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English tort law and the pandemic: the dog that has not barked

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Abstract
As of February 2023, no case has been reported in the U.K., either in the law reports or in the media, of a victim of COVID-19 suing in tort a person or organisation alleged to have caused the victim to contract the disease. This article considers the reasons this situation might have arisen. It provisionally concludes that the main legal reasons might lie in the applicable doctrines of factual causation and goes on to discuss whether uncertainty in those doctrines should be resolved in the courts.

Keywords Tort · Liability · Pandemic · COVID-19 · Causation · Negligence

In July 2020, a short article appeared in the British newspaper the *Daily Telegraph* that opened with the line: 'Up to three quarters of businesses are failing to meet government guidelines on reopening, sparking fears of a wave of legal claims if staff or customers contract Covid-19 on unsafe premises' (O'Dwyer 2020). An even more alarming version of the story appeared online six months later, claiming that a vast number of businesses had already received claims (Sangster 2021). But, oddly, very little news of these claims has been heard of since. No case appears to have been reported in Britain, either in the media or in case law, in which a member of staff or a customer has successfully sued a business in tort for contracting COVID-19.

Other types of litigation have surfaced—for example, contract cases about insurance and employment law cases about dismissal and discrimination—and to be fair to the authors of the report on which the *Daily Telegraph* based its story, that was probably all that they were originally referring to (see Croft 2021). In addition, politically motivated cases seem to have started in the U.S. (see Perry 2021), but despite the inability of some journalists (and some scholars) to tell the difference, the U.S. and the U.K. are different countries.[1]

[1] For the profound differences between English and American conceptions of the common law, see Priel (2017). For less profound examples of mainly journalistic confusion and conflation, see Granet (2019).

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Perhaps the much foreshadowed personal injury cases are still in preparation. Admittedly, some time remains before the end of the relevant limitation period.[2] Or perhaps cases have arisen but have been settled using highly effective non-disclosure agreements. But with not even a hint of a real case, it seems just as likely, if not more likely, that few, if any, exist.

This paper explores why, if it turns out that the number of real cases of tort liability for causing COVID-19 in England is very low, that might not be a very surprising outcome. It also asks whether anything should be done about that outcome.

Background

COVID-19 and SARS-CoV-2

COVID-19 is an infectious disease affecting the respiratory system and other organs. It is caused by a coronavirus now known as the SARS-CoV-2 virus. In its original form, COVID-19 was estimated to result in the death of 1.35% of all those it infected in the U.K.[3] Later variants of the virus were even more deadly, with an infection fatality rate (IFR) of 1.5%. The IFR rose sharply with age, reaching 12.8% for those aged over 75, and even 19.3% for later variants, but barely registering at all for people below the age of 25. Those suffering from certain underlying medical conditions were also at greater comparative risk (see e.g. Clift et al. 2020).

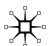
COVID-19 also appears to have long-term physical and psychological effects for some of its survivors ('long COVID'), including tiredness, breathlessness and cognitive difficulties.[4] The precise prevalence, seriousness and causes of these effects remain as yet unclear, The World Health Organization having released an agreed definition of the condition only in late 2021 (World Health Organization 2021). But they are unlikely to be trivial. Using a looser self-report method, the U.K. Office of National Statistics (2023) reported that, in April 2022, 2.8% of the entire population of the country appeared to be suffering from 'long COVID'.

Initially, no vaccines and no specific treatments existed for COVID-19. By December 2020, however, Britain was deploying effective vaccines, and some partially effective treatments had been discovered. As a result, together with the appearance of variants that might be less inherently deadly, by the start of 2022, the IFR

[2] See e.g. Anderson (2021), reporting that Glasgow solicitors had been advising potential claimants, such as a nurse who had died from COVID-19 allegedly contracted at work and had also infected her spouse. The solicitor pointed out that the limitation period for personal injury claims was three years.

[3] See Birrell et al. (2021). This is the 'Infection Fatality Rate' ('IFR'), which should be contrasted with the less useful (because more sensitive to testing and healthcare regimes) 'Case Fatality Rate' ('CFR') which records the death rate among cases that find their way into the healthcare system. Britain was able to calculate the more accurate IFR because early on in the pandemic it instituted a population-wide random sampling and testing system. See Office for National Statistics (2020).

[4] For lung function effects see e.g. Magdy et al. (2022). For the neurological and psychiatric effects, see Taquet et al. (2022).



had fallen to 0.12%, although the sharp gradient with age remained (Birrell et al. 2022). Full vaccination reduced the IFR further, by around 80–90%.[5]

But while the IFR was falling because of vaccines, treatments and new variants, the infectivity of the disease was increasing. Each person infected by the original variant would on average, without further measures being taken, infect two to three other people (Billah et al. 2020). For the Omicron variants, which affected Britain in 2022, some experts have proposed estimates of around 10 other people (Burki 2022).

The likelihood of transmission of COVID-19 increases with the extent of the viral load suffered by the transmitter (e.g. Barajas-Carrillo et al. 2022; Kawasuji et al. 2020). The relationship between the viral load taken on by the transmittee and the severity of the disease is less clear but is probably positive (e.g. Shenoy et al. 2021, but see contra Dadras et al. 2022). Transmission of the disease occurs most likely through aerosol, that is through breathing in very small droplets of air that have been exhaled by an infected person (Tellier 2022), although other mechanisms are possible.[6]

The risk of aerosol transmission is much greater indoors than outdoors, and the risk indoors is greater the less the room is ventilated, alongside more obvious risk factors such as how many people are present and for how long. The wearing of masks also reduces the risk of transmission, principally by reducing the amount of viral material infected people insert into the atmosphere around them, but also, with properly worn higher quality masks (FFP2 and FFP3), by reducing the amount of viral material breathed in (see e.g. Li et al. 2021). All these factors eventually became modellable.[7]

An important characteristic of COVID-19, which makes it more dangerous than other viral respiratory diseases, is that it is possible for infected people to transmit the disease before they themselves suffer symptoms. Indeed, they might never suffer symptoms. As a result, merely requiring those with symptoms to isolate themselves proved insufficient for controlling the spread of the disease. On the other hand, the development of tests for the disease capable of detecting it even in asymptomatic patients meant that it became possible to reduce the risk of pre- or non-symptomatic transmission by requiring testing.

COVID-19 in Britain

It is worth setting out, in summary form, the course of COVID-19 in Britain and the legal and regulatory response to it. The disease was first detected in Britain in late January 2020. On 10 February 2020, the government issued regulations allowing

[5] U.K. Health Security Agency (2022) and author's own calculation based on Birrell et al. (2022).

[6] The authorities in many jurisdictions, including Britain, failed to recognise the importance of aerosol transmission for many months, leading to an overemphasis on measures such as cleaning surfaces, which many experts now regard as mere 'hygiene theatre,' and in some jurisdictions to a resistance to requiring the wearing of high-quality masks. See e.g. Tang et al. (2022).

[7] See e.g. https://airborne.cam/

the forced physical isolation of infected individuals.[8] On 5 March, COVID-19 was declared to be a 'notifiable' disease, requiring medical professionals to report cases of it to the public health authorities, which was the same day that the first COVID-19 death in the U.K. was announced. On 16 March, the government advised vulnerable people to avoid social mixing and to work from home and advised generally against attending large gatherings. The same day, the Prime Minister made a broadcast in which he went further, saying 'now is the time for everyone to stop non-essential contact with others and to stop all unnecessary travel. We need people to start working from home where they possibly can. And you should avoid pubs, clubs, theatres and other such social venues.' On 18 March, the Prime Minister announced the closure of schools from 20 March. On 21 March, the Secretary of State for Health issued regulations closing all restaurants, bars, pubs and places of entertainment.[9] On 23 March 2020, the Prime Minister made a further broadcast in which he told the public 'You must stay at home' and saying that all but essential shops must close. As with the closure of pubs and theatres, the legal basis for these requirements came into force in England not immediately but later, on 26 March.[10] Another gap between ministerial announcements of instructions to the public and the creation of a legal basis for them occurred in Scotland, to which the relevant legislation did not extend until the U.K. parliament passed emergency amending legislation on 25 March,[11] as part of the Coronavirus Act 2020. That Act created various authorisations, many of them time-limited, for public services to be delivered differently and for the government to spend unlimited amounts of money for purposes approved by the Treasury. It is important to note, however, that the government used existing legislation, the Public Health (Control of Disease) Act 1984, to bring in nearly all the restrictions introduced to combat COVID-19, rather than the Coronavirus Act 2020.

