FORUM OF INSURANCE LAWYERS

IRELAND

Informing Progress - Shaping the Future

FOIL Ireland learning event

2021 - CV19 and the Court of Appeal

Held on 4th March, this event featured **Simon Kearns BL,** talking about the potential for claims arising from the Covid-19 pandemic pursuant to the Health Act 1947 (as amended) and two recent Court of Appeal decisions from 2021 – *Naghten (A Minor) v. Cool Running Limited* and *Morgan v ESB.*

Civil Liability – Covid-19

On 3 March 2020, Ireland had one confirmed case of Covid-19 but within a few weeks there was a full lockdown. At the date of the presentation, there were some 221,000 cases and there had been more than 4,300 deaths.

COVID-19 gave rise to a myriad of operational, logistical and legal issues for employers and businesses relating to health and safety. A wide range of issues immediately arose for employers relating to the health and welfare of employees who continued to work from their normal place of work such as essential retailers and essential service providers including those who were required to work in factories, manufacturing, food processing and in health care and long-term residential care facilities. Similar issues and considerations arose for places of work and businesses which reopened following the easing of restrictions, while employers also had to get to grips with setting up and facilitating employees to work remotely since this time last year.

Some US states have already passed legislation providing immunity against civil liability in Covid related claims, but litigation is likely to arise in Ireland.

There has already been the business interruption litigation but, in the future, there are likely to be claims arising from vaccination (failure to vaccinate or related to the outcome); clinical negligence (including failure to diagnose); and personal injury (failure to protect employees or visitors).

Employers owe a wide range of duties to their employees so as to ensure that their safety, health and welfare at work is protected so far as is reasonably practicable. This duty arises regardless of whether the employee is working in a food plant under an employer's direct supervision or from a laptop in their kitchen. These duties are set out in statute and also arise under the common law and under contract. The applicable legislation includes the Safety Health and Welfare at Work Act 2005 (as amended); the Occupiers' Liability Act 1995; and the Health Act 1947 (as amended) (the 1947 Act).

The 1947 Act has become much more prominent during the pandemic, as it relates to the control of infectious diseases and adds a new dimension to the discussion on potential civil liability. It imposes a general duty to take precautions against infecting others with an infectious disease on a person who knows that he or she is a probable source of infection with an infectious disease. S43 specifically refers to the possibility of a civil claim and deals with the issue of causation, which inevitably arises as an issue given the nature of the potential claim. Covid was added to the list of infectious diseases covered by the 1947 Act, with effect from 28 February 2020.

S30(1) of the 1947 Act requires a person, who knows that he or she is a probable source of infection with an infectious disease, to take reasonable precautions to prevent the infection of others. S30(2) of the 1947 Act imposes similar duties on a person having the care of another person and knowing that such other person is a probable source of infection. To be caught by the section, the person must know they (or the person in their care is), are a probable source of infection. The duty is wide ranging and introduces a duty to take every reasonable precaution to avoid infecting others. Hospitals and care homes and similar facilities are likely to fall under S30(2) in relation to employees, patients and visitors.

Returning to S43, it states where circumstances have arisen in which a relevant provision of the 1947 Act or of any related regulations requires a "person" to take a precaution against the infection of other persons with a particular infectious disease, and that person has failed to take the precaution, and any other person has been without his knowledge exposed by such failure to the risk of infection with the disease, and after such exposure has been infected with the disease, then in any action against the first person by the other for damages suffered by reason of the infection, the court shall presume that the infection was the direct result of the failure to take precautions unless it is satisfied that by reason of the time of the infection or for any other reason that it was unlikely that such failure caused such infection. The onus will be on the defendant to satisfy the court that this is the case.

A 'person' is not defined in the Act if the definition in S18 of the Interpretation Act 2005 is applied would include companies and firms, as well as individuals. This could impact on employers in relation to claims brought by employees, where a breach is established.

The speaker then cited some authority (*Denneny v. Kildare County Board of Health* [1936] IR 384) which related to a claim that a hospital negligently allowed an infected person to leave its care, only for the patient to infect numerous others. The claim was dismissed. Some *obiter* judicial comment in that case perhaps reflected a concern about allowing the floodgates to be opened in respect of claims arising from the spread of an infectious disease.

Although the courts will make some allowance for the steep learning curve that employers experienced at the beginning of the pandemic, the balance remains tilted in favour of employees, when it comes to examining safe systems of work; the safe use of shared equipment; hygiene facilities; and the provision of personal protective equipment. Risk assessments will be important. However, employees also have duties. Under S13 of the Safety Health and Welfare at Work Act 2005, an employee is required to comply with the relevant statutory provisions, as appropriate, and take reasonable care to protect his or her safety, health and welfare including to make correct use of any article or substance provided for use by the employee at work or for the protection of his or her safety, health and welfare at work, including protective clothing or equipment. Under the Updated Work Safety Protocol (updated December 2020) employees are obliged to cooperate with the employer on prevention measures and undergo any COVID-19 testing as part of serial or mass testing as advised by Public Health and implemented by their employee.

The duty on the employer remains unchanged where the employee is working remotely, and official guidance has been issued by the HAS. This includes a requirement to have an adequate risk assessment, even where the employee is working from home.

Morgan v Electricity Supply Board (2021) IECA 29

This case analysed the obligations of both plaintiffs and defendants under the Civil Liability and Courts Act. It focused on Ss10 - 13 Civil Liability and Courts Act 2004 (the 2004 Act) and the need for full and proper pleadings by both plaintiffs and defendants. It also emphasised the importance to both parties of the verifying affidavits under S14.

In this case it was found that the plaintiff's case was pleaded in such generic terms that they were 'utterly uninformative'. For example, breaches of duty were alleged, without particularising what specific regulations had been breached and how the breaches had occurred. The Court noted that 'a plaintiff is required to plead specifically and cannot properly rely on the pleading equivalent of the Trojan Horse, which can as needed spring open at trial and disgorge a host of new and/or reformulated claims.'

What this means for defendants from a practical point of view is that a plaintiff must state clearly and specifically what their claim is. Where this is not the case, the defendant should raise particulars and this case cited where the claimant fails to provide meaningful replies.

The obligations under the Civil Liability and Courts Act regarding pleading *'clearly and specifically'* apply to defendants in equal measure when pleading a defence.

Naghten (A Minor) v. Cool Running Limited (2021) IECA 17

The plaintiff (10) had succeeded at trial and been awarded damages. The defendant appealed both liability and quantum. The Court of Appeal noted that several pleas made in the defence were not pursued at trial and other allegations had not been particularised. The Court noted that certain pleas were advanced without 'any evidential basis and indeed, on the contrary, in the teeth of the evidence which was at all times in the possession of the defendant'. This case provides a timely reminder to all practitioners that S14 applies with equal force to defendants and that careful consideration is required before pleas are advanced in any defence. Swearing the affidavit is not to be seen as a form-filling exercise and clients must be made aware of its importance and the potential consequences.

On the issue of expert witnesses, the decision reiterated the need to engage experts in a timely fashion. The Court was critical of the defence in relation to their belated decision to instruct an engineering expert after the commencement of the first High Court trial. SI/391 was introduced to bring about a degree of transparency designed to avoid trial by ambush and as a consequence, in theory at least to facilitate earlier resolution of personal injuries litigation. This was seen to be particularly important in the context of expert evidence where there was a perceived absence of equality of arms or, to use a more current expression, a level playing field. General guidance was also given on the status of expert witnesses and when expert evidence is warranted.

While the Court did not make any specific findings on the issue, it made some comments that questioned whether a plaintiff aged 10 could be in fact be capable of contributory negligence.