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Private liability for public health

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6. Private liability for public health

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As at this writing, COVID-19 continues to spread around the world. Most disease transmissions, one hopes, are unintentional. But could one nonetheless be liable for unintentionally, yet carelessly, transmitting the disease? If so, when would liability arise, and how wide may its scope be? If X transmits the disease to Y who in turn transmits it to Z, can Z claim against X? If not, why should liability escape one who carelessly spreads a deadly and highly contagious virus when courts have historically found liability for more innocuous harms?[154]

This short essay discusses how private liability might complement public regulation in the battle against COVID-19. It first examines the case for establishing private liability for public health. It then explores causes of action that victims may bring against disease transmitters and discusses legal issues arising from such claims. The essay shall draw primarily from Singapore and English tort law,[155] and focus most on COVID-19, though certain parts of the analysis may generalize to other Commonwealth jurisdictions as well as other communicable diseases.

The case for transmission liability[156]

Nearly without exception, countries have self-imposed economically and emotionally painful lockdowns to contain the spread of COVID-19. Only some have succeeded, for now. Like speed limits, lockdowns are a kind of *ex ante* regulation — imposed to *prevent* harm by through mandating certain precautions (e.g. masks) and/or outlawing certain risky activities.[157] As regulations go, lockdowns belong with the most extreme. *All* activities, unless essential, are prohibited.

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[154] Recall that Donoghue was claiming for 'shock and severe gastro-enteritis': *Donoghue v Stevenson* [1932] AC 562, at p 562.

[155] For an American tort law perspective see Shelly Simana, 'Coronavirus Negligence: Liability for COVID-19 Transmission' (*Harvard Law Petrie-Flom Centre*, 14 April 2020) <https://blog.petrieflom.law.harvard.edu/2020/04/14/coronavirus-negligence-liability-for-COVID-19-transmission/>.

[156] This essay adopts an economic, instrumentalist view taking as given that an important, common goal is to contain COVID-19. This is to engage with policymakers who are presumably relying more on cost-benefit analyses than Kantian ethics to make decisions on pandemic control. That is not to deem deontic concerns irrelevant. Every life that COVID-19 claims is an immeasurable and painful loss, and taken to extremes a purely instrumentalist approach may yield a morally contestable, non-zero solution as the 'efficient' level of COVID-19 deaths, all things (especially the economic cost of a lockdown) considered. The law and economics presented below, targeted at generalist readers, is necessarily brief and somewhat idealized. It bears emphasis that the economic assumptions relied on are not universal truths whether across time or space, and are subject to empirical confirmation. For a more sophisticated treatment see generally Jennifer Arlen (ed), *Research Handbook on the Economics of Torts* (Edward Elgar Publishing Limited, 2013).

[157] The distinction between regulation and liability is trite law and economics. See Steven Shavell, 'Liability for Harm versus Regulation of Safety' (1984) 13 The Journal of Legal Studies 357.

The main problem with regulation is that it requires significant public resources. The state must first incur information costs to determine the 'right' precautions (activities) to mandate (prohibit).[158] An under-resourced state may set too strict a lockdown for too long or, rather more dangerously, re-open too much too quickly. As much remains unknown about COVID-19, the level and types of activities that should be most or least regulated, and the right duration of any lockdown, is difficult to pin down.

The state must also incur enforcement costs to ensure regulatory compliance.[159] The extent of such costs will vary from state to state. Some have found even a blunt instruction to 'stay home' difficult to enforce. In large countries, preventing all social gatherings is unfeasible, especially if country leaders flout the rules themselves. Even smaller countries known for effective regulation have had to prosecute non-compliers for such curious offences as 'unlawfully meeting a friend'. Weakly-enforced regulation does not alter the private citizen's incentive to deviate enough to effectively reduce harm. The Holmesian bad person cares not for fines they are unlikely to pay, nor for the health risks they impose upon others.