The regulations of 26 March 2020 created the first 'lockdown', in the sense that they required people not to leave their homes except for specified permitted purposes. Permitted purposes included travelling to a place of work 'where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living', in effect requiring working from home except where doing so was not reasonably possible. Although amended in various details (allowing, for example, elite sports events to take place without spectators), the structure of the regulations remained unchanged until 1 June 2020, when the basis changed

[8] The Health Protection (Coronavirus) Regulations 2020 SI 2020 No. 129. Ministers issued the regulations using s. 45R of the Public Health (Control of Disease) Act 1984, which allows regulations of this kind to made without parliamentary approval for a period of 28 parliamentary sitting days as long as ministers declare the need to issue the regulations without parliamentary approval to be 'necessary' by reason of 'urgency'. Ministers would use this provision repeatedly during the pandemic.

[9] The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 SI 2020 No. 327. The equivalent for Wales was issued the same day by Welsh ministers: The Health Protection (Coronavirus, Business Closure) (Wales) Regulations 2020 SI 2020 no 326 (W 74).

[10] The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 SI 2020 No. 350.

[11] Paragraph 1(1) of schedule 19 of the Coronavirus Act 2020, authorising the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 Scotland SI 2020 No. 103.

from restricting leaving one's home to restricting staying overnight in other people's homes and forbidding various types of 'gathering'.[12] Restrictions on the opening of non-essential shops, however, stayed in place until 12 June,[13] and restrictions remained on pubs, restaurants and places of entertainment until 3 July, after which the only restrictions were on nightclubs and discotheques and 'gatherings' of more than 30 people.[14]

Over the summer of 2020, restrictions were reintroduced in England in particular localities in response to renewed outbreaks of the disease.[15] The areas covered by local restrictions grew until, in October, a 'tiers' system was adopted, similar to the Italian 'colour' system but without precision in what would prompt a move from one tier to another.[16] After a delay of around six weeks, in which the second wave of the disease and the death toll grew rapidly, the government eventually reintroduced restrictions on leaving one's home, which is to say a second 'lockdown', lasting for around a month.[17] The government then declared that the second wave was coming to an end, failing to notice the growing problem of a new, more infectious variant, the alpha or 'Kent' variant. Ministers announced major relaxations of restrictions for the Christmas period and on 2 December reintroduced the regional 'tiers' system, only for the rising chaos in the health system to prompt a major cut in the proposed Christmas relaxation period and the introduction of a new 'tier' for the regional system that in effect reproduced lockdown.[18] After Christmas, again arguably too late, the whole country was placed in the new top tier, initiating the third or 'Kent variant' lockdown, at about the same time as the U.K.'s highly successful vaccination programme began to kick in. The third lockdown lasted until July 2021, although some restrictions were lifted at various points along the way according to a sequence established in the so-called 'steps' regulations.[19] For example, the number of people

[12] The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020 SI 2020 No. 558. The Prime Minister had, rather inexplicably, called on people to go 'to work' (scil. 'work from their place of work') on 10 May, but the law remained the same until 1 June and public health guidance advising everyone to work from home wherever possible remained even after the law changed.

[13] The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 SI 2020 No. 588.

[14] The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 SI 2020 No. 684.

[15] E.g. The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 SI 2020 No. 685. Different regulations applied in Scotland and Wales, although the various governments worked together so that the content of regulations was roughly similar. Timings of introductions and relaxations of restrictions, however, sometimes differed markedly, with restrictions coming in earlier and being relaxed later in Wales and Scotland than in England.

[16] Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 SI 2020 no. 1103); Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020 SI 2020 no. 1104; Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020 SI 2020 no. 1105.

[17] Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 SI 2020 no. 1200.

[18] Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 SI 2020 no. 1374 and then Health Protection (Coronavirus, Restrictions) (All Tiers and Obligations of Undertakings) (England) (Amendment) Regulations 2020 SI 2020 no. 1611.

[19] Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 SI 2021 no. 364.

allowed in outside gatherings grew to six at the end of March and to 30 from the middle of May, with non-essential retail being allowed to reopen on a similar timetable. On 18 July, all restrictions apart from those relating to the isolation of individuals who had tested positive and to international travel were lifted,[20] never to return except for a short period in December 2021 to early January 2022, when some regulations requiring mask-wearing and proof of vaccination were introduced, but without any stay-at-home requirements.[21] On 24 February 2022, even the requirement for infected people to isolate themselves was lifted.[22]

In terms of the effects of the disease, by August 2022, more than 170,000 people had died of COVID-19, as recorded by the Office of National Statistics through the "weekly number of deaths of people whose death certificate mentioned COVID-19 as one of the causes".[23] The weekly pattern of deaths (Fig. 1) shows the timing of the various waves. One thing to notice is that the third ('Delta') and fourth ('Omega') waves of the disease in the third quarter of 2021 and the first third of 2022, respectively, resulted in far fewer deaths than the first two waves, largely as a result of the vaccination campaign, but nevertheless still resulted in substantial numbers of deaths, in the region of 30,000 and counting. In this period, very little regulation was in place.

The COVID-19 case law

It is also worth mentioning the reported cases, across all areas of the law, that the pandemic has so far generated. Only three cases of note deserve detailed analysis (one private law case and two public law cases), although in each instance considerable overlap occurs between private law and public law issues.[24] None of the cases concerns tort law directly, but all turn out to give indications about how tort law might or might not operate in pandemic conditions.

[20] Health Protection (Coronavirus, Restrictions) (Steps etc.) (England) (Revocation and Amendment) Regulations 2021 SI 2021 848.

[21] E.g. Health Protection (Coronavirus, Wearing of Face Coverings) (England) Regulations 2021 SI 2021 no. 1340.

[22] Health Protection (Coronavirus, Restrictions) (Self-Isolation etc.) (Revocation) (England) Regulations 2022 SI 2022 no. 161.

[23] https://coronavirus.data.gov.uk/details/deaths

[24] Two other cases might be mentioned in passing. In *R (on the application of NB) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin), the risk of COVID-19 infection was one of the reasons the court held that conditions in which asylum seekers were being housed were unlawful. And in *R (on the application of Good Law Project Limited, Runnymede Trust) v The Prime Minister, Secretary of State for Health and Social Care* [2022] EWHC 298 (Admin) the applicants challenged the legality of the appointment of Baroness Harding of Winscombe (Dido Harding) as Chair of the Test and Trace Task Force. The claim failed on all grounds except one, 'that the Secretary of State for Health and Social Care did not comply with the public sector equality duty in relation to the decisions how to appoint Baroness Harding'—i.e. in deciding how to make the appointment rather than in making the appointment itself. The latter case is mainly notable for the court's ferocity in rejecting the locus standi of the Good Law Project, an organisation of campaigning 'cause' lawyers.

Financial Conduct Authority v Arch Insurance (UK) Ltd.[25]

The first major case generated by the pandemic in England concerned insurance, but not liability insurance. The Financial Conduct Authority, using a new procedure called the Financial Markets Test Case Scheme,[26] which allows the Authority to bring test cases about issues of general importance to the financial markets, instituted proceedings on behalf of thousands of small and medium-sized enterprises against insurance companies that were refusing to pay out on business interruption policies, the interruptions allegedly arising out of the start of the pandemic and the government's consequent actions. It is essentially a contractual interpretation case and uses the now standard approach in England to contractual interpretation as established in *Wood v Capita Insurance Services Ltd,*[27] namely that:

> The core principle is that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task.

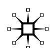
The case focussed on four types of clause that the insurance companies had variously inserted in their business interruption policies: a 'disease' clause, which provided cover for business losses caused by the occurrence of a notifiable disease at or within a specified distance of the business premises; a 'prevention of access' clause, which provided cover where a public authority prevents or hinders access to, or use of, business premises; a 'hybrid' clause, which combined elements of both disease and prevention of access clauses; and a 'trends' clause, which quantified the loss by referring to what the performance of the business would have been if the insured peril had not occurred.

The insurance companies claimed that 'disease' clauses were inapplicable to COVID-19 because they only covered the business interruption consequences of COVID-19 cases occurring within a distance (usually 25 miles) specified in the contract. Even if there were such cases, the companies argued, the businesses would not be able to show that their losses were caused by those cases, as opposed to by cases elsewhere. The companies claimed that 'prevention of access' clauses only worked after restrictions on businesses acquired the force of law. Instructions given by local authorities on the basis of ministerial rhetoric, no matter how forcefully expressed ('stop', 'avoid', 'must'), should not count. And they claimed that 'hybrid' clauses failed to create cover for both reasons. On the 'trends' clause, the companies argued that, since the pandemic would have resulted in businesses closing anyway, even without the occurrence of the disease within the specified distance or the actions of public authorities, the insurable losses were zero.

25 [2021] UKSC 1; [2021] A.C. 649.

26 Practice Direction 63AA Section 6 (October 2020).

27 [2017] AC 1173.



