BRIEFING

POLICE LAW

April 2020

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THE POTENTIAL LIABILITY OF POLICE FORCES FOR THE CONTRACTION OF COVID-19 BY POLICE OFFICERS OR STAFF

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Coronavirus, or covid-19, is a highly contagious virus. The majority of the population can be expected to have exposure to it at one time or another, with the only way to avoid it altogether being a prolonged period of self-isolation, the development of a vaccine or a generous dose of good luck.

However policing has had to continue during the lockdown and officers have been on the streets, coming into contact with members of the public. In addition most of us will not be locked down for a prolonged period and nor will we be vaccinated any time soon. We will have to resume our working lives and that means that we may become exposed to the virus whilst at work.

There has been no change to the law on employers' liability as a result of the virus. The courts have always demanded a high standard of care from employers and so employers may well become a target for employees who believe that they can prove that they contracted the virus as a result of some work-related activity. On 24th April the newspapers reported that two NHS doctors had instructed solicitors to write a letter of claim to the Government in relation to official guidance on the use of PPE. The prospect of work-related claims is clearly there.

What duties will forces have to fulfil? Police staff are owed the common law duties of care established in *Wilsons and Clyde Coal v English* [1938] AC 57; the duty to provide a safe place of work, a safe system of working, safe staff and safe equipment. It is a non delegable duty, so the employer remains liable for a negligent failure even if the obligation was delegated,

and although the House of Lords held in *Wilsons* that the standard was that of reasonableness, in practice the courts have always applied a high standard. Police officers are officeholders not employees – that is why they cannot bring claims of unfair dismissal in employment tribunals – but the courts expect the same high standard of care to be exercised by police forces as would apply if the officers were employees. The duty extends to watching over the employees to check that they do what they are supposed to do in the manner in which they are supposed to do it. There are large numbers of cases where an employer has been held liable even though the person at fault was primarily the employee. Employers are expected to know that their employees will fail to notice even obvious dangers, misunderstand instructions, make mistakes, become tired or just try to cut corners, and it is the employer's duty to guard against injury caused in those types of circumstances.

In relation to PPE, the Employers Liability (Defective Equipment) Act 1969 means that employers will be strictly liable for any injury caused by the failure of equipment. Again the Act is expressed to apply to employees but a court would certainly wish to apply it to police officers.

As well as common law duties, there are the various familiar sets of regulations that employers have to abide by. Breach of these is no longer a cause of action in themselves, but the regulations still apply and are the benchmark for courts who have to decide whether the appropriate standard of care has been met. The Management of Health and Safety at Work Regulations 1999 prescribe the making of a suitable and sufficient assessment of all risks that an employee is likely to face in the course of employment. The virus adds a significant new layer of risk to everyone's work activity and has necessitated new ways of working, all of which has to be assessed. The Provision and Use of Work Equipment Regulations 1998 oblige employers to provide work equipment which is safe and suitable and to provide training in its use. The Personal Protective Equipment at Work Regulations 1992 govern the provision and use of PPE. It must be the right PPE, it must do the job it was intended to do and the employee must understand how to use it appropriately.

Under these common law and statutory duties, employers will have to take a fresh and detailed look at what the employee is being asked to do and what information, training and equipment he or she needs in order to do it. If the wrong PPE is issued, or hand sanitiser is not provided, or the method of working is not optimised to avoid contact with the virus, or the new way of working with social distancing is not reinforced by adequate instruction and training, there may be arguable breaches of the employer's duty of care.

One important indicator of whether the employer has fulfilled his or her duty of care is whether relevant guidance has been followed. There has been a significant amount of new guidance designed to help during the virus crisis.

On 23rd March a Coronavirus Interview Protocol was published jointly by the National Police Chiefs' Council, the Crown Prosecution Service, the Law Society, the Criminal Law Solicitors' Association and London Criminal Courts Solicitors' Association. The protocol recognises that under the Criminal Procedure and Investigations Act 1996, investigators have a duty to pursue all reasonable lines of enquiry, including those which point towards and away from the suspect and that in most cases "reasonable lines of enquiry" will require an interview. If it is not reasonably possible to keep those participating in the interview safe then interviews can of course be postponed. However where an interview does take place, the protocol suggests that it should ideally be a remote interview, with the suspect on his own in a room with a computer terminal and with the officer in the case and the suspect's solicitor each dialling in. If it has to be a physical interview, the interviewing officer and all other persons present must wear PPE.

The following day the UK Government issued guidance for first responders (primarily the emergency services). This states that if the police have to come into close contact with someone who may have the symptoms of covid-19 (for example, to make an arrest) they should be wearing face masks that are fluid-repellent, disposable gloves, disposable eye protection such as a visor and a disposable plastic apron.

It is not always going to be possible to comply with all of the guidance. However in that event it is the employer who will have to persuade the court that the standard of care was still met.