The shortfalls of *ex ante* regulation may be addressed by *ex post* liability.[160] A speeding driver who carelessly knocks down a pedestrian does not merely risk getting their licence revoked. They are also liable for damages. The victim, not the state, incurs the cost of prosecuting the claim.[161] Damage caused falls to be internalized by the damage-causer. The prospect of liability for harm thus adds a second deterrence to deviators proportional to the self-perceived risks they pose to society. Relative to a blunt regulatory edict that 'no one may drive', liability may be better calibrated, particular since it need not be determined *a priori*, but only after the facts of the case have materialised.[162] Drivers who think themselves risky have the strongest additional incentive to stay home. For COVID-19, this encourages those with the highest transmission risks to self-quarantine. Liability incentivises socially-desirable behaviour through the market mechanism, increasing the effectiveness, and reducing the public costs, of regulation.

Liability may further be imposed on persons other than disease-transmitting individuals. Many jurisdictions have, for example, promulgated regulations compelling employers and businesses to enforce safe distancing measures. The liability analogue would be permitting employees and consumers who contract the disease at workplaces or shops to seek damages against these

[158] On the information costs of regulation see ibid at pp 359–360.
[159] See Steven Shavell, 'A Fundamental Enforcement Cost Advantage of the Negligence Rule over Regulation' (2013) 42(2) The Journal of Legal Studies 275.
[160] For an analysis of the interplay see Shavell, 'Liability for Harm versus Regulation of Safety' (n 157).
[161] If successful, the victim may of course recover some of these costs from the driver.
[162] Shavell, 'Liability for Harm versus Regulation of Safety' (n 157); Shavell, 'A Fundamental Enforcement Cost Advantage of the Negligence Rule over Regulation' (n 159).

corporations. The efficiency arguments above apply mutatis mutandis. The prospect of liability incentivises businesses to follow, and possibly exceed, pandemic regulations.

Corporations may indeed be in better positions to implement and coordinate pandemic precaution. This is a not simply an appeal to deep pockets —the pandemic may soon reveal many corporate pockets to be ridden with holes. Rather, corporations may be able to take precautions at lower unit costs than individuals, *e.g.*, by bulk producing/purchasing masks. Corporate liability may also overcome collective action problems.[163] Masks, for instance, present classic free-rider problems because their primary function is protecting *others*.[164] If everyone else wears a mask, one may reap all the benefits, and avoid all the inconvenience and supposed threats to one's liberty, even if one does not. If climate change is any indication, the logical conclusion of free-ridership in the absence of concerted efforts by coordinating bodies is complete and utter inaction. Incentivising employers and businesses to in turn mandate individual precaution alleviates this. An employee who could be fired (during a pandemic, no less) for non-compliance with company policy has greater incentives to mask up.

Lest this be unclear, the present argument is that liability may *complement* regulation for pandemic control. Liability *alone* is not enough because markets famously fail. One's perceived risks seldom line up with one's actual risks. Like bad driving, COVID-19 can be largely asymptomatic.[165] One looks and feels entirely fine until one gets behind the wheel. The efficiency of liability alone is further limited by the difficulty with observing each individual's risk. Were this otherwise, low-risk individuals could pay high-risk individuals an amount commensurate with the latter's private value of their (outside) activities to stay home.[166] Thus the highest risks are managed, the most valued activities persist, and as Coase noted private bargaining would lead to a socially-efficient outcome. This is, of course, not currently possible with COVID-19, though better testing methods may change this.

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[163] For an examination of collective action and free rider problems in tort see Michael Faure and Franziska Weber, 'Dispersed Losses in Tort Law - An Economic Analysis' (2015) 6(2) JETL 163.