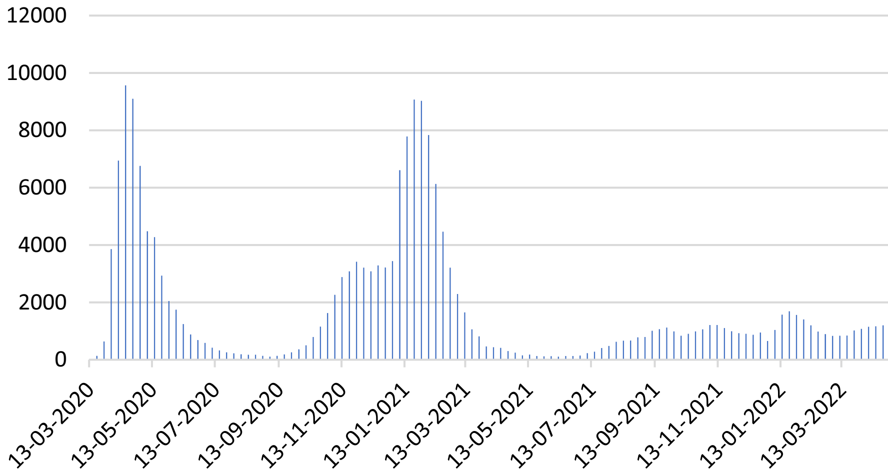


Fig. 1 U.K. weekly COVID-19 deaths 2020–2022; Source: U.K. Office of National Statistics

The U.K. Supreme Court decided that the disease clauses did require COVID-19 cases to have occurred within the specified distance, contrary to the view of the court below and the dissenting judgment of two Supreme Court judges who thought that the radius restriction was simply a condition of the application of cover, not the event against which the cover gave protection. On the prevention of access issue, the Supreme Court held that 'advice or exhortations, or social distancing and stay at home instructions' were not enough to trigger prevention of access clauses. On the other hand, a specific instruction emanating from a public authority did not need 'the force of law' if 'from the terms and context of the instruction, compliance with it is required, and would reasonably be understood to be required, without the need for recourse to legal powers.'

So far so relatively disappointing for the policyholders. But the Supreme Court's decision in the end favoured them because of the way it dealt with the issue of causation and 'trends'. The Court rejected the insurance companies' view that the businesses had to show that their losses would not have occurred but for the occurrence of instances of COVID-19 solely within the specified distance. The Court justified its view by referring to academic work on 'unnecessary' causes, which are situations in which several people act in a similar way that results in harm where the harm would still have occurred even if fewer of them had acted that way (Stapleton 2013, 2015). In such situations, what each person did is neither a necessary nor a sufficient condition for the harm to occur but, proponents argue, we should still count what each did as causing the harm. For example, in an election in which one candidate receives more than a single vote more than another candidate, the vote of no elector is a necessary or sufficient condition for the result of the election, but it would be odd not to concede that the votes of each elector should count as a cause of the result. On that basis (precisely how we will return to later), the court decided that it was enough that COVID-19 occurred within the specified distance and that those occurrences in conjunction with other

occurrences of the disease caused the loss, or in the case of 'prevention' clauses, caused the restrictions. The Court said, 'the parties could not reasonably be supposed to have intended that cases of disease outside the radius could be set up as a countervailing cause which displaces the causal impact of the disease inside the radius.'

As for the 'trends' clauses, the Court rejected the view that the trend included the pandemic. Rather the intention of these clauses was to exclude from the trend the consequences of the occurrence of the insured peril itself, and to make adjustments 'only to reflect circumstances which are unconnected with the insured peril and not circumstances which are inextricably linked with the insured peril in the sense that they have the same underlying or originating cause.'

The practical result of the case was thus a victory for the businesses, albeit reached by a route that involved new developments in thinking about causation. Some commentators have said that the result reveals an unspoken sympathy with small and medium-sized businesses faced with the market power of the insurance companies (McCunn 2021), although it should be said that subsequently lower courts have not always displayed the same sympathy.[28]

R (on the application of Gardner and Harris) v Secretary of State for Health and Social Care et al.[29]

The main public law case arising out of the pandemic is also, in some ways, a significant private law case, at least in the sense that the claimants took a public law route in circumstances in which one might have expected a private law claim.

Michael Gibson and Donald Harris were among around 20,000 residents of care homes in England who died of COVID-19 during the first wave in 2020, around 5% of the whole care home population at the time. Care homes in England are largely privately run but they are subject to inspection and guidance by the public authorities, including by the central government Department for Health and Social Care and by Public Health England (PHE). The Department also has a power and a duty to impose requirements on care homes by regulation where they are necessary to ensure that no 'avoidable harm' occurs to residents.[30] From the start of the pandemic, the Department and PHE issued various regulations, policies and pieces of guidance that attracted heavy criticism. One policy document, issued on 13 March 2020, failed to restrict visitors to care homes who were not at the time displaying symptoms and required staff and patients to wear personal protection equipment (PPE) only if either had symptoms. Since the virus was transmissible before symptoms became apparent, the effect, it was alleged, was a very great increase in the incidence of COVID-19 and consequently of death among the elderly population of

[28] E.g. *Rockliffe Hall Ltd v Travelers Insurance Co Ltd* [2021] EWHC 412 (Comm), refusing to interpret the term 'plague' in a business interruption insurance policy to include COVID-19.

[29] [2022] EWHC 967.

[30] Health and Social Care Act 2008s. 20. No such regulations were in fact made during the early months of the pandemic.

the homes and among staff. The document also increased the risk of harm by encouraging homes to share workers, thereby transferring the disease from one home to another. A second policy statement, of 17 and 19 March 2020, was aimed at hospitals. It ordered the wholesale discharge of patients from hospitals into care homes without any testing for coronavirus infection or any isolation on arrival, or appropriate guidance about PPE or other safety measures the homes might take. This policy was also alleged to have produced disastrous results. A third policy statement, of 2 April, corrected some of the deficiencies of the 17–19 March policy on discharges, but still failed to require a negative test result before discharge, still treated the end of symptoms as the end of infectiousness and still only required PPE to be worn in the presence of symptoms. A further revision on 15 April required testing before discharge but still allowed discharge pending the result of the test.

The defendants' response to the accusations about the policies was to claim (i) that at the relevant time it was reasonable to believe that transmission was only by symptomatic patients; (ii) that further restrictions would have had serious deleterious effects on the physical and mental health of residents; (iii) it was a relevant consideration that staff were in short supply; (iv) restricting visitors would only have had a marginal effect; (v) the discharge policy was adequate because it allowed for professional judgment by clinicians in individual cases; (vi) the purpose of the discharge policy was to free up hospital resources to treat known serious cases and was a reasonable response to the emergency; and (vii) that capacity for testing all patients being discharged was limited and that it was reasonable to target testing at other types of individual.

The court accepted the defendants' arguments on many points, but on one crucial point it rejected the defendants' position. The evidence showed that the possibility of asymptomatic transmission of the disease was known not only in scientific circles but also within government before the issue of the guidance that completely ignored that possibility. Embarrassingly for the defendants, the need to clear hospital beds to create space for severe cases of COVID-19 to which they referred was established by calculations within government that themselves assumed asymptomatic transmission. As a result, the court condemned the relevant aspects of the policies as 'irrational'.

So far, these proceedings might sound like a standard tort claim, and they could certainly have been framed as a claim in negligence by the estates of the victims. As I discuss below, nothing in principle prevents British public authorities being sued in tort in the ordinary courts.[31] But that was not the way the claims were framed. Instead, descendants of the two victims brought the claims in public law in their capacity not as personal representatives for the victims' estates or as tort claimants but as individual citizens with a sufficient interest. The court gave no precise explanation of why the claims were framed in public law rather than in private law, but one might discern a clue in a passage in which the judges say[32]:

[31] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736, [31–42]; *GN v Poole BC* [2019] UKSC 25.

[32] At [181].

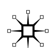
> On causation, Mr Coppel [counsel for the Claimants] submitted (and it was accepted by all parties) that he did not need to show on the balance of probabilities that either the Claimants' fathers or anyone else died because of anything the Defendants did. Rather, for the purposes of the ECHR claim, he had to show that care home residents were put at greater risk of harm as a result of the actions and inactions complained about. To question whether the high death toll in care homes was technically caused by the Defendants' policies was not the correct question: the correct question was an increased risk to life.

R (on the application of Dolan) v Secretary of State for Health and Social Care[33]

The second public law case to deserve mention concerned an attempt to have declared unlawful the original lockdown regulations. The attempt failed, but had it succeeded private law consequences would have followed. For example, public authorities might have been open to actions in the tort of intentionally causing loss by unlawful means by businesses adversely affected by their customers being told to go home. The applicants challenged the legality of the Health Protection (Coronavirus, Restrictions) (England) Regulations of 26 March 2020[34] on three broad grounds: that the regulations exceeded the power to make them in the parent Act, the Public Health (Control of Disease) Act 1984, as amended in 2008; that in making the regulations ministers violated several norms of public law; and that the regulations violated in various ways the claimants' human rights.

