COVID-19: A PRACTICAL GUIDE
TO PERSONAL INJURY CLAIMS AGAINST EMPLOYERS ARISING FROM THE SHORTAGE OF PERSONAL PROTECTIVE EQUIPMENT

A Practical Guide from the 2TG Personal Injury Team | Spring 2020

INTRODUCTION

One of the most widely-publicised issues in the UK during the course of the Covid-19 Pandemic has been the shortage of personal protective equipment (PPE) amongst frontline workers, particularly within the healthcare sector. This shortage of PPE may, in some cases, have caused or contributed to workers contracting the virus and it appears likely that claims against employers for personal injury will follow. The intention of this Practical Guide is to consider the legal framework surrounding an employer's duty in respect of PPE; specific issues relating to breach of duty which are likely to arise within the Covid-19 context; how the courts are likely to grapple with causation; and potential defences to claims.

THE LEGAL FRAMEWORK

The effect of section 69 of the Enterprise and Regulatory Reform Act 2013 ("ERRA") was – in respect of accidents after 1 October 2013 – to remove civil liability on the part of an employer for breach of the statutory duties contained within health and safety regulations (criminal sanctions for breach remain in place). Subject to some very limited exceptions[1], health and safety regulations no longer, therefore, provide a free-standing cause of action. Actions against an employer in respect of personal injury must now be brought in negligence: an employee must show that their injury was a foreseeable consequence of their work and that it was caused by their employer's breach of the common law standard of care.

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[1] In respect of pregnant workers and new mothers.

The essence of an employer's duty at common law is to take reasonable steps to provide a safe place and system of work so as to protect employees, as far as it is reasonably practicable to do so, from reasonably foreseeable harm. This encompasses a duty to provide safe equipment and safe staff.

The classic statement of the common law test remains that laid down by Swanwick J in *Stokes v Guest Keen and Nettlefold (Nuts and Bolts) Ltd* [2], a case concerning cancer caused by exposure to chemicals at work:

> *"The conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; … where there is developing knowledge he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks he may be thereby obliged to take more than the average or standard precautions…"*

The statement is particularly apt to cover the current crisis, where knowledge of Covid-19 is constantly developing and where large healthcare employers, including the NHS, are likely to have greater than average knowledge of the particular risks to which employees are exposed.

In assessing the standard of care owed by an employer, health and safety regulations continue to be highly relevant. The regulations remain in force and the courts have consistently emphasised since section 69 was enacted that a reasonable employer will be expected to be aware of relevant regulations and to comply with them[3].

In considering the duties owed by an employer in relation to PPE, the starting point is the Personal Protective Equipment at Work Regulations 1992 ("PPEWR") (which owe their origin to the PPE Directive 89/656/EC). The 1992 Regulations are comprehensive and cover, for example, the duty to provide PPE; the duty to undertake assessments of suitability of PPE; the duty to maintain and replace PPE; and information, instruction and training on PPE.

The PPEWR must not be considered in isolation. The other "6-Pack Regulations"[4] remain relevant, as do Approved Codes of Practice, HSE guidance and other government publications. Whilst such guidance is being constantly published and updated (see, for example, **https://www.gov.uk/government/publications/wuhan-novel-coronavirus-infection-prevention-and-control/covid-19-personal-protective-equipment-ppe**), it is noteworthy that in *Stokes*, where relevant government guidance had not been issued, Swanwick J went on to hold, "[t]*he good employer does not merely sit back and wait for official action or regulations.*" Thus, whilst an employer is under a duty to keep abreast of public guidance, the absence of the same is no excuse for inaction.

The Employers Liability Defective Equipment Act 1969 ("ELDEA"), which survives section 69 ERRA, may also have a role to play. This imposes liability on an employer for the faults of suppliers of work equipment.

PPE: THE DUTY OWED BY AN EMPLOYER

The provision of PPE should only be adopted as a last resort if other means of avoiding a risk cannot be implemented. This was made clear in the Directive and is also echoed in regulation 4 of the PPEWR. Thus, an employer ought first to consider whether there are other means available to enable it adequately to control the risk posed by Covid-19

[2] [1968] 1 WLR 1776, at 1783, quoted with approval by the Court of Appeal in, for example, *Dugmore v Swansea NHS Trust* [2002] EWCA Civ 1689

[3] See, for example, *Gilchrist v Asda Stores* [2015] CSOH 77 and *Cockerill v CXK Ltd & ors* [2018] EWHC 1155

[4] Including, in particular, the Management of Health and Safety at Work Regulations 1999, the Workplace (Health, Safety and Welfare) Regulations 1992, the Provision and Use of Work Equipment Regulations 1998 and the Control of Substances Hazardous to Health Regulations 2002.

to an employee's health and safety while at work. These are likely to include, for example, requiring employees to work from home or, in extreme cases, temporarily ceasing business[5]. Where the risk posed by Covid-19 cannot be adequately controlled by other means, an employer has a duty to provide suitable PPE.