[164] Jeremy Howard, 'Masks help stop the spread of coronavirus – the science is simple and I'm one of 100 experts urging governors to require public mask-wearing' (*The Conversation*, 14 May 2020) <https://theconversation.com/masks-help-stop-the-spread-of-coronavirus-the-science-is-simple-and-im-one-of-100-experts-urging-governors-to-require-public-mask-wearing-138507>; Jeremy Howard et. al., 'Face Masks Against COVID-19: An Evidence Review' (*Preprints*, 12 April 2020) <https://www.preprints.org/manuscript/202004.0203/v1>.

[165] The WHO recently acknowledged that asymptomatic transmissions could occur, though it also suggested that asymptomatics are less likely to transmit: see World Health Organization, 'Transmission of COVID-19 by asymptomatic cases' (11 June 2020) <http://www.emro.who.int/health-topics/corona-virus/transmission-of-COVID-19-by-asymptomatic-cases.html>.

[166] It is assumed for simplicity that the low risk group values the reduced risks more than the high risk group values their activity, and vice versa.

Another problem with liability is the judgment-proof defendant.[167] Defendants too elusive, powerful, or insolvent to be made to honour an award of damages simply need not care — even if paper judgments against them can be obtained *ex parte*. Since COVID-19 permeates all levels of the social hierarchy, however, judgment-proof defendants are presumably the exception and not the norm. The more pressing question is therefore whether liability judgments may be obtained in the first place.

Is there liability for COVID-19 transmission?

Intentional transmission by individuals

Let us begin from the strongest case: intentional transmission. X, intending to transmit disease to Y, engages in social contact with Y, and Y comes down with the disease thereafter. Such contact may take various forms, ranging by intensity from mere conversation and social touching to targeted coughing and sexual intercourse.

Where *physical* contact can be proven, Y may claim a battery. Battery, to recall, is intentional and unjustified direct physical contact. "Direct" does not require actual bodily touching. Mere contact with X's virulent droplets could suffice.[168] Y may plausibly prove this circumstantially by showing that X was the only COVID-19 positive person they recently interacted with. Of course, the more intense their interaction had been, the easier Y's case would be.

On intention, Y need *not* prove that X intended to *transmit* the disease, only that X intended the *contact*, and this is generally not difficult to show. This does call into question whether X may still be liable for battery, as X did *not* know they had the disease, but did intend the contact. Holding X liable for battery here appears onerous, and this situation seems better dealt with by principles of negligence, as discussed below.

Courts may thus be minded to find such unknowing contact justified — that is, "generally acceptable in the ordinary conduct of daily life".[169] Knowing defendants will probably not enjoy the same sympathy. They may argue that any physical contact was likewise consensual, particularly since Y could, assuming away duress and other coercion, have exited or refused the contact. But such 'consent' would not have been fully informed unless Y knew specifically about X's COVID-19

[167] Steven Shavell, 'The Judgment Proof Problem' (1986) 6 International Review of Law and Economics 45 <http://www.law.harvard.edu/faculty/shavell/pdf/6_Inter_Rev_Law_Econ_45.pdf>. Note that Shavell's original definition of "judgment proof" includes only defendants unable (but not powerfully unwilling) to pay.
[168] Spitting in another's face is battery: *R v Cotesworth* (1704) 6 Mod Rep 172. If X spits on a surface which Y later touches, there is an arguable case. Like the defendant in *Scott v Shepherd* (1773) 2 Wm Bl 892; 96 ER 525, X has set in motion a (risky) chain of events that culminates in physical contact with Y.
[169] *Wainwright v Home Office* [2004] 2 AC 406 at [9].

risks. For example, if X had made clear that they had recently been travelling, or if X had displayed flu-like symptoms throughout their interaction.