In the end, it is the difficulty of proving causation that is likely to result in few claims being brought. Proving liability will require a claimant to show not only that there was some breach of duty, but that it was that breach of duty that caused the claimant to contract the virus. In disease claims in the past, the courts tried to ease the difficulties in proving causation by holding that it was sufficient for the claimant to prove that the breach caused a material contribution to the onset of the disease. However those cases all relate to claimants who have been exposed to some harmful material in several employments. That reasoning does not apply to covid-19. Given that it is perfectly possible to catch the virus from someone who is themselves asymptomatic, it is difficult to imagine how causation could be proved.

HUMAN RIGHTS RECAP

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Following the Supreme Court's decision in *Commissioner of the Police of the Metropolis v DSD [2018] UKSC 11*, it is a reasonable assumption that we will see an increase in the number of claims alleging a breach of Article 3 in relation to investigative failures. This therefore seems like an opportune moment for a quick refresher on managing Human Rights Act claims and a reminder of the key practical and procedural issues to consider when one lands on your desk.

Limitation

Under section 7(5), claims arising under the Human Rights Act are subject to a very short primary limitation period of one year from the date on which the act complained of took place.

This limitation period can, however, be extended to *"such longer period as the court or tribunal considers equitable having regard to all the circumstances"*.

In the 2017 case of Mlia v Chief Constable of Hampshire, two Claimants (X and Y) sought to bring claims seven and a half years out of time, alleging in failing adequately to investigate complaints of abusive behaviour and harassment by X's partner, Z, the police had violated their rights under Articles 3 and 8. Refusing to extend the limitation period, Lavender J applied the decision of Thomas LJ in *Dunn v. Parole Board [2009] 1 WLR 728*. In *Dunn*, Thomas LJ held that the court had a wide discretion which it should not fetter. He considered it unhelpful to list the relevant factors or to indicate which factors may be more important than another. Lavender J noted, however, that it had been held that it would not be inappropriate to have regard to the factors at section 33 Limitation Act 1980. In concluding that it would not be equitable to extend time, he particularly noted that the matters complained of had been known by the Claimants, and that they had made many previous complaints in relation to the police handling ofthe investigation. The First Claimant had also in that time brought other related legal proceedings with the aid of a solicitor.

Note that while it may not be inappropriate to have regard to the factors at section 33, nonetheless per Lord Dyson in *Rabone v Pennine NHS Trust [2012] UKSC 1*, *"the words of section 7(5)(b) of the HRA mean what they say and the court should not attempt to rewrite them. There can be no question o interpreting section 7(5)(b) as if it contained the language of section 33(3) of the Limitation Act 1980."*

The courts have consistently recognised that the short limitation period allowed in human rights claims underlines a policy that they should be dealt with swiftly and at proportionate cost. By definition they are brought against public authorities and they are usually of modest value.

Is the Claimant a victim?

The Human Rights Act only covers "victims" of violations of Convention rights (section 7(1)). A victim includes anyone directly or potentially affected by the act, as well as relatives and dependents. The court will not decide a hypothetical case, but a person may be victim where there is an anticipated and real risk of a breach (see for example *Soering v United Kingdom (1989) 11EHRR 439*).

What remedies does the Human Rights Act provide?

Per section 8:

"In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and equitable."

This includes the power to award damages but under section 8(3), no award of damages shall be made unless the court is satisfied that an award is necessary to afford "just satisfaction". An award of damages is not, therefore, automatic. In assessing awards of damages, the courts have taken into account factors such as the type of right that has been violated, the effect of the violation on the victim and the conduct of the public authority.

In determining whether to award damages and if so in what sum, section 8(4) requires the court to take into account the principles applied by ECtHR in relation to the award of compensation under Article 41 of the Convention. The challenges in identifying those principles from the jurisprudence of the ECtHR were acknowledged by the Supreme Court in R (on the application of Faulkner) v Secretary of State for Justice and another [2013] UKSC 23. Lord Reed held that domestic courts should have regard to comparable ECtHR cases. Given that ECtHR awards reflect the real value of money in the country in question, the most reliable guidance as to the quantum of award under section 8 will therefore be awards made by the European court in comparable cases brought by applicants from the UK or other countries with a similar cost of living.

Awards are generally modest. In Faulkner, Lord Reed further cited *Lord Bingham in R (Greenfield) v Secretary of State for the Home Department [2005] 1 WLR 673* who held that the Human Rights Act is not a tort statute. It is relevant that even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted.

What about Brexit?

The UK's exit from the European Union does not have any automatic impact on the ability of individuals to enforce breaches of Convention rights in the domestic courts. The Human Rights Act 1988 is part of UK law. The Council of Europe is an entirely separate organisation with a much wider membership than the European Union. Our exit from the EU does not change the fact that the UK ratified the European Convention on Human Rights and accepted the jurisdiction of the European Court of Human Rights. However, membership of the Council of Europe is a condition of membership of the EU, and Brexit may remove one obstacle for those who wish to replace the Convention with a British Bill of Rights.

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