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## COVID-19 – the Ultimate ‘Emerging’ Risk?

- UK cases: approaching **7 million** (current 7 day average: approx. 34K per day).
- UK fatalities: **133,000** (current 7 day average: 111 per day).
- UK hospital admissions: **520,000 +** (current 7 day average: 900+ per day).
- Latest R. range : **0.9 to 1.1** for England and **1.0 to 1.3** for Scotland.

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## Long COVID cases - REACT-2 (June 2021)

- A self-reported study of over **508,000** adults in England conducted by Imperial College London.
- A **third** of those infected reported suffering at least 1 of 29 linked symptoms for 12 weeks or more (thus, over **2 million** people in England may have/have had long COVID).
- Most common symptoms at **12 weeks** were in 2 groups:
  - tiredness, muscle aches and difficulty sleeping; or
  - Respiratory (shortness of breath affecting normal activities, chest tightness and chest pain).
- Limited change on follow-up at 5 months in these groups.

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## Reporting of Injuries, Disease & Dangerous Occurrences Regulations (2013)

- Employers are **required** to report to the HSE or local authority where a **worker** has been **diagnosed** as having COVID-19 and there is **reasonable evidence** to suggest it was **caused** by **occupational** exposure.
- RIDDOR COVID-19 figures (for the period 10 April 2020 - 14 August 2021):
  - disease notifications: **34,835** (current 3 week average: 178 per week)
  - death notifications: **409**
- Almost certainly significant under-reporting.

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# Potential Liability Claims

## How does a claimant establish civil liability in a Covid-19 infection claim?

- The existence of a duty of care (this is inevitable in an EL case);
- Breach of that duty by the defendant; and
- Infection/injury arising from the defendant's breach of duty.

## How will Courts approach the issue of breach of duty in Covid-19 infection claims?

In a hospital, hospice, care home, surgery, medical lab, prison, etc:

- COSHH Regulations – “*substance hazardous to health*”.
- Risk assessment.
- Prevention.
- Control measures.
- Personal Protective Equipment (PPE).

Other settings:

- Work from home if possible, otherwise:
- Risk assessment.
- Hygiene - cleaning and handwashing.
- Social distancing.
- Managing the transmission risk.

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## Covid-19 EL & PL claims – Breach of duty (1)

### Healthcare or social care settings

- Regulation 7(1) of the COSHH Regulations 2002:

*“Every employer shall ensure that the exposure of his employees to substances hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled.”*

- In a hospital, care home or such like, the virus will be a ‘*biological agent*’ and therefore a ‘*substance hazardous to health*’ under the COSHH Regulations.
- Section 69 of the Enterprise & Regulatory Reform Act 2013 – from 1 October 2013, claimants can not rely purely on the basis of strict liability imposed by the likes of regulation 7(1).
- Regulation 7(1) arguably remains relevant as evidence of the standards expected of employers taking reasonable care for the health & safety of their employees.

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## Covid-19 EL & PL claims – Breach of duty (2)

### Other workplaces

- The COSHH Regulations have no application to Covid-19 in relation to factories, warehouses, construction sites, retail or leisure, etc.
- Cases relating to non 'care' settings are therefore more likely to be determined based upon compliance with other 'six-pack' regulations and relevant Government guidance.
- This might have involved adherence or otherwise to guidance on:-
  - enabling work from home if possible, or otherwise:
  - undertaking risk assessments
  - implementing appropriate measures in respect of: –
    - hygiene, cleaning and hand washing;
    - social distancing; and
    - managing the transmission risk (for instance, applying a strict face mask policy, introducing a shift system so that all workers are not in work together at the same time, setting out a one-way system to ensure social distancing, workers not facing each other, etc).

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## Covid-19 EL & PL claims – Breach of duty (3)

- Evolving Government guidance:
  - pre-first lockdown;
  - during lockdowns (including local lockdowns, as in Leicester, etc);
  - in the immediate easing of lockdown phases; and
  - from 19 July 2021 in England (later dates applicable as regards Scotland & Wales).
- The Government guidance issued in respect of specific workplace settings may also be relevant (e.g. the '*Working safely during coronavirus*' guides issued in respect of various sectors on 11 May 2020).
- Uncertainties?
  - Should employers have been taking workers' temperatures before they started work?
  - Should employers have been/be issuing employees/visitors with face masks?
  - Should employers be requiring employees/visitors to be fully vaccinated?

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## Covid-19 EL & PL claims – Causation

**Stage 1 – Medical causation** (a diagnosis of Covid-19).

- The first step will be for a claimant to prove that they (or the deceased) has contracted Covid-19. This will need to be proved on the balance of probabilities.
- In many cases, a test result evidencing a positive diagnosis (along with evidence of relevant symptoms) is all that will be needed.

**Stage 2 – Legal Causation**

- The second step is for the claimant to establish that Covid-19 was caused by negligent exposure to the virus on the part of the relevant tortfeasor.

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## Legal causation

How might a claimant prove that they contracted Covid-19 due to a defendant's breach of duty?