To knowingly attempt to transmit disease must fall outside the bounds of ordinary contact, particularly in the *new* ordinary that COVID-19 has engendered. In the context of another deadly virus — HIV — one who knows or has reason to believe that they are infected is statutorily obliged to inform others of that risk before sex; any consent obtain without disclosure is invalid.[170] It is well-established in American tort law that knowingly transmitting a sexually-transmitted disease is battery.[171]

While a battery case for intentional transmission appears straightforward, the damages quantum remains a thorny issue. Though battery is actionable per se, few victims will be happy with nominal damages. For substantial damages, Y must be able to rule out alternative channels through which Y may have contracted the disease. Alternatively, Y might seek to prove that X materially increased the severity of Y's disease. These causation issues are more conveniently discussed alongside negligence liability.

We might briefly consider other intentional torts before proceeding. Assault is possible if X merely *threatens* to cough upon Y, but in the absence of physical contact Y should not, on the prevalent droplets theory of COVID-19 transmission,[172] have been infected by X. This would plainly be an ordinary assault case. There is also a suggestion in the Singapore Halsbury's that the rule in *Wilkinson v Downtown* 'can extend to intentional infection of another person with disease'.[173] No authority or explanation is provided for this proposition other than a footnote to s 23(1) of the *Infectious Diseases Act*, which sets out the obligation to warn of HIV risks. Liability under this tort, however, has traditionally focused on the malicious communication of words, not diseases.[174] It is unclear if courts would extend the tort to accommodate COVID-19 claims.[175]

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[170] Infectious Diseases Act (Cap 137, 2003 Rev Ed) s 23(1).

[171] *Leleux v United States* 178 F.3d 750 (5th Cir, 1999) at [13]. For a list of other American cases which have referenced this see Theresa Porter, 'Cause of Action for Negligent Transmission of Contagious or Infectious Disease (May 2020 Update)' in *vol 22 Causes of Action First Series 1* (Clark Boardman Callaghan 1990), section 13; Lawrence O Gostin and James G Jr Hodge, 'Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification HIV Law and Policy: Ensuring Gender-Equitable Reform' (1998) 5(9) Duke Journal Gender Law & Policy 9, 150.

[172] Centres for Disease Control and Prevention, 'How COVID-19 Spreads' (16 June 2020) <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html>.

[173] *Halsbury's Laws of Singapore* vol 18 (LexisNexis, 2019 Reissue) at [240.464].

[174] *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [138]; *Rhodes v OPO* [2015] AC 219 at [74].

[175] But cf the American approach which acknowledges causes of action for intentionally transmitting venereal diseases under either (1) a general prima facie tort, (2) an action for intentional infliction of emotional distress, or (3) fraud, deceit and misrepresentation: *Doe v. Roe*, 598 N.Y.S.2d 678 (1993) at p 680. Other than (3), there are no directly analogous torts in English law. The elements a so-called 'prima facie tort', for instance, are: (1) the infliction of intentional harm; (2) solely to injure plaintiff without any excuse or justification; (3) resulting in

Negligent transmission by individuals

If X accidentally transmits COVID-19 to Y, can Y claim against X?[176] The elements of a hypothetical negligence suit will be discussed in seriatim.

Duty

It is uncontroversial, even in English law, that duties of care can arise in respect of physical respiratory diseases like COVID-19.[177] Since COVID-19 transmission occurs in *physical* proximity, it is presumably not difficult for prima facie duties to arise. Policy concerns, particularly indeterminate liability, may militate against duty. But even in the most innocuous case — where X is reasonably ignorant of an infection[178] — it remains conceivable for X to be under a duty to take reasonable care not to transmit COVID-19 to their contacts. This concededly imposes duties on virtually everyone whenever they are in close proximity with others. But scope alone does not preclude duties of care: whenever I am near others I owe a duty not to accidentally punch them. The more X knows or has reason to suspect themselves infected, the easier it will be to find a duty owed.

