

## Employer's liability: back to basics

### Introduction

- 2-part series - but don't worry if you missed Webinar 1
- Webinar 1: overview of basic principles / commonly-encountered issues in EL claims
- Webinar 2: Covid-19 pandemic and employer's liability

## Employer's liability: back to basics

### Webinar 1: recap...

- The causes of action now available to employees
- Who can bring a claim against an employer
- The four central tenets of the employer's duty
- Impact of H&S Regulations
- Contributory negligence
- Potential defences

Now we consider... Covid-19 claims in light of this analysis

## Employer's liability: back to basics

### What are the causes of action now available to employees?

- Liability may arise in:
  - negligence (i.e. reasonable care)
  - Occupiers' Liability Act 1957
- Enterprise and Regulatory Reform Act 2013 s.69
- Since 1<sup>st</sup> October 2013 breach of duty imposed by “health and safety regulations” do not confer a cause of action

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### When and how can Regulations still assist an employee?

- The “six pack” can still assist in demonstrating the standard of care required
- But...*Stark v Post-Office*-type strict liability has gone
- Must now be able to prove fault on the part of the employer

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Who can potentially bring a claim against an employer?

- An employee...obviously!
- Secondary exposure - members of the family or social circle

Who cannot (usually) bring an employer's liability claim against an employer?

- An employee of an independent contractor?
- Consider the facts carefully

In practice - look where control lay

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What are the four central tenets of the employer's duty?

- Safe staff
- Safe place of work
- Safe work equipment
- Safe system of work
- Note...the employer's duty is non-delegable, thus performance can be delegated, but liability for non-performance cannot

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What is the standard of care required of the employer?

- Meaning of “reasonable care”
- In practice...compliance with guidance will be critical

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### Control measures:

- Manage risk:
- Enable working from home
- Comply with social distancing
- Where not possible: must activity continue? If so, take mitigating actions



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### Covid-19 risk assessment

**Staying COVID-19 Secure in 2020**  
We confirm we have complied with the government's guidance on managing the risk of COVID-19

**FIVE STEPS TO SAFER WORKING TOGETHER**

- ✓ We have carried out a COVID-19 risk assessment and shared the results with the people who work here
- ✓ We have cleaning, handwashing and hygiene procedures in line with guidance
- ✓ We have taken all reasonable steps to help people work from home
- ✓ We have taken all reasonable steps to maintain a 2m distance in the workplace
- ✓ Where people cannot be 2m apart, we have done everything practical to manage transmission risk

Employer: Housing Solutions Date: May 2020

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### PPE

Guidance says:

Continue using your usual PPE.

Covid-19 is a different type of risk to usual workplace risks and should be managed “*through social distancing, hygiene and fixed teams or partnering, not through the use of PPE*”

(Exception: clinical settings, eg hospital, first responders... also some other roles eg immigration enforcement officers)

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### COSHH

- Covers “biological agents”
- Covers substances where chemical or toxicological properties and the way it is used or is present at the workplace creates a risk to health
- BUT not intended to extend to community-acquired illness (as opposed to work with an exposure to biological agents in the workplace) - see ACOP

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### Claims in respect of psychiatric injury?

- PTSD, adjustment disorder etc. arising from illness and/or treatment unlikely to be controversial
- More problematic scenarios...
  - “Stress at work” claims?
  - Primary or secondary victim when injury arises from fear of exposure at work?
  - Potentially affected third parties concerned about indirect exposure?
- Significant controls already exist to limit the scope of all such claims

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### Causation

- Do not ignore the need to prove causation...it is not always obvious and especially so here...
- Problematic cases...
  - Stress at work cases
  - Mesothelioma and other occupational exposures
- Impact of the limits of medical and scientific knowledge
- Will another exemption be created - cf. *Fairchild*?
- Human Rights Act 1998 -
  - need for “just satisfaction”
  - Quantum and causation issues difficult to resolve
- No reason contributory negligence cannot be asserted

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### Issues in relation to quantum?

- Size of claim - many will be relatively low in value, although sadly not all
- Difficulties in identifying attributable symptoms and sequelae
- Can one recover in respect of asymptomatic disease?

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### Novel approaches?

- Complete immunity from suit
  - Distinction between clinical and managerial functions?
  - NHS and care related employment alone?
- Extension of combat immunity?
- Non-fault “tariff” scheme?
- Significant political considerations applicable to all

## Employer's liability: back to basics

### Cases and materials

- <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/offices-and-contact-centres#offices-3-1>
- *Cockerill v CKX* [2018] EWHC 1155 (QB)
- *Edwards v National Coal Board* [1949] 1 K.B. 704
- *Goldscheider v Royal Opera House Covent Garden Foundation* [2019] EWCA Civ 711
- *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597
- *McGowan v W & JR Watson Ltd* [2006] CSIH 62
- *Brumder v Motornet Service and Repairs Ltd* [2013] EWCA Civ 195



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### Cases and materials (contd.)

- *Margereson v JW Roberts Ltd* [1996] Env. LR 304
- *Maguire v Harland & Wolff* [2005] PIQR P21
- *Carey v Vauxhall Motors Limited* [2019] EWHC 238 (QB)
- *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32
- *Rothwell v Chemical and Insulating Co.* [2007] UKHL 39
- *Sienkiewicz v Grief* [2011] UKSC 10

Coming up!

Next week's webinar:-

Ed Bishop QC and Laura Johnson discuss the challenges of secondary victim cases.

*Same place, same time. Hopefully see you there!*