The claimants failed on all points. On the power to make the regulations, the court held that a general power in the Act to 'make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection' was not restricted by the fact that the Act went on to say that the power could be used 'in particular' to create powers and obligations which did not include all the powers and obligations created by the regulations. On the alleged violations of public law norms, the court held, firstly, that the government was entitled to adopt a policy, including five 'tests', for when they would loosen the restrictions; secondly, that accusations that the government had failed to take various kinds of evidence into account before making the regulations were not made out on the facts; and thirdly, that, given the evidence before it and the difficulty of the issues, it was not 'irrational' for the government to make the choices it did, even though other decision-makers might have made different choices. On human rights, the court held that the regulations did not violate art. 5 (right to freedom) because the stay-at-home obligation was subject to numerous exceptions and a general defence of reasonable excuse; that they did not violate art. 8 (private life) because they proportionately pursued a legitimate goal, namely public health; that they did not violate art. 11 (assembly) because of the existence of the reasonable excuse defence and the availability of legal challenge to any misinterpretation of

[33] [2020] EWCA Civ 1605; [2021] 1 W.L.R. 2326.
[34] SI 2020 No. 350.



what counted as reasonable excuse[35]; that there was no violation of Art. 1 of the First Protocol (property) because this was a case of the control of property not a deprivation of it, and no violation of Art. 2 of the First Protocol (education) because the regulations did not in fact order schools to close, because education continued remotely and because the right itself was qualified by the need to strike a balance between individual and societal interests. A challenge on the grounds of a violation of art. 9 (thought, conscience and religion) was deferred because it was subject to separate proceedings (*R. (on the application of Hussain) v Secretary of State for Health and Social Care*[36]), but the government also won that case, on the grounds that restrictions on attendance at religious gatherings were temporary and proportionate.

The lack of tort cases

Although absence of evidence is not evidence of absence, the lack of reported tort cases involving the transmission of COVID-19 is striking. In principle, tort law has relevance for a very large number of events in a pandemic. Every occasion on which one person transmits a disease to another or fails to take an action that would have prevented transmission to another is potentially a liability-creating event. But searches of the main case law databases have failed to reveal any reported cases of actions of this type.[37] Similarly, searches of media databases have produced no reliable reports of tort claimants commencing proceedings, let alone proceedings reaching the courts.[38] Some reports have emerged of lawyers saying that they were

[35] Subsequently, a challenge succeeded to a police decision to use the coronavirus regulations to restrict protest without taking into account the right to protest and the possibility of reasonable excuse: *Leigh v Commissioner of Police of the Metropolis* [2022] EWHC 527 (Admin).

[36] [2020] EWHC 1392 (Admin).

[37] For example, the Westlaw search '(COVID-19 or coronavirus) & negligence' in August 2022 yielded 356 cases, none of which were personal injury claims in which the claimant accuses the defendant of causing them to contract the disease. In most the reference to COVID-19 or coronavirus is purely incidental, although in a few cases the disease forms part of the relevant facts, e.g. *Re AH* [2021] EWCA Civ 1768, which concerned a medical decision to cease treatment of a seriously brain-damaged COVID-19 patient in intensive care. A further search in February 2023 produced no subsequent cases.

[38] E.g. a search in Factiva of U.K. major news sources of the form 'COVID AND (sue or compensation or liable or negligent)' in the category 'Crime/legal action') (and excluding references to 'Sue Gray'), yielding 2902 non-duplicate stories, but included no instances of a British individual suing a British defendant on the basis that the defendant had caused them to contract COVID-19. Some threats of legal action appear (e.g. White 2020) but no follow through is reported. Several cases are mentioned of alleged proceedings in other jurisdictions (e.g. Spinney 2021, (mentioning a case in Austria); Tondo 2021; Giuffrida 2020; Donelly 2021; The Independent 2021; Edwards 2021; Place 2020; Zaczek 2020). In addition, British cases other than personal injury are reported, especially successful unfair dismissal claims, for example where an employer had insulted an employee for complaining about the employer's inadequate precautions against COVID-19 (Giordano 2022) and where an employer had dismissed an employee who was unwilling to return to working in an office (Purkess 2022), and discrimination claims (e.g. Weldon 2021; Ames 2022). Also mentioned was a false imprisonment and human rights claim in respect of the quarantining of tourists (Hull 2021). A further search in February 2023 yielded no subsequent examples of negligence cases alleging personal injury by transmission of the virus.

'advising' clients about potential personal injury actions, although it is not clear what the substance of the advice was (see e.g. Anderson 2021) and in comments in the press after the judgment in *Gardner*, journalists speculated that the decision 'opened the way' to 'compensation claims' (presumably negligence claims), but no such claims have yet come to light. In one well-publicised instance, lawyers for the family of Belly Mujinga, a railway ticket collector who died of COVID-19 after allegedly having been spat at by a man who claimed to have the disease, were reported as threatening to bring an action against the man (presumably for assault as well as for negligence) (Feehan 2021). But subsequently the facts of the incident fell into doubt and a coroner seems to have decided not to investigate how Ms Mujinga contracted COVID-19 (see e.g. BBC 2022).

Looking more broadly, the Association of British Insurers (2022) refers to 'Covid-19 related individual claims [having] almost doubled in 2021, to £261 million' but it turns out to be referring not to liability insurance claims but to first-party claims, usually people insuring their income against illness, or life assurance. Similarly, the Association reported that its members expected to pay out £2.5 billion in COVID-19 related claims, but the text makes only a passing reference to liability claims, which are bundled with 'other general insurance products, including events [and] weddings', which between them total less than 5% of the value of all COVID-19-related claims (Association of British Insurers 2021). NHS Resolution, which acts as the insurer of National Health Service hospitals, issued protocols for how to deal with COVID-19 claims that it described as 'inevitable' but as yet has not pointed to a single claim for transmission of the disease in a healthcare facility, and the material on its website seems more concerned with the possibility of clinical negligence claims from patients denied other kinds of treatment as a result of hospitals needing to shift resources to deal with COVID-19.[39] And the Claims Recovery Unit, with which all new personal injury claims must be registered, has seen no increases in clinical claims or claims against employers or miscellaneous claims, for example against occupiers of premises.[40]

Some tort cases might nevertheless exist and might come to light before the relevant limitation date (generally three years after the harm or the claimant's date of knowledge, if later).[41] But on the evidence we have so far, the expected liability tsunami has not taken place.

[39] Search of https://resolution.nhs.uk/ on the term 'covid-19 claims'.

[40] See https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data – the only obvious changes during the pandemic have been a reduction in claims related to use of the roads – traffic accidents and claims against public authorities.

[41] Limitation Act 1980s. 11.

Why so few cases?

If fewer cases than expected are materialising, the question is why? A death toll of more than 170,000 and long-term disabling illness affecting millions might have been expected to generate at least a few cases. One factor is that COVID-19 affected the old far more than the young, with the risk of death given infection doubling with every five or six years of age (see e.g. BMJ 2020). As a result, very many potential claims would have been in respect of people in retirement, who would have been unlikely to be supporting relatives who could have sued for the most important head of loss under the Fatal Accidents Act, namely loss of dependency (loss of income transferred to family members from the deceased). But one might still have expected some claims to have been brought in respect of younger victims. In addition, although it might be early for cases to be put together, long COVID affects all age groups and one might have expected personal injury claims in respect of loss of amenity (objective loss of bodily functions), pain and suffering and, above all, lost future earnings or future earning capacity. The British social security system is far from generous in the way it deals with long-term sickness,[42] and tort damages in respect of lost future earnings and lost earning capacity can be substantial,[43] so that financial incentives to sue seem to exist in the U.K. that might not prevail in other jurisdictions. Moreover, although at least one rather obscure example exists in English law of direct insurance liability,[44] in the type of case that might arise from COVID-19 transmission, insurance is only relevant once liability is established or admitted and so the fact that many defendants would have been insured would not have shielded cases from appearing in the official statistics.

In some instances, extra-legal factors might be at play. Particularly for cases of low monetary value where the motive to sue might be restricted to a desire to assign blame or to discover what happened, any emotional benefits of legal action might be outweighed by the emotional pain of repeatedly re-enacting the details of a loved one's death. In addition, given that household transmission appears to be the most likely way in which the disease is contracted, some of the absence of litigation might be attributable to the fact that victims or their dependants would be understandably reluctant to sue other members of the same family. Nevertheless, it seems unlikely that no cases at all exist in which the losses are so high that the considerable pain of litigation might strike some claimants as worthwhile. Moreover, non-family member

[42] See the relevant House of Commons Library Briefings CBP-9435.pdf (parliament.uk) and Abolition of the ESA Work-Related Activity Component (parliament.uk). In outline, employers pay sick pay for 28 weeks, at a minimum rate of £99.50 a week (more only if contracted for), after which the state benefit system takes over and pays an amount that varies with the degree of disability—a minimum of £77 a week and a maximum of £188 a week.