Breach

Liability for the reasonably ignorant is better left to be excluded at breach. The crux of the inquiry, as always, lies in establishing what a reasonable person in X's position would have done considering the risk and magnitude of possible harm against the costs of care. Though debate on death rates rages on, it is undeniable that COVID-19 is highly infectious and potentially debilitating, stacking the breach calculus in favour of serious precaution. Nonetheless, tort law makes allowances for an individual's 'position'. If true that asymptomatic carriers are less likely to transmit the disease,[179] the standard expected would accordingly be lower. Contexts which necessitate physical proximity, such as contact sports, warrant special consideration.[180]

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special economic damage which must be specifically pleaded; (4) by an act or series of acts that would otherwise be unlawful: ibid.

[176] As with intentional transmission, negligent transmission is an acknowledged cause of action in American tort law. See the sources listed in n 163 above.

[177] See e.g. the wealth of cases on pneumoconiosis and mesothelioma, some of which are discussed below.

[178] For instance, when X is entirely asymptomatic and has not been in contact with any known clusters.

[179] World Health Organization, 'Transmission of COVID-19 by asymptomatic cases' (11 June 2020) <http://www.emro.who.int/health-topics/corona-virus/transmission-of-COVID-19-by-asymptomatic-cases.html>.

[180] On HIV transmissions liability in sports see Roger S Magnusson and Hayden Opie, 'HIV and Hepatitis in Sport: A Legal Framework for Resolving Hard Cases' (1994) 20(2) Monash University Law Review 214, at pp 262–267.

X's knowledge is also relevant to their 'position'. What is 'reasonable' when one knows or ought to suspect an infection is logically differs from when one doesn't. In the former case, one is well-advised to stay home and avoid all social contact — not throw a party.[181] But even the latter is not a licence to party with reckless abandon. Basic precautions such as masks and distancing may still be reasonably expected, given the lethality of COVID-19. What qualifies as 'basic' will however differ from country to country, having become a politicized question in some. Even if one does not actually know, one might be reasonably expected to find out, particularly after developing flu-like symptoms or being notified of prior contact with a positive case. There are thus two non-mutually exclusive ways in which one might be liable: failing to reasonably discover an infection (e.g. by seeing a doctor), and failing to reasonably avoid social contact (e.g. by self-quarantining after developing symptoms).

The exact standard of care is not something this theoretical essay can or should formulate. It will fall to be calibrated by the courts when eventually faced with such claims. Or, perhaps better still, by legislators after careful cost-benefit balancing. Courts may, as always, take reference from prevailing regulatory, industry, and scientific standards. But regulatory and liability standards are seldom carbon copies of one another. Indeed the two *should* differ because of the relative strengths of regulation versus liability, as explained above. Regulation tends to be blunt and generalized, whereas liability can be tailored to individual cases. Just as traffic courts emphasize speeding is not *per se* negligent because specific road conditions must be considered,[182] the circumstances of the specific transmission will have to be accounted for. Detaching the two further allows courts to come to the aid of regulatory standards set too high or too low.

Damages

Thus, a prima facie case of negligence should, depending on specific case facts, be possible. But, as with battery, victims may have significant problems proving damage. Since COVID-19 is physical harm, there should be no issue with remoteness. The main stumbling block is causation, which is always problematic for diseases, particularly new ones.[183] 'But for' causation is virtually impossible to prove. Given COVID-19's incubation period, Y would likely have had contact with many others alongside/after X (lesson I: stay home for a better shot at compensation). Y would

[181] Cf Gilad Edelman, 'he Latest Covid Party Story Gets a Twist' (*WIRED*, 14 July 2020) <https://www.wired.com/story/the-latest-covid-party-story-gets-a-twist/>

[182] *Tong Khing Kia v Yeo Kong Boon* [1990] 2 SLR(R) 792 at [15]. See also *Thorben Langvad Linneberg v Leong Mei Kuen* [2013] 1 SLR 207 at [34].

