liability claims have been summarily dismissed. The lead Plaintiffs sought damages for negligent infliction of emotional distress ("NIED") based on their fear of contracting COVID-19 whilst required to quarantine on the ship; none of the Plaintiffs in fact developed COVID-19 or symptoms thereof.

The Plaintiffs' argument was that they fell within the zone of danger test as applicable in US maritime law i.e. they were placed within "*the immediate risk of physical harm*". In English law, the analogous though not identical principle would

seem to be the legal test for those who class as a primary victim for the purpose of a claim for psychiatric harm without physical harm.

United States District Judge R Gary Klausner granted the motion to dismiss. The Judge held that claims for NIED could not succeed solely on the Plaintiffs' proximity to individuals with COVID-19 and resulting fear of contracting the disease. Of interest here were the Judge's comments on public policy concerns, and opening the door to "*unlimited and unpredictable liability*":

> "*The Court disagrees that fears of unlimited liability are overblown and declines to carve out the cruise-ship industry from* Metro-North's *mandate. The risk of exposing individuals to COVID-19 is not unique to cruise ships – quite the contrary, in fact, as restaurants, bars, churches, factories, nursing homes, prisons and other establishments across the country continue to report COVID-19 cases. It is true that cruise-ship goers are a captive audience in a way that is not the case in other contexts. But this alone does not warrant creating a "cruise-ship exception" to the zone of danger test. What of an individual who is exposed to COVID-19 while imprisoned? The individual is "captive" in a more extreme sense than a person on a cruise ship. And the prison exerts more control over the environment than a cruise-ship operator. Setting aside concerns with qualified immunity, the Eleventh Amendment, and the like, can a prisoner recover for NIED against the prison based solely on their proximity to individuals with COVID-19 and their fear of contracting the virus? Based on* Gottshall *and* Metro-North*, the answers appears to be "no" for all of the reasons discussed above.*"

In England & Wales, a Claimant without physical injury (i.e. who had not contracted COVID-19) and without a recognisable psychiatric injury will not have a compensable injury upon which to found a civil claim. Nonetheless, the focus on public policy in the above matter is interesting, and one can envisage public policy arguments being deployed by Defendants in claims where COVID-19 has been contracted.