COVID-19 – The Law Un-Masked: The Coronavirus and Employees' Compensation Claims

In our seventh article of the series "COVID-19 – The Law Un-masked", Simon Wong and Flora Lam clarify the legal basis for employees to seek compensation for contracting the coronavirus, and the hurdles that must be overcome to make a successful claim.

Introduction

Following the WHO's official announcement that COVID-19 is considered a pandemic as of 12 March 2020[1], understandably employers and employees are becoming increasingly concerned about the question of whether an employee is entitled to claim employees' compensation ("**EC**") under the Employees' Compensation Ordinance[2] ("**ECO**") in cases where an employee contracts the coronavirus.

On 10 February 2020, the Labour Department issued a statement on this subject.[3] It is stated therein that according to section 36 of ECO, despite the fact that COVID-19 is not one of the prescribed occupational diseases under the Second Schedule of the ECO,[4] an employee may still claim compensation for the contraction of COVID-19 if it is a personal injury by accident arising out of and in the course of employment.

This article will set out the legal basis for the above EC claims, in particular it will analyse whether and under what circumstances the contraction of COVID-19 would be regarded as an accident within the meaning of ECO.

Meaning of an "Accident"

The expression "accident" may, on the face of it, appear to exclude diseases. However, in the context of ECO, it actually does not.

Although the ECO gives no definition to the expression "accident", such expression was defined and explained in the landmark case of *Fenton v J Thorley & Co*[5] by Lord Macnaghten at 448:

> "I come, therefore, to the conclusion that the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

Lord Lindley also gave similar meaning to this expression, at 453:

> "The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any

[1] http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic
[2] Cap.282
[3] https://www.info.gov.hk/gia/general/202002/10/P2020021000730.htm?fontSize=1
[4] As of the date of this article
[5] [1903] AC 443

> unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident."

In other words, according to *Fenton*, "accident" within the meaning of ECO is essentially an untoward and unexpected event.

Disease and Injury by Accident

"Internal accident" or physiological change invisible from outside the body can also be an accident within the meaning of ECO. Lord Atkin said in *Fife Coal Co Ltd v William Young*[6] that "… apart from external accident there may be what no doubt others as well as myself have called internal accident" (at 489) and that "a physiological change brought about by an undersigned untoward event happening in the employment" might suffice (at 488).

In the context of respiratory infection, the House of Lords held that an accident includes absorption of bacteria into the respiratory system. In *Brintons Ltd v Turvey*[7], an employee was employed to sort wool in a factory, where he died from contracting the anthrax bacteria which was passed from the wool to his eyes. The majority judgment of the House of Lords (Lord Robertson dissenting) found for the claimant who was the employee's wife. Although the House of Lords made it clear that not all diseases contracted by an employee in the course of his employment are to be regarded as accidents, Lord Halsbury's majority judgment may be able to shed some light on the present issue. He supported his reasons with the following examples at pp.233-234:

> "Suppose in this case a tack or some poisoned substance had cut the skin and set up tetanus. Tetanus is a disease; but would anybody contend that there was not an accident causing damage? ... It does not appear to me that by calling the consequences of an accidental injury a disease one alters the nature or the consequential results of the injury that has been inflicted.
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> Many illustrations of what I am insisting on might be given. A workman in the course of his employment spills some corrosive acid on his hands; the injury caused thereby sets up erysipelas – a definite disease; some trifling injury by a needle sets up tetanus. Are these not within the [ECO] because the immediate injury is not perceptible until it shews itself in some morbid change in the structure of the human body, and which when shewn we call a disease? I cannot think so."

The County Court's judge's reasoning (which was upheld by the Court of Appeal and the House of Lords) is worth citing as well:

> "I find as a fact that the anthrax, which was the immediate cause of death, was caused by the accidental alighting of a bacillus from the infected wool on the part of the deceased's person which afforded a harbour in which it could multiply and grow and so cause a malignant disease and consequent death. I can see no distinction in principle between the accidental entry of a spark from an anvil or the

[6] [1940] AC 479
[7] [1905] AC 230

> accidental squirting of scalding water or some poisonous liquid into the eye. The only difference is that in those cases, the foreign substance would be so large as to be visible, in the case the foreign substance is microscopic."