[43] In the 1990s, Richard Lewis found that the average award for lost future earnings was nearly £100,000. See Lewis (2002) ('Actual Court Award Mean' was £97,396 in the 'Total Sample (108 cases)', which includes eight cases with anomalously low awards). That was admittedly in adjudicated cases. The average in settled cases is likely to be very much lower, but even if claimants judged their chances of success at only 50%, damages under this head will often be substantial.

[44] See Automated and Electric Vehicles Act 2018 s. 2.

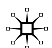
possible defendants abound—employers, public transport operators, occupiers of commercial properties, medical practitioners, and public bodies, to name just the most obvious.[45]

Several causes of action would be available in English law, including outré options such as product liability, public nuisance and assorted intentional torts such as assault and battery. The basic cause of action, however, would be negligence, whose principles also cover occupiers' and employers' liability. Causing someone else to become ill through the transmission of a disease is causing personal injury within the scope of the tort of negligence, even when it occurs through the infectiousness of another person.[46] The test for liability is carelessness, or unreasonable behaviour, as judged objectively. Although it might sometimes be difficult to establish carelessness against individual defendants, because the disease is transmissible by people who themselves are not symptomatic, and requiring everyone to test themselves repeatedly before any kind of contact with other people might be thought to impose an unreasonable burden, establishing fault on the part of corporate defendants such as employers, public transport providers and organisers of events seems easier, given the foreseeable risks of other people passing on the disease while on the relevant premises. Carelessness on their part might include failure to take simple precautions, such as to provide good ventilation or to allow office workers to work from home. Although English law does not recognise a negligence per se doctrine, but on the contrary, perhaps surprisingly, takes the view that breaches of regulatory or criminal law that contain their own enforcement provisions normally create no tort liability (see e.g. Jones et al. 2021, chapter 8 Sect. 2 and Sect. 5), the imposition of lockdowns and the issuance of elaborate regulations and guidelines on matters such as meetings, mask-wearing and social distancing could not fail to impress on potential defendants the seriousness of the risk and the nature of the precautions a reasonable person would take. Perhaps the constantly changing content of the regulations and guidance might provide potential defendants with an argument that failure to take specific precautions at specific points in time (for example failing to wear a mask before the effectiveness of mask-wearing had become generally accepted) should not count as unreasonable, but it is difficult to believe that claimants would find the task of establishing carelessness to be impossible in all cases. The result of the *Dolan* case is also important because it undermines a possible line of argument for defendants to the effect that it cannot possibly be unreasonable for the defendant to do something that would be a violation of the defendant's human rights, for example about assembly or about property, for the public authorities to stop them doing.

As for what else a claimant in negligence needs to prove, conventionally that a duty to take reasonable care existed and that breach of that duty caused actionable damage both in fact and in law, the U.K. Supreme Court has adopted a new

[45] In addition, most of the potential non-family defendants carry liability insurance, some of them compulsorily (e.g. employers and bus operators), a state of affairs which would normally itself incentivise the making of claims.

[46] *Evans v Liverpool Corpn* [1906] 1 KB 160, although in that case the court found no breach of duty (carelessness).



schematic six-question approach, which makes some changes in the way the tort works. The main innovation, however, separating the actionability of the form of loss from the issue of whether the law should allocate the risk to the defendant or the claimant, poses no obvious threat to liability in a COVID-19 personal injury case (see Howarth 2022). The type of loss in a normal case is personal injury and so clearly actionable and as for allocating the risk to the claimant rather than the defendant, there might be an argument that in a pandemic suffering is so widespread that the state should bear the risk and spread the losses, but that does not translate, at least outside cases against the public authorities themselves,[47] into an argument that individual victims should bear the risk and individual injurers should not. So, the question arises, what are the legal barriers to bringing actions?

Special legislation

The first thing to note is that, unlike in other jurisdictions, especially some in the U.S. (Terry 2020), in Britain the COVID-19 crisis produced very little in the way of statutory shields against litigation. Existing legislation, the Human Medicines Regulations 2012,[48] provided some protection against actions relating to treatments authorised by the relevant public agencies, but even that gives no protection to manufacturers against actions under the Consumer Protection Act 1987 (implementing the EU Product Liability Directive). Otherwise, the British approach was not to stop litigation but to offer some types of potential defendant indemnity payments in the event of successful legal action against them. So, for example, Section 11 of the Coronavirus Act said that the state would reimburse anyone working within the National Health Service for any damages payments not otherwise covered by insurance that they were required to make arising out of any aspect of medical care in respect of coronavirus infection. If anything, indemnities of this kind encourage litigation rather than suppress it, although they might also encourage early settlement under conditions of non-disclosure.

Common law protection of public authorities

As is well-known in comparative law circles, one of the characteristics of English (and Scottish) law is that public authorities in Britain enjoy no general immunity from ordinary actions in private law. The only special protection they attract in negligence is that courts disallow actions where they might undermine or ‘cut across’ the authority’s public law duties. Admittedly, the courts’ jurisprudence has been leaning against claimants in one specific way that might be relevant to COVID-19-related litigation. The Supreme Court has extended the idea that the law creates no special rules for public authorities in a way that protects them in an unexpected way. The Court not only says that public authorities can be liable in the same way

[47] See footnote 64.
[48] 2012 No. 1916 reg 345.

as private parties but also that in instances in which private parties would not be liable, public authorities are not liable either. In particular, the Supreme Court has, perhaps eccentrically, applied to public authorities the rule that no liability arises in negligence for 'pure omissions', with the effect that public authorities now rarely face liability for failing to prevent harm being caused to claimants by third parties or by claimants to themselves.[49] But that rule does not, for example, explain why the claimants in *Gardner* proceeded in public law rather than private law. In *Gardner*, the source of the claim was something the authorities themselves did, not something they failed to do to prevent harm being done by others or by the victims.

Causation

A clue for what might be going on appears in both the *Gardner* case and the *Arch* case. In both cases, the judges refer to problems of causation (see also Perry 2021). In *Gardner*, the court mentions that in the context of a public law challenge to the lawfulness of guidance or regulations, claimants need not show that the guidance or regulations caused them or their relatives any harm. The case is about the process the government adopted to consider whether to do what it did, not the consequences of what it did. Risk of harm might be a relevant consideration, but the existence of actual harm is not relevant. In *Arch*, the issue of causation did arise and loomed large in the eventual outcome of the case. But the unexpected way in which it was resolved illustrates the point that causation issues in COVID-19-related cases might not be straightforward.

How would a claimant go about proving causation in a COVID-19 personal injury tort action, whether in negligence or occupiers' liability or in employers' liability (the issues are the same even though the third mentioned, and perhaps the second, might technically concern contract rather than tort)?

The factual causation requirement in negligence is usually satisfied by proving that, on the balance of probabilities, if the defendant had not breached the duty to act reasonably (the 'duty of care') the harm would not have occurred (see generally Jones et al. 2021, ch. 2 Sect. 2). This basic 'but-for' test ('but for the breach, the harm would not have occurred') is subject to some exceptions and modifications, but it is where we need to start.

One can immediately see a difficulty in showing but-for causation for claimants in cases arising in the middle of a pandemic. The virus is easily transmissible—increasingly so as new variants developed—but it is transmissible by people who have no symptoms. Any interaction could have been the one that resulted in transmission. Once the virus has been transmitted in sufficient quantity, subsequent transmission makes no difference, but equally it is possible for several people, for example different guests at the same dinner party, to contribute at the same time to a concentration of virus in a room and for the victim to breathe in a combination of particles that resulted in infection.

[49] E.g. *GN v Poole BC* [2019] UKSC 25.