Provision of Suitable PPE (Regulation 4 PPEWR)

Under regulation 4(1), an employer is obliged to provide PPE "*except where and to the extent that* [a risk to an employee's health and safety] *has been adequately controlled by other means which are equally or more effective*". Employers who are operating on the frontline of the pandemic are unlikely to be able to take steps adequately to control the risks posed by Covid-19 without the provision of PPE. They will not be able to require an employee to work from home and other measures, such as regularly disinfecting work premises and providing hand washing facilities, are unlikely to be adequate. The importance of making efforts to obtain appropriate PPE for workers on the frontline cannot be underestimated.

An important aspect of the obligation to provide PPE is that the equipment must be "*suitable*". Suitability is assessed by reference to five characteristics listed in regulation 4(3), namely that it is (a) appropriate for the risk/s involved and the conditions at the place where exposure to the risk may occur; (b) it takes account of ergonomic requirements and the state of health of the person/s who may wear it; (c) it is capable of fitting the wearer correctly; (d) it is effective, so far as is practicable, to prevent or adequately control the risk/s involved without increasing overall risk; and (e) it complies with any relevant standards. It is noteworthy that there is a presumption in the wording of the regulation that equipment shall not be deemed suitable unless it has all the characteristics specified.

Regulations 4(3)(a) and (c) are of particular relevance in the context of Covid-19:

- Regulation 4(3)(a) imposes a duty on an employer to ensure that the equipment provided is "*appropriate*" for the risks involved. Courts are likely to measure appropriateness by looking at contemporaneous guidelines from the WHO, Public Health England, the Health and Safety Executive, and the government. However, this is likely to be a fraught point in litigation, because the guidance about what constitutes "*appropriate*" PPE for doctors and nurses working around infected patients has changed over the course of the outbreak of the virus, with some commentators arguing that it has done so to take account of availability of stock rather than because of any change in need.

- Regulation 4(3)(c) requires an employer to check that PPE is "*capable of fitting the wearer correctly*". Whilst some healthcare employers are carrying out 'fit tests' on employees using FFP3 masks, smaller or non-clinical organisations are less likely to have the knowledge or resources to do this. As it has been well-publicised that face masks will be ineffective in protecting against the virus if not properly fitted to the wearer, employers should be particularly careful to ensure that they are taking all reasonably practicable steps to fit masks to employees.

Assessment of PPE (Regulation 6 PPEWR)

The duty upon an employer to conduct a risk assessment in connection with its operations, so

[5] In case law decided before the introduction of s.69 ERRA, it was established that an employer may be under a duty to dismiss an employee where suitable PPE cannot be provided. See, for example, *Coxall v Goodyear Great Britain Ltd* [2002] EWCA Civ 1010; followed in *Lane Group Plc v Farmiloe* [2004] PIQR P22. Whether an employer is under such a duty is likely to depend, in part, on the nature of the employer's business and whether it would otherwise be unable to provide essential services.

that it can take suitable precautions to avoid injury to its employees, is established at common law[6]. The new risks posed by Covid-19 make it likely that any existing risk assessment will be inadequate and a new one will need to be prepared. Moreover, as more becomes known about Covid-19 and those who are particularly vulnerable to it, employers will be under a duty continually to review and update their risk assessments. This may include preparing employee-specific risk assessments in cases where it is known that individual employees are particularly vulnerable and a more generic risk assessment will not be adequate[7].

Regulation 6(1) PPEWR imposes a specific duty on an employer to ensure that an assessment of proposed PPE is undertaken before it is chosen to determine whether it is "*suitable*", suitability having been defined in regulation 4(3) (see above).

In the rush to secure supplies of scarce PPE, it seems likely that questions relating to whether a particular item is suitable, as defined by regulation 4(3), may well be overlooked. Some equipment, possibly that made by new suppliers (many of whom have repurposed existing factories in order to manufacture PPE) or by volunteers (some reported to be working from home or in school science laboratories) may not be appropriate given the risks involved, and employers need to remain mindful of their obligation to carry out an assessment of any proposed PPE before it is supplied to staff.

It is particularly important that kit meets any relevant safety standards. These will differ depending on the nature of the employee's role and the particular environment in which the employee works. There are very specific European standards relating, for example, to respiratory protective equipment and the standards which different types of masks must meet depending upon the environment in which they are to be used. It has been reported that when much-needed PPE has arrived at the frontline it has, unfortunately, sometimes had to be returned, quarantined or not used because it does not meet the minimum standards staff and patients need to remain safe[8]. Whilst this is no doubt a frustrating situation for all concerned, it is illustrative of the duty upon an employer to check PPE before it is supplied to workers and to ensure that only suitable PPE is in fact provided.