The case of *Pyrah v Doncaster Corporation*[8] may also assist us in understanding how contracting a disease can be regarded as an injury by accident. In *Pyrah*, a nurse suffered tuberculosis as a result of her being subjected to constant attacks of tuberculosis germs when she was brought into unusually close contact with tubercular patients. The majority of the Court of Appeal held that the nurse's tuberculosis infection was an injury by accident. Denning L.J. (as he then was) of the majority said this:

> "Many diseases cannot in their nature be due to accident, but some may be. These include the diseases produced or precipitated by trauma (that is, injury or shock), by exposure or exertion, by infection or contagion, or by contact with or invasion by foreign elements. If one of these diseases is due to an accident or series of accidents, it may form the subject of compensation under the [ECO], but if it is due to a process of work, and not to an accident or accidents, it will not form the subject of compensation unless it is one of the scheduled diseases. The present question is: where is the line to be drawn between a disease which is due to an accident or accidents, and a disease which is due to a process of work. In my opinion, the solution to that question is to be found by remembering that an accident is something fortuitous, something which is unsought but happens by chance, something of which it can be predicated that even if it is very likely to happen, and happen repeatedly, nevertheless it is still a chance that it does happen. Applying this test, if a disease can be attributed to one external factor only, whether that factor be trauma, exposure. exertion, or infection, or such like, then it is undoubtedly due to an accident, even though the precise occasion on which it occurred cannot be ascertained … but if the disease is due to a number of external factors acting in combination, such as inhaling foreign particles over a long period, exposure to dust, or numerous cuts, then a distinction has to be drawn. On the one hand, the disease is due to a series of accidents if the external factor which produce it occur fortuitously as a matter of chance ... On the other hand, a disease is due, not to a series of accidents, but to a process of work if the external factors which produce it are a continuous and necessary concomitant over a long period of the work in which the man is engaged …"

In *Wong Chick v Swire Pacific Ltd*[9], the applicant had been a boiler maintenance worker for almost four decades, and he claimed EC for loss of hearing due to repeated exposure of noise associated with his work. HH Judge Peter Cheung (as he then was) adopted the above approach in *Pyrah*. Having considered the factual and expert evidence, the Judge however found against the applicant and concluded that the applicant's loss of hearing (caused by repeated and prolonged exposure to hazardous noise levels associated with his routine work) was not caused by an accident or a series of accidents.

Hence, applying the case authorities, despite COVID-19 being a disease which may not be visible from outside the body, this in itself does not preclude the claimant from claiming

[8] [1949] 1 All E. R. 883
[9] [1992] 1 HKC 571

under the ECO. However, it is apparent from the above authorities that the Court's findings would be highly dependent upon the facts and medical evidence of each case.

Arising Out of and In the Course of Employment

Once an employee has established that he/she suffered an injury by accident, he/she must then prove that the same occurred in the course of employment and arose out of employment. Generally, it is not difficult to identify the time and place of the occurrence of an accident, especially in cases involving external injuries. However, an employee who has contracted COVID-19 may face tremendous difficulty in establishing that such accident occurred in the course of and arose out of the employment as it is difficult to know precisely when and where the virus was contracted. The employee would only know that he/she has contracted the virus upon a positive test result (which would be sometime after the contraction), and even then the test result would not indicate the mode of contraction.

It is anticipated that in order for the applicant employee to discharge the burden of proof of this element, expert evidence may be required, for example, through the analysis of the investigation results of the Centre for Health Protection or opinions from experts in the specialty of infectious diseases. Such evidence or opinions may relate to that applicant's probable mode of contraction, approximate time of contraction, incubation periods, etc. However, it may still be medically impossible to ascertain the precise moment of the contraction and/or the exact mode of contraction.

The hurdle of establishing whether the injury by accident occurred in the course of and arose out of employment is especially relevant in the present situation where many employers have allowed their employees to work from home. To illustrate the difficulty, assuming an employee worked from home and contracted COVID-19 through the ventilation system in the bathroom. Even where the mode of infection is known (for example based on expert evidence), the time of contraction may still not be precisely ascertained. An employee may be entitled to compensation if he contracted the virus only in the course of and arising out of employment (but not when he contracted the virus while engaging in personal activities at home). But the task for an employee to precisely ascertain what he was doing when he contracted the virus is a difficult one.

Conclusion

Based on the present state of law, the contraction of COVID-19 can be regarded as an "accident" within the meaning of ECO. The main difficulty lies in proving that said accident occurred in the course of and arose out of the employment. The determination of the above issues is extremely fact sensitive and highly dependent upon the facts and evidence (including expert evidence) of each case.

This article was produced by Simon Wong and Flora Lam, whose profiles appear on the next page.

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