Consequently, if a claimant has interacted with other people in different settings, for example in a workplace and in a household, and if we know nothing else about what happened, we would not usually be able to say in which setting transmission took place. Unhelpfully for claimants, who, we might suppose, would be happier suing their employer or a public transport operator than other members of their household, transmission seems to have been more likely in household settings than at work and more likely at work than in healthcare settings, but even these estimates are all subject to wide error terms and the only very clear result to appear in the literature so far is that transmission in a household setting is more likely than transmission during air travel (Tsang et al. 2022). This uncertainty does not help claimants.[50]

It might be thought that the fact that the virus has developed many different variants and sub-variants might help to identify where transmission took place. At least in the U.K., genetic analysis of coronavirus variations has become remarkably astute (Furuse 2021). But the chances of such analysis being useful in a British tort case are much reduced by the fact that the U.K.'s contact tracing regime was far from comprehensive and, to begin with at least, operated in a 'forward-tracing' rather than a 'backward-tracing' mode (Martyn et al. 2021). That meant that positive cases were asked for a list of their contacts since they became aware that they were positive, for the purpose of testing and isolating those contacts, rather than being asked for a list of their contacts before they became aware of being infected for the purpose of discovering where they were infected. It is possible for forward tracing to identify a probable source of infection, if by luck the claimant is a forward-traced contact of a known positive case and the genetics match, but otherwise the tracing system would not have produced useable evidence of the source of infection.

It is also possible that the claimant's lifestyle can be used, in the manner of Sherlock Holmes,[51] to eliminate all the other possibilities and so leave causation by the defendant's breach as the only plausible option. For example, a university lecturer whose only exposure to other people is in a lecture hall, who drives herself to and from her lectures, lives alone, shops exclusively online and does not go out for any other purpose, might be able to show on the balance of probabilities that her disease was caused by encounters in her workplace, the dangerous state of which was caused by the employer's carelessness. But these are rare cases.

Exceptions to but-for causation

The difficulties claimants face with conventional but-for factual causation might lead their lawyers to turn to the limited number of exceptions to the but-for rule that English law has developed.

[50] In any case, the courts' reluctance to use Bayesian risk estimates means that even if the result was scientifically clear, a court might not accept it *R. v Adams* (No.2) [1998] 1 Cr. App. R. 377 (Bayesian analysis might be technically current but it is too confusing to use), though see also *Rich v Hull and East Yorkshire Hospitals NHS Trust* [2015] EWHC 3395 for a slightly more enlightened approach.

[51] 'Eliminate all other factors and the one which remains must be the truth', Conan Doyle (1993a [1890], p.8).

Cumulative diseases

In *Wardlaw v Bonnington*[52] the claimant employee had contracted pneumoconiosis, blaming his employer for failing to fit all the machines in the vicinity of his work with dust extraction equipment. The equipment reduced but did not eliminate the dangerous dust. The employer said that the claimant could not show that the disease was caused by dust from the machine that had not been fitted with the equipment. The House of Lords decided in favour of the claimant. The basis for the decision, as described by Lord Simon of Glaisdale in the later case of *McGhee v NCB* was:

> [W]here an injury is caused by two (or more) factors operating cumulatively one (or more) of which factors is a breach of duty and one (or more) is not so, in such a way that it is impossible to ascertain the proportion in which the factors were effective in producing the injury or which factor was decisive, the law does not require a pursuer or plaintiff to prove the impossible, but holds that he is entitled to damages for the injury if he proves on a balance of probabilities that the breach or breaches of duty contributed substantially to causing the injury. If such factors so operate cumulatively, it is, in my judgment, immaterial whether they do so concurrently or successively.[53]

That sounds promising for COVID-19 claimants, but they face an immediate problem. What is a situation in which factors operate ‘cumulatively’? In pneumoconiosis, at least as the court understood it at the time, the severity of the disease was in direct proportion to the gradual exposure to dust. As Lord Reid said:

> The medical evidence was that pneumoconiosis is caused by a gradual accumulation in the lungs of minute particles of silica inhaled over a period of years.[54]

COVID-19 is different. Although the risk of infection rises with the viral load the transmitter carries and a relationship might exist between the viral load the transmittee absorbs and the severity of the disease, COVID-19 is not a disease caused by a gradual build-up of particles over an extended period. It is quite possible for transmission to take place in a single incident. Moreover, and perhaps more important, in a COVID-19 case the virus particles for which the defendant was responsible could easily have contributed nothing at all to the disease suffered by the claimant, whereas in *Wardlaw*, at least on the simplest interpretation of what the court seems to have said, every particle made some contribution to making the harm worse. On that basis, the applicability of *Wardlaw v Bonnington* is highly questionable.

[52] [1956] A.C. 613.
[53] [1973] 1 W.L.R. 1 (Lord Simon of Glaisdale).
[54] *Bonnington v Wardlaw* [1956] AC 613 at 621.

Material contribution to the risk of harm

The *McGhee* case opened a door to another method of overcoming the difficulties of but-for causation. The claimant suffered from dermatitis, which resulted from working in an environment filled with brick dust. The employer had acted reasonably regarding the amount of brick dust in the factory but had supplied no washing facilities on site. The employee alleged that his dermatitis was caused by the additional time it took him to go home and wash. But all he could prove was that the delay increased his risk of suffering dermatitis. The House of Lords nevertheless found for the claimant, saying that it was enough to show that the defendant caused a 'material increase in the risk' of harm.

Subsequently, however, the judges lost enthusiasm for *McGhee*. In *Wilsher v Essex AHA*,[55] the House of Lords decided that where a medical accident had occurred through one of five different possible causal mechanisms of unknown relative probability, only one of which included carelessness by the defendant, the increase in the risk was not 'material' enough.

Cases exist in which the increase in the probability of harm from the causal route under scrutiny is so great that one can say that it is more likely than not that it was the source of the harm.[56] And so it might be possible to combine the Sherlock Holmes approach with the material increase in risk approach to show that if we confine ourselves to the explanations that are possible, the causal route that includes the fault of the defendant is the most likely. But in most cases that will not be the case. In the COVID-19 context, too many routes to infection will usually be in play for the claimant to be able to say that the defendant's carelessness was more likely than not the cause and so the original *McGhee* door seems closed in most COVID-19 cases.

Fairchild causation

Wilsher remains good law, but in some circumstances the courts make an exception to it that might appear to be the COVID-19 claimants' best chance. *Fairchild v Glenhaven Funeral Services Ltd* concerned workers who suffered from the invariably fatal disease mesothelioma.[57] The disease is caused by exposure to asbestos but is not cumulative. Exposure to very small amounts of asbestos can lead to the disease and the seriousness of disease is no different the more asbestos one is exposed to. The only relevance of the amount of asbestos is that exposure to more asbestos increases the risk of contracting the disease in the first place. The claimants' difficulty in *Fairchild* was that the disease has a very long latency period and the claimants had worked for several employers, all of whom had exposed them to asbestos. As a result, it was not possible to determine which employer's asbestos had caused the disease. The House of Lords decided that even though the claimants could not show but-for cause or material increase in the risk in the *Wilsher* sense, their cases

[55] [1988] A.C. 1074.

[56] E.g. *Novartis Grimsby Ltd v Cookson* [2007] EWCA Civ 1261 (70% increase in risk).

[57] [2002] UKHL 22; [2003] 1 A.C. 32.

should succeed. The majority of the court disagreed with the harshest views of *McGhee* expressed in *Wilsher*, preferring to explain *McGhee* as a case that shows that circumstances can exist in which 'no distinction was to be drawn between making a material contribution to causing the disease and materially increasing the risk of the pursuer contracting it' and *Wilsher* as showing only that those circumstances might not exist where there are multiple causal routes, only one of which was tortious.[58] But the court in *Fairchild*, in contrast to *Wilsher*, asserted that liability might nevertheless exist in multiple route cases and carved out an exception to the requirement for but-for causation in such cases where various conditions applied. Different judges laid down different conditions, but, at the risk of some over-simplification, the main ones are: (1) the harm resulted from one of a number of possible causal routes; (2) the same causal mechanism is in play in all the possible routes[59]; (3) the defendant's carelessness was capable of causing the harm; (4) the defendant's carelessness created a material risk of harm to the claimant of the type that eventuated[60]; and, crucially, (5) it is impossible in the current state of scientific knowledge for the claimant to prove which of a number of possible routes was the one that caused the harm.

From a COVID-19 point of view, the *Fairchild* doctrine looks promising. Conditions (1) to (3) are satisfied. Satisfying condition (4) is not automatic but is not impossible: the question would be, was the degree of risk created by the defendant's carelessness enough to count as 'material'? No need exists in a *Fairchild* context to show that the defendant's carelessness satisfied the *Wilsher* criterion by, for example, doubling the risk.[61] But courts have decided circumstances can exist in which the increase in the risk was too low to count as material and so the issue would need to be argued out.[62]

Claimants in a COVID-19 case seem to have open to them at least two lines of argument that might help them to satisfy the materiality requirement. First, on the assumption (perhaps not always safe) that the public regulatory authorities knew what they were doing, if the alleged carelessness also broke public health guidelines it might be possible to persuade a court that the risk of transmitting the disease where the guidelines were ignored must have been 'material' since it was enough to move the regulators to require the action in question to be carried out. Secondly, one important U.K. regulator, the Health and Safety Executive, works to quantitative guidelines about annual risks of death from job-related activities that might be helpful. In particular, the Executive says that employers are not allowed to ignore annual risks of employees dying of greater than one in a million.[63] So, it is a plausible

[58] At [21]-[22] (Lord Bingham of Cornhill). [44] (Lord Nicholls of Birkenhead). [65]-[70] (Lord Hoffmann).