Maintenance and Replacement of PPE (Regulation 7 PPEWR)

Regulation 7(1) PPEWR requires every employer to ensure that PPE, "*is maintained (including replaced or cleaned as appropriate) in an efficient state, in efficient working order and in good repair*".

This duty is likely to be highly relevant in cases involving the re-use of equipment which may previously have been provided for single-use or designed and marketed as such. Whether or not it is "*appropriate*" in the current circumstances, when stocks are in scarce supply, to clean and then re-use such kit, or to replace it less frequently, is likely to be a moot point. It will be difficult for an employer to justify the re-use of single-use kit unless it can prove that its approach was consistent with Public Health England guidance at the material time, that steps were taken to avoid risks posed by the re-use of such kit (e.g. the same employee may be asked to re-use their own kit) and there was no other reasonably practicable alternative.

[6] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6

[7] The British Association of Physicians of Indian Origin has called on employers to reflect in their risk assessments the disproportionate impact Covid-19 is having on BAME workers, citing data from April 2020 which indicates that whereas BAME staff make up 21% of the NHS workforce, 63% of the NHS staff who have died from the virus were from a BAME background.

[8] For example, on 7 May 2020, it was reported that 400,000 gowns imported by the NHS from Turkey were to be impounded because of a failure to meet safety standards.

Information, Instruction, Training and Use (Regulations 9 and 10 PPEWR)

Regulation 9(1) requires the employer to provide "*information, instruction and training as is adequate and appropriate*" to an employee using the PPE provided. Many employees (for example bus drivers) who are now being asked to use PPE will never have used it before, so training will be especially important for them. To ensure compliance with this duty, employers should consider:

- How should PPE be fitted to guard against the risk of contracting the virus?
- How should PPE be kept when it is not being worn?
- When and how should it be cleaned, or disposed of?

Regulation 10(2) imposes a counter-duty on employees to use their PPE in accordance with their training. This will assist defendants in making contributory negligence arguments in a number of situations: for example, there may be evidence that an employee has, contrary to instruction, removed their PPE whilst working to take a break from the discomfort of wearing it.

Employers Liability Defective Equipment Act 1969

Where an employee suffers personal injury in the course of employment which is a consequence of a defect in equipment provided by the employer, but the defect is attributable to the fault of a third party (whether identified or not), the ELDEA provides that, "*the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection)*".

The key points to emphasise are:

- There must be a "defect" in the equipment. This is likely to be interpreted broadly, it being held, for example, in Ralston *v Greater Glasgow Health Board*[9] that soap which was "*materially more irritant than other soaps*" (and so liable to cause dermatitis) was enough to satisfy the definition.
- The defect must be attributable to the fault of a third party. Most employers are unlikely to make their own PPE, and will rely upon PPE which has been manufactured and supplied by third parties.

The ELDEA will, therefore, be relevant in any case where an employer has provided defective PPE to an employee and an employee suffers an injury because of it (whether Covid-19 or any other type of injury). Such cases are unlikely to be rare given that the unprecedented nature of the pandemic has required many employers to obtain PPE in a rush, possibly from new suppliers and without the usual quality control measures being implemented. The ELDEA means that an employer will be liable for injury caused by such equipment even without fault or proof of negligence on their own part, i.e. an employee will not have to prove that the employer acted unreasonably in sourcing or supplying the defective item; and an employee will not have to identify the manufacturer or supplier of it.

CAUSATION

Given the prevalence of Covid-19 in the community, its transmissibility and, in particular, the lack of tracing data in the UK, it may be a challenge for an employee to prove that it was their employer's breach of duty (in failing to provide adequate PPE, etc) which caused them to contract Covid-19. This challenge is not, however, likely to be insurmountable. Employees will only need to prove causation on the balance of probabilities and they will not need to prove the precise cause of the

[9] 1987 SLT 386, Court of Session

infection, only that the most probable cause was a negligent cause.

It may be that in due course expert evidence will be required as to the likelihood of the virus being contracted in the community or in the workplace by a non-negligent cause (even with comprehensive PPE an employer is likely to argue that the risk of contracting Covid-19 cannot be avoided altogether), compared with a negligent cause. In any event, relevant factors are likely to include:

- The timing of infection. Since the lockdown was imposed and social distancing measures very widely adhered to, the infection rate – particularly amongst the working age population – has fallen. Causation is likely to be easier to establish in cases of employees contracting the virus after the lockdown than before the lockdown.
- Whether the employee lives alone and, if not, whether any other household member contracted the virus before the employee.
- The nature of the employee's role and the extent to which the employee is likely to be exposed to Covid-19 in the workplace. An employee working in the healthcare sector directly with Covid-19 patients is more likely to have contracted Covid-19 at work than an employee working as a supermarket delivery driver.
- Evidence of testing. An employee must prove that the breach caused the injury. The more that members of the workforce are tested for Covid-19, whether or not they are showing symptoms, the easier it will be to pin down the issue of causation because timing of an individual's infection will be possible to determine. An employer may acknowledge that it provided inadequate PPE early in the pandemic but argue that, by the time the employee contracted the virus, those issues had been resolved.