[183] For an American practitioner's view see Daniel P. Waxman, 'Identifying and Mitigating the Product Liability Risks in the U.S. Posed by SARS-CoV-2/COVID-19' (*Bryan Cave Leighton Paisner*, 26 March 2020) <https://www.bclplaw.com/en-US/insights/identifying-and-mitigating-the-product-liability-risks-in-the-us-posed-by-sars-cov-2COVID-19.html>.

have to exclude all other sources of disease, for instance, by showing that every subsequent contact was COVID-negative at the material time (lesson II: trace your contacts). The presence of alternative *non-negligent* sources raises the issue in *Bonnington Castings v Wardlaw*,[184] where the plaintiff was simultaneously exposed to pneumoconiosis-causing dust from a negligent and non-negligent source. Alternative *negligent* sources would, despite giving Y another defendant to go after, still raise the *Fairchild v Glenhaven Funeral Services* problem with attributing but-for causation.[185] The success of a negligent transmission suit hinges on whether the court accepts alternative tests for COVID-19 causation. This decision, as Lord Denning provocatively suggested, may ultimately be a 'question of policy'.[186]

Suppose for now that the courts accept the case for liability above and are minded to do this. Would the proper alternative test be a material increase in risk, in damage, or something *sui generis*? On existing principle, this turns on whether COVID-19 is a trigger or cumulative disease. That is, is COVID-19 caused by a 'single, uniform, trigger' agent that does not thereafter affect disease severity, or does virus exposure operate 'cumulatively first to cause the disease and then to progress [it]'?[187] This essay cannot, of course, resolve COVID-19's pathogenesis. From what may be gathered, this remains a matter of scientific uncertainty in itself. On one theory, the accumulation of the SARS-CoV-2 virus in the body 'triggers' a dysfunctional immune response that inflames and damages the lungs, after which 'it remains controversial whether virus persistence is necessary to drive the ongoing damage'.[188] Empirical evidence on whether those exposed to higher viral loads suffer more severe infections appears mixed.[189] Assuming that virus persistence is *unnecessary*, COVID-19 may indeed challenge the trigger-cumulative dichotomy. *Cumulative* exposure to the virus is necessary to cross a *trigger* point that significantly worsens the disease, but further exposure thereafter would not worsen it.

How would the courts deal with this *meta*-uncertainty over the very causal mechanism of a disease? By the time COVID-19 claims reach the courts, scientists may of course have resolved the uncertainty. Until such time, if cases like *Bonnington*, *Fairchild*, and *Sienkiewicz* are understood broadly to support the principle that plaintiffs *in general*, and not just industrial employees or

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[184] *Bonnington Castings v Wardlaw* [1956] AC 613.
[185] *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32.
[186] *Lamb v Camden LBC* [1981] QB 625.
[187] *Sienkiewicz v Greif (UK) Ltd* [2010] QB 370 at [12]–[16].
[188] Tay, M.Z., Poh, C.M., Rénia, L. et al. 'The Trinity of COVID-19: Immunity, Inflammation and Intervention' (2020) 20 Nature Reviews Immunology 6, 363, <https://www.nature.com/articles/s41577-020-0311-8#citeas> at pp 365–67.
[189] Sara Kayat, 'Doctor's Note: Does a high viral load make coronavirus worse?' (*Al Jazeera*, 29 May 2020) <https://www.aljazeera.com/indepth/features/doctor-note-high-viral-load-coronavirus-worse-200515075609542.html>; Damian McNamara, 'Unexpected: Higher Viral Loads Seen in Less Severe COVID-19' (*Medscape*, 17 July 2020) <https://www.medscape.com/viewarticle/934147>; Chuck Dinerstein, 'COVID-19: Viral Load And The Mucociliary Stairway?' (*American Council on Science and Health*, 20 July 2020) <https://www.acsh.org/news/2020/07/20/COVID-19-viral-load-and-mucociliary-stairway-14917>.

mesothelioma victims, may be given the benefit of the doubt in the face of scientific uncertainty, then the greater uncertainty surrounding COVID-19 should persuade courts to be equally if not more receptive to alternative causation tests. Even if established alternative tests cannot readily apply, since 'the concept of causation is not based on logic or philosophy',[190] a recovery-leaning court can always fashion a new test for COVID-19 specifically.