[59] *Novartis Grimsby Ltd v Cookson* [2007] EWCA Civ 1261.

[60] E.g. *Bannister v Freemans Plc* [2020] EWHC 1256 (QB).

[61] *Sienkiewicz v Greif (UK) Ltd [*2011] UKSC 10, [2011] 2 A.C. 229.

[62] E.g. *Bannister v Freemans Plc* [2020] EWHC 1256 (QB).

[63] Health and Safety Executive (2002). Where the risk is worse than one in a million, employers must take all 'reasonably practicable' preventive measures. Cf *Bolton v Stone* [1951] A.C. 850.

argument, at least in workplace cases, that any risk the defendant imposed on the claimant greater than that level should count as 'material'.

But there is more of a problem with condition (5). At first sight it seems obvious that the reason claimants cannot prove which of a number of possible sources of infection is the correct one is 'scientific'. But is the reason for their difficulty really 'scientific'? Or is the difficulty instead organisational, for example the lack of backward tracing? The distinction arose in *Sanderson v Hull*,[64] which concerned an employee suffering a campylobacter infection at a turkey farm. The only way she could have caught the disease was by a microorganism entering her body via her mouth, but that could have happened in several ways, only some of which could be attributed to the employer's carelessness. The Court of Appeal refused to apply *Fairchild* on the ground that there was no scientific uncertainty: people get campylobacter by the known route of touching their mouths with infected hands. Not knowing how that happened in the specific case was not the result of a lack of scientific knowledge but merely of a lack of evidence about how the farm worked. Similarly, one can argue that we know how COVID-19 infects people (more or less). What we do not know is where the specific infection happened, which is in turn the result of not knowing enough about the claimant's prior contacts.

In response, one might ask how a COVID-19 case differs from *Fairchild* itself? What is the difference between not being able to distinguish between different examples of asbestos dust and different examples of a virus? It would be odd, one might argue, that the existence of techniques that might have been able to distinguish between different examples of the virus if they had been taken at the time would mean that the 'impossibility' in a COVID-19 case is not 'scientific' whereas the 'impossibility' in *Fairchild*, in which no such technique existed even if dust samples had been preserved, is 'scientific'. But odd or not, that is where the logic of *Sanderson* takes the law, a point reinforced in another Supreme Court case in which the judges entertained the possibility of *Fairchild* coming out in the opposite direction if sufficient technical advances were to occur.[65]

Admittedly, the mere existence of a possible distinction between *Fairchild* and a COVID-19 case does not mean that the courts will use that distinction and refuse to apply *Fairchild*. But, combined with the reluctance of some judges to extend the scope of *Fairchild*,[66] refusing to apply it in a COVID-19 case, whether for the 'science' reason or for lack of materiality or for another reason, would not be a surprise.

Unnecessary causes

The *Arch* case suggests a new possibility for overcoming the but-for cause doctrine. It is worth quoting the Supreme Court's precise words:

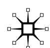
[64] [2008] EWCA Civ 1211.

[65] *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, [2011] 2 A.C. 229 at e.g. [58] and [70].

[66] See e.g. *Ministry of Defence v AB* [2012] UKSC 9.

> 183. … There is, however, a further class of cases in which a series of events combine to produce a particular result but where none of the individual events was either necessary or sufficient to bring about the result by itself. A number of examples are given by Professor Jane Stapleton in her scholarly work on causation in law: see most recently "Unnecessary Causes" (2013) 129 LQR 39; and "An 'Extended But-For' Test for the Causal Relation in the Law of Obligations" (2015) 35 OJLS 697.
>
> 184. A hypothetical case adapted from an example given by Professor Stapleton, which was discussed in oral argument on these appeals, postulates 20 individuals who all combine to push a bus over a cliff. Assume it is shown that only, say, 13 or 14 people would have been needed to bring about that result. It could not then be said that the participation of any given … individual was either necessary or sufficient to cause the destruction of the bus. Yet it seems appropriate to describe each person's involvement as a cause of the loss. Treating the "but for" test as a minimum threshold which must always be crossed if X is to be regarded as a cause of Y would again lead to the absurd conclusion that no one's actions caused the bus to be destroyed.
>
> 185. Other examples of a similar nature given by Professor Stapleton include a case where the directors of a company unanimously vote to put on the market a dangerous product which causes injuries, although the decision only required the approval of a majority. Again, it cannot be said that any individual director's vote was either necessary or sufficient to cause the product to be marketed and yet it is reasonable to regard each vote as causative rather than to say that none of the votes caused the decision to be made. Another example is where multiple polluters discharge hazardous waste into a river. In all these cases each individual contribution is reasonably capable of being regarded as a cause of the harm that occurs, even though it was neither necessary nor sufficient to cause the harm by itself.

In *Arch* the unnecessary cause line of reasoning is used to justify saying that where the risk insured was COVID-19 occurring within a certain distance of the insured business and where, as is normal in insurance contracts, the occurrence of the insured risk must cause the loss for the insurer to be liable to pay out, if one cannot tell whether a loss resulted from COVID-19 within the distance or outside it, we are entitled to say that the loss was caused by disease within the distance. That is so even if the losses would have been much less if COVID-19 had only occurred within the distance. This at first unlikely sounding argument is clearer in relation to 'prevention of access' clauses. The losses occurred because of government action aimed at closing or restricting the businesses. The decisions of government were themselves caused by the occurrence of COVID-19 both inside and outside the distance. Each occurrence was neither a necessary nor a sufficient condition for the restrictions but taken together they count as a cause, and each individual occurrence should therefore also count as a cause. In the disease cases, the reasoning is similar but concentrates on the decisions of customers to stay away—each customer was influenced by concern about becoming infected, a



concern that arose out of all the instances of the disease, including the ones that occurred within the specified distance.

Could individual negligence claimants use the unnecessary cause argument in a COVID-19 infection case? *Arch* is ultimately a case about the meaning of an insurance contract, with the court in the end saying that using simple but-for causation would lead to an interpretation of the contract that would not make commercial sense, for it would mean that the insurers could use the occurrence of COVID-19 outside the distance as a reason for saying that occurrences inside the distance would not count as causes. Tort cases, in which the parties are not in a position to bargain about what their relationship should be, are very different. The court is deciding on how the law should apply in general, not in the specific circumstances of a contract. But something very like the unnecessary cause argument already applies in tort, albeit in the very different tort of nuisance. For example, where multiple defendants pollute the same waterway, every defendant is liable for the resulting pollution, even if the degree of pollution each defendant individually caused might not have been actionable by itself.[67] It is therefore not impossible that courts will adopt the unnecessary cause point in the tort of negligence.

Arguments of principle, however, exist for rejecting the unnecessary cause argument in negligent COVID-19 infection cases, not least that unlike an insured business's losses and the pollution of waterways, the disease individuals suffer does not necessarily result from the effect of many concurrent instances of COVID-19 but quite possibly results from an individual instance of transmission. One might be able to say that the government and customers were caused to act by the undifferentiated mass of COVID-19 cases and that the stream was polluted by an undifferentiated mass of pollutants, but each individual case of COVID-19 could have been caused by a previous individual case, not by the undifferentiated mass of cases.

At this stage, the final answer is unknown and before that answer emerges, claimants' lawyers might be understandably cautious about their prospects for success through a newly minted argument from related but essentially different fields of the law.

Systemic negligence

One final route to tort liability deserves a mention. Carelessness and factual causation depend on one another in several ways, not least in the central idea that the counterfactual for testing but-for causation is not that the defendant failed to act at all but rather that they acted reasonably. And so, to judge factual causation one needs to know what would have counted as reasonable conduct in the circumstances. Another, related, example is the notion of systemic negligence. If the defendant's carelessness consists of failing to set up a reasonable system for keeping other people safe, it might be possible to cover within the rubric of that system the actions of other people and thus cover several routes to the harm at once. For example, hospital

[67] *Pride of Derby & Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch. 149. See *Thorpe v Brumfitt* (1873) L.R. 8 Ch. App. 650 at 656.

managements that fail to maintain proper safety systems might be held liable for outbreaks of hospital-acquired infections even though the precise route by which each patient became infected cannot be identified (see generally Heywood 2021). The argument is most straightforwardly applicable to hospitals and care homes, but it might also prove useful for individual claimants suing their employers or public transport operators.