There may also be some scope for argument that the *Fairchild* exception[10] should be applied to cases of Covid-19, i.e. if the employee cannot prove that the employer's negligence caused or materially contributed to the contraction of Covid-19, but can prove that its negligence materially increased the risk of the employee contracting the disease, that should be sufficient for the purposes of proving causation. Whilst the *Fairchild* exception has been held to apply in limited cases other than mesothelioma[11], such an argument will inevitably face fierce resistance. Employers are likely to argue that there is insufficient reason to depart from the traditional tests for causation and that there are some essential differences compared with the traditional *Fairchild* context, for example, the short period between infection and the damage occurring and the fact that it is unlikely that more than one employer would be potentially liable.

POINTERS FOR DEFENDING CLAIMS

The following pointers may be useful to an employer seeking to defend any future claim in respect of failure to comply with the duties under the PPEWR:

- Gather and retain as much evidence as possible to show that all reasonably practicable steps were taken to fulfil the duties under the PPEWR. This will include evidence of what attempts were made to obtain PPE and why they were unsuccessful (e.g. the only available equipment was not "*suitable*" as defined in regulation 4(3); suppliers failed to deliver promised supplies; or the PPE advertised for sale was prohibitively expensive); evidence of any testing done on equipment; and records of training and support provided to employees in the use of PPE. Evidence of the measures taken to supplement, or substitute, PPE will also be worthwhile, as this will create an overall picture of a diligent employer doing its best in extraordinary

[10] *Fairchild v Glenhaven Funeral Services Ltd* [2001] EWCA Civ 1881

[11] For example, in *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA Civ 86, it was applied to a case of lung cancer.

circumstances (for example, the provision of washing facilities). Employers should also implement and document a system for sending staff home if they display symptoms of Covid-19, and be prepared to reduce opening hours if possible.

- Prepare a case that emphasises the specific challenges that the defendant was facing, and the competing interests it had to balance. If an employer has been unable to obtain adequate PPE but has kept its doors open, they should focus on the preventative measures that were taken (e.g. additional cleaning) and on the contribution they were making to providing the public with essential services. A relevant consideration will be any duty of care which was owed to others including, for example, vulnerable patients or the residents of care homes.
- Consider whether there is evidence of contributory negligence. There may, for example, be evidence that the employee failed to wear the PPE which was provided properly and in accordance with their training and/or consistently.
- Consider whether the complete defence of volenti is arguable (i.e. the employee voluntarily accepted the risk of injury). While volenti has generally been seen to have an extremely limited role in employer's liability cases (it is established law that volenti is not a defence to a breach of the employer's own statutory duty[12]), in light of section 69 ERRA it may be said that volenti should have a role. In an extreme case, perhaps of an elderly male with chronic underlying health issues coming out of retirement in the peak of the pandemic to volunteer for work on the frontline, and in the knowledge that there is a shortage of PPE and that appropriate kit is unlikely to be available, a defendant employer may wish to consider running volenti.

GOVERNMENT LIFE ASSURANCE SCHEME FOR NHS AND CARE WORKERS

Litigation arising out of the PPE shortage appears inevitable and, on 27 April 2020, the Government foreshadowed the demand for compensation when it announced a new life assurance scheme for frontline NHS staff and social care workers during the coronavirus pandemic. It was stated that families of workers who die from coronavirus in the course of their frontline work will receive a £60,000 payment. Full details of the scheme are yet to be announced, but it appears unlikely that any payment made pursuant to the scheme will prejudice the right of a dependant from bringing a claim under the Fatal Accidents Act 1976 ("FAA") (most probably for a sum which far exceeds £60,000) or that it will have to be taken into account when assessing damages (section 4 of the FAA specifically requires the court to disregard any benefits which have accrued as a result of the death).

[12] *Baddeley v Earl of Granville* (1887) 19 QBD 423

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Helen joined 2TG in 2004 following pupillage. She specialises in Personal Injury and Clinical Negligence and is recommended in the Legal 500 and in Chambers & Partners in both areas. Described in the Legal 500 as having "*excellent knowledge of clinical negligence law*" and in Chambers and Partners *as "extremely incisive in terms of both her paperwork and her cross-examinations", "very experienced, trustworthy and approachable"* and *"firm but pragmatic, and very good at what she does"*, Helen enjoys a broad practice, acting for claimants and defendants. She has a particular interest in cases involving psychiatric injury, chronic pain and knotty issues of causation. She served as Junior Counsel to the Crown (C Panel) between 2009 and 2014.

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