Whether the legislature is better-placed to decide this, however, is a question worth asking. The historical cases, particularly those involving mesothelioma, are famously intertwined with considerations of industrial and legal policy which may not apply to COVID-19.[191] COVID-19 would also raise a host of other pressing policy questions that could sway the court towards denying recovery as well. For instance, governments may by then have set up statutory compensation pathways. In short, when COVID-19 causation can be proven is at best uncertain. This concern notably applies to all causes of tortious action explored in this essay.

Defences

X could argue that Y *consented* to the risks of transmission by agreeing to socially contact X. As earlier explained for battery, this would probably fail unless X had made the risks clear before the contact. A more promising defence is contributory negligence, which might be established where Y should reasonably have known of X's infection and excused themselves (e.g. if X persistently displayed flu-like symptoms throughout their contact). In extreme cases, consent may be found.

Claims by secondary victims

If Y in turn transmits the disease to Z, would X be liable *in negligence*? If so, this would widen the scope of X's duty and liability significantly. While the courts' analysis of such indirect claims would differ at every element, three issues stand out.

First, duty is more difficult to establish. X would not have had physical proximity to Z (if there was, Z is better off claiming direct negligence). Z must rely on a *relational* argument to establish indirect proximity. For instance, if Z is Y's spouse. This argument, to be clear, *could* succeed. Broadly speaking, X could reasonably have foreseen that Y's close contacts would be harmed should X carelessly transmit the disease to Y. If relational duties may arise in respect of psychiatric[192] and

[190] *McGhee v National Coal Board* [1973] WLR 1 at 4–5 (per Lord Reed).
[191] The UKHL's decision in *Barker v Corus (UK) plc* [2006] 2 AC 572 was effectively overruled by the Compensation Act 2006, s 3, in respect of mesothelioma claims *only.* On this history see *Sienkiewicz* (n 187) at [1].
[192] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

economic harm,[193] then it arguably could also arise for physical harm.[194] But the spectre of indeterminate liability hovers menacingly over such claims. Even if the courts were to accept them, the scope of duty would presumably be restricted to very close relations.

Second, factual causation would be more difficult to prove. By the time Z discovers their infection, more time would have passed. More social contacts would have been made by *both* Y and Z. But for causation would require excluding both Y's *and* Z's contacts as alternative sources. These increased difficulties apply, though possibly with less force, to alternative causation tests. But given the policy concerns above, courts may be less willing to relax the rules of causation for Z.

Third, even if factual causation succeeds, Y's subsequent conduct could break the chain. This is especially if Y were themselves negligent in transmitting the disease to Z, or if Z was contributorily negligent.[195]

Claims against corporations

Corporations might be evil,[196] but one evil they cannot commit is physically spreading COVID-19. Their officers and employees, however, can. A corporation might thus be subject to vicarious liability should their employees tortiously transmit the disease in a manner "so closely connected with acts the employee was authorised to do that … it may fairly and properly be regarded as done by the employee while acting in the ordinary course of [their] employment".[197] Vicarious liability is particularly conceivable, though not a given, for an employee's whose job scope puts them in a position to commit the tort. The clearest instance is if X is employed to administer COVID-19 tests, but carelessly or intentionally uses a virus-contaminated swab on Y.