The causation problems that systemic negligence solves are limited to the defendant organisation concerned. It does not reach the problem of the possibility of infection acquired outside the organisation. On a grander scale, however, one can imagine the argument being used, within the limits of public authority liability, against negligent regulators or government departments, which might cover the complete range of infection routes in the relevant geographical area.[68] For example, the government might be accused of negligence in the way it relaxed lockdowns and other requirements too quickly, setting off a great number of infection chains. Causation issues might remain—for example the government might argue that continuing to regulate might not have worked and that the claimant would have been infected anyway by people refusing to comply. But even on that point the claimant would be able to point to evidence about the levels of compliance the regulations were achieving at the time (see e.g. Office for National Statistics 2021).

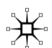
Systemic negligence finesses the problem of factual causation, but the cost of using it is that it complicates other issues, especially whether the authorities acted reasonably in all the circumstances. As in the *Gardner* case, the authorities would have many points to deploy about the emergency nature of the situation and the importance of other interests. In addition, in the grandest scale case, alleging negligence by central government, some judges might retain doubts about the institutional competence of the courts to make such assessments. They might be tempted to deploy the 'cutting across statutory duties' argument or the 'pure omission' argument to deny liability, regardless of their technical applicability.[69] Lawyers might consequently treat bringing such a case as a risky undertaking.

Conclusions and final questions

It may well be the case that COVID-19 personal injury cases exist in their thousands or even tens of thousands somewhere in the system and are just waiting to reveal themselves. In that case, this article will at least have served the purpose of identifying problems that such cases will need to overcome when they appear and will have provided a starting point for analysing them.

[68] This is essentially the route (not very plausible for other reasons) taken by the U.S. tort plaintiffs who have been trying to sue the government of China. See Perry (2021).

[69] Presumably using the risk allocation question (question 2) in the new six-question approach of *Manchester Building Society v Grant Thornton* [2021] UKSC 20, and *Meadows v Khan* [2021] UKSC 21. See Howarth (2022).



It is, however, also possible that the great litigation avalanche that some, including insurance providers, have been predicting, will never occur. If that is the case, the causes of its absence are worth considering. To use another Sherlock Holmes expression, why did the dog not bark? (Conan Doyle 1993b [1892], p. 23). Extra-legal factors, in particular reaction against the prospect of suing one's own family, will have played a part, but my suggestion here has been that the main legal reason for the absence of tort cases arising out of the transmission of COVID-19 might well turn out to be the likely difficulties claimants will face in showing factual causation. English (and Scottish) law has the capacity and the doctrinal resources, in the shape of *Fairchild* causation and the unnecessary cause argument, to overcome those difficulties, but claimants' lawyers may well hesitate before launching contestable actions that defendants' insurance companies would be well motivated to resist. Lawyers with clients to advise might be wary of basing a claim on the possibility of extending doctrinal developments that are already controversial into new sets of facts.[70]

One remaining question to address is whether a state of affairs in which claimants hang back from bringing actions because of uncertainty in the applicable law is satisfactory. Legal scholars might immediately react by saying that it must be unsatisfactory. If claimants are being denied their rights because of lack of clarity in the law, ways should be found of resolving the uncertainty. An extension of the test case procedure used in the *Arch* case, a collective test case brought by a public body in a dispute of general importance, has attractions and might work.

But one can also make a case for hesitation and delay. The sums of money and the political implications of a test case about negligence liability in the pandemic would be immense. One might legitimately ask whether issues about the meaning of factual causation, important for the long-term development of the law, are best decided in cases in which so much is at stake. It might be better for the issues to be considered more slowly and without drama.

And what are those issues? They present themselves as issues about technicalities, the applicability of *Fairchild* to new fact patterns, the scope of the unnecessary cause argument and so on. But behind those issues lies a more fundamental issue, about which debate has raged for a long time. The essential question underlying these issues is, what is the function, if any, of the factual causation requirement in negligence?

One point of view is that the requirement for factual causation is an anomaly that frustrates tort law's most important functions, whether that is to bring financial assistance to injured people or to promote economic efficiency through forcing potential injurers to internalise the costs they impose on others.[71] On this view, the

[70] The full force of the old English cost rule ('loser pays all') no longer applies to personal injury claims, having been replaced by 'qualified one-way cost shifting' (losing defendants pay claimants' costs but usually losing claimants do not pay losing defendants' costs) but unsuccessful claimants still have to pay their own costs and the regime still contains risks for claimants. See Hurst (2014).

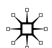
[71] For the latter, see e.g. Parisi and Fon (2004).

factual causation requirement is, at best, an imperfect instrument for a rough-and-ready screening out of cases that fail to promote the law's purposes. For example, if, on the whole, situations in which but-for causation is absent are also situations in which the deterrence effect of tort law is weak, one can use but-for causation to weed out types of case in which the benefit for forward-looking deterrence purposes would not be worth the effort and expense of litigation.[72] At worst, it is an obstacle to achieving those purposes. The other point of view is that the purpose of the requirement is to maintain the connection between tort law and individual responsibility for harm (Weinrib 1975), so that movement away from strict but-for causation can amount to an attempt to collectivise risk and to turn tort law into a form of social insurance.

The pandemic brings this debate into sharp focus. Does it make sense in a situation of mass infection, with millions of people infecting millions of other people with a deadly disease month after month, to deal with the adverse consequences of the disease to individuals using the concept of legal liability? For mass events where almost everyone is potentially either a victim or an injurer, or indeed both, and where causation is unclear and responsibility disputed, both efficiency and justice seem to require collective solutions: for example, enhanced social security benefits and healthcare spending funded by general taxation. That might be thought to point away from relaxing causation rules and towards keeping tort law narrowly focused on individual responsibility. But what if such solutions are not forthcoming? Those who call for collective solutions might have the problem the wrong way round. If demand for deploying civil liability in COVID-19 cases does ever arrive, it will likely have arisen from a lack of state support. Assessing what is the right course in those circumstances involves thinking about tort law not in isolation but as a form of back-up system, a kind of reserve parachute (see e.g. Howarth 2020). And so the question ceases to be whether tort law provides the best solution in all respects but rather whether we value the individual responsibility aspects of tort law so much that we are willing to deny the possibility of using it to save the day when the welfare state fails?

A related issue concerns another use of tort law, namely to satisfy a demand for authoritative explanations of what went wrong, the ombudsman function of tort (Linden 1973). The *Gardner* case is an example of claimants using public law in this way, and illustrates the role of causation in such circumstances. The fact that public law, by concentrating on the legality of a decision to act in a particular way, did not require claimants to show that the decision caused harm, demonstrates two things, which point in opposite directions. It shows that strict but-for causation requirements obstruct the use of tort law as ombudsman. But it also shows that, at least in cases about the public authorities, public law can fulfil that function without the

[72] See e.g. Shavell (1980) and Calabresi (1975). One interesting consequence of treating but-for causation as a screening device for what Shavell calls 'prospective' causation and Calabresi 'causal tendency' is that because it is more likely that but-for causation will be absent where prospective causation was not absent (e.g. loss of a chance cases) than for but-for causation to be present when prospective causation was absent (e.g. pure coincidences such as *Berry v Borough of Sugar Notch* 191 Pa. 345 (Pa. 1899)) the screen will be biased against liability. Hence, one might speculate, the pressure to relax but-for cause.



need to use tort law. The issue boils down to the value of the ombudsman function of tort law against not state but private-sector defendants.

But another question lurks even further in the background: are judges the best people to decide what the function of factual causation should be? Academic discussion of factual causation sometimes seems to assume that the issues are highly technical or 'lawyers' law' and of little or no concern to outsiders. But the pandemic shows how such apparently technical issues can have enormous impact when they affect large numbers of people. A reduction in the earning capacity of 2.8% of the population through 'long COVID' left uncompensated through the tort and liability insurance system will inevitably lead to appreciable burdens on other systems, especially in health, social care and social security. But equally, leaving the issue to the vagaries of litigation might result in serious problems of fairness, overcompensating some but ignoring the needs of others.

Consequently, the question arises of whether questions of such importance are best made not by judges but by democratic legislatures. In the end, for all the subtleties of legal and philosophical argument about tort law, should we not concede a point made in the British House of Commons in 2008 by Mr Jim McGovern MP:

> I am intrigued by the legal case that the hon. Gentleman is putting forward. I would never pretend to be a lawyer—I am aware of the saying that if one puts two lawyers in a room, three legal opinions will come out—but I am here as a legislator. If the hon. Gentleman believes that the Law Lords applied the law in an orthodox and correct way, should we as legislators not simply change the law? (House of Commons 2008).

Lawyers have a role in ensuring that the issues are set out clearly and comprehensively, and in pointing out any contradictions and gaps in proposed solutions, but the sheer scale of what has happened and of what might happen next are grounds for lawyers to exercise reticence and restraint in offering solutions of their own.

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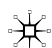

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