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## Covid-19 – the ‘but for’ test

- Causation is usually established by application of the *but-for* test – ‘would the claimant have contracted Covid-19 but for the defendant’s breach of duty?’
- ‘*Doubling of the risk*’ is sufficient to establish causation pursuant to the ‘*but-for*’ test.
- IIAC Position Paper 48, an interim report looking at COVID-19 and occupation, published 25 March 2021.
- Does working in certain occupations gives rise to a doubling of the risk of the injury or disease in question?
- A ‘clear association’ between several occupations and increased risk of death from COVID-19.
- IIAC intends revisiting the question of prescription of COVID-19 once better data is available.

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## Covid-19 – material contribution

- In divisible cases where there are 2 or more potential sources of the harmful agent, 1 or more of which are not in breach of duty, then the claimant can establish causation on the basis of material contribution.
- However, assumed that Covid-19 is an ‘indivisible’ condition (similar to cancer).
- This effectively excludes any arguments as regards ‘material contribution’ as a causative test.
- If it is not possible to ascertain where the virus came from, it cannot be proved that any breach of duty materially contributed.

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## Covid-19 – material increase in risk

- It seems that in most Covid-19 cases, what can be established is that breach of duty on the part of the employer may have contributed to the risk of infection.
- Brings into play the law introduced in *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22.
- The key element for creation and application of the '*material increase in risk*' test was the scientific impossibility of proving causation using the *but for* or *material contribution* tests.
- But there has been refusal to extend the *Fairchild* principle beyond indivisible asbestos disease cases.
- *Sanderson v Hull* [2008] EWCA Civ 1211, per Smith LJ;
 

*"The conclusion I am driven to is that this was not a case in which it was impossible for Ms Hull to prove causation. The crucial issues were not incapable of proof, as is a necessary feature if a case is to be brought within the Fairchild exception. Here it could be said that there were difficulties of proof but that is not enough."*

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## Covid-19 – Impossibility of proof of causation?

- Is impossibility of proof a prospect in Covid-19 cases?
- Contracted at work or at home, when shopping, socialising or exercising, on public transport, etc?
- Acquired tortiously or non-tortiously?
- *McGhee v National Coal Board* [1973] 1 WLR 1 (since accepted as an earlier application of the *Fairchild* exception).

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## Covid-19 Genomic Sequencing – the game changer?

- The world- leading UK genomics sequencing industry - estimated to contribute 23% of all worldwide COVID-19 genomic sequencing.
- More than 600,000 positive COVID-19 samples were sequenced in the UK up to 2 July 2021.
- The Chan Zuckerberg (CZ) Biohub.
- SARS-Cov-2 genome (sum total of an organism's DNA) mutates once every 1-2 weeks - every 2 or 3 transmission events being marked by a new mutation.
- By tracking these mutations, researchers can monitor the dynamics of viral transmission and circulation, and:
  - distinguish separate chains of transmission within a community
  - identify potential sources of importation of the virus into a community
  - estimate the number of undetected cases in a community

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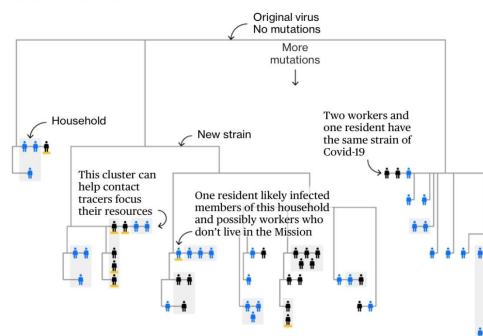
## Covid-19 Genomic Sequencing

### Genetic Clues for Tracing Covid-19 Transmission

Viral relationships can reveal social relationships, making connections we otherwise wouldn't make, which has implications for contact tracing

Simplified family tree of Covid-19 strains found in the Mission District, San Francisco

■ One resident ■ One worker — Older infection



Source: Chan Zuckerberg Biohub

Note: People not connected with a line to a specific strain have a version of the virus with an undetermined genome and are placed according to best-guess assessments. An older infection is indicated by a positive antibody test result. Three workers who tested positive for Covid-19, but didn't receive an antibody test to determine whether their infection was older or recent, are shown in the graphic as recent infections.

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## When has there been actionable personal injury?

- *"A claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability."*

Thus, there needs to be a physical change which makes the claimant "appreciably worse off."

(Lord Hoffman, *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, the pleural plaques litigation)

- Actionable personal injury can be hidden and symptomless - *Cartledge v E. Jopling & Sons Ltd* [1963] AC 758
- *Dryden and others v Johnson Matthey plc* [2018] UKSC 18  
*"...further exposure carried with it the risk of an allergic reaction, and for that reason they must change their everyday lives so as to avoid such exposure."*

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## Short-tail & other claims

What we are seeing and likely to see:

- Discrimination
- Cumulative Back Injuries
- Work-related Upper Limb Disorders
- Display Screen Equipment claims
- Stress



<https://www.hse.gov.uk/toolbox/workers/home.htm>

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## The Vaccination challenge



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## The Vaccination challenge

- Primarily the role of the Government and health services to combat disease.
- COVID-19 vaccination will effectively become compulsory for care home workers in England from 11 November 2021.
- Employers are required to take reasonable steps to reduce any workplace risks.
- Highly questionable whether an instruction to have a COVID-19 vaccine is reasonable. There is at least a risk of unfair dismissal, discrimination and/or other claims.
- What if a reluctant employee was to suffer a serious reaction to vaccination?

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