Another less clear example would be if X's employment involves close, sustained social contact. Salespeople who make home calls are one example. So too are doctors and nurses, though the healthcare setting warrants special consideration. Although delivery personnel go door-to-door, contact is more transient. Delivery personnel raise a separate, difficult question as many are now

[193] See the SGCA's discussion of English and Australian authority on this point in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] SGCA 41 at [58]–[79].
[194] Note that these categories are a matter of *English* law. In Singapore, the inquiry would simply revolve around proximity. On the departure from the categorical exclusion of pure economic loss see *Spandeck Engineering v DSTA* [2007] 4 SLR(R) 100 at [69]; *NTUC Foodfare Co-operative Ltd v SIA Engineering Company Limited* [2018] SGCA 41 at [59]. On the departure from the primary-secondary victim dichotomy in psychiatric harm see *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674.
[195] Third-party, as well as the plaintiff's own, negligence are likely supervening events: *McKew v Holland* [1969] 3 All ER 1621; *Wright v Lodge* [1993] 4 All ER 299; *PlanAssure PAC v Gaelic Inns Pte Ltd* [2007] 4 SLR(R) 513.
[196] Douglas Litowitz, 'Are Corporations Evil?' (2004) 58 University of Miami Law Review 811.
[197] *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12 at [25]. See also *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074.

either employed or independently-contracted by app platforms.[198] Fortunately, there seems to be few reports of COVID-19 spreading through them — at least in Singapore, and for now.

As with causation, vicarious liability is intertwined with policy.[199] Indeed policy concerns may become even more complex when corporations are involved, thus raising questions of economic allocation, business costs, and enterprise risk. The employment and activity types at which courts might draw the vicarious liability line is thus difficult to determine *a priori*.

Corporations may also be the target of *direct* negligence claims from consumers. Duties may in particular be owed by commercial (mall) occupiers to customers. The occupier is in a position to control COVID-19 transmission risks within their premises, especially by limiting who and how many may enter.[200] Of course, the standard of a reasonable corporation remains to be set. Masks and social distancing are probably a given. Contexts like contact sports and healthcare implicate higher transmission risks and warrant greater care.

Causation will be trickier to establish relative to individual transmission cases: victims must first pinpoint *where* they contracted the disease from, before explaining how the occupier's unreasonable behaviour materially contributed to this. Aggressive contact tracing may alleviate victims' difficulties here, perhaps to the chagrin of some businesses. This indeed reveals how *regulation* (e.g. mandating that all commercial premises enforce check-ins) may complement liability. Notably, corporate liability for transmissions within well-delineated physical areas with known occupant lists, such as airplanes, nursing homes, and prisons, may be significantly easier to establish.[201]

Another demographic that corporations owe duties to is their employees. Thus retail occupiers who carelessly permit an outbreak to occur on premises could face claims from both employees and customers. It is well-established in both tort law and statute that employers are to provide safe working environments.[202] Apart from retail settings, employees who contract the disease at the

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[198] This question has famously reached the U.S. and UK courts, but not Singapore's. For an overview see Ariene Reis and Vikram Chand, 'Uber Drivers: Employees or Independent Contractors?' (*Kluwer International Tax Blog*, 3 April 2020) <http://kluwertaxblog.com/2020/04/03/uber-drivers-employees-or-independent-contractors/?doing_wp_cron=1595323269.4006099700927734375000>.

[199] See David Tan, 'For Judges Rush In Where Angels Fear To Tread: "Insofar as it is Fair, Just and Reasonable" to Impose Vicarious Liability' (2013) 21 Torts Law Journal 43–58.

[200] On the centrality of control in an occupier's negligence duty see *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284.

[201] There is a wealth of American literature arguing both for and against airline liability for disease transmission aboard aircrafts. See e.g. Ruwantissa Abeyratne, 'International Responsibility in Preventing the Spread of Communicable Diseases through Air Carriage - The SARS Crisis' (2002–2003) 30(1) Transportation Law Journal 53; Kathryn Brown, Comment, 'Please Expect Turbulence: Liability for Communicable Disease Transmission During Air Travel' (2017) 66(4) DePaul Law Review 1081.

[202] *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2009] 3 SLR(R) 995 at [13].

office may have a claim against the employer. The crux of the issue, other than similar questions around causation we need not revisit, is what 'reasonable' care entails. Basic precautions aside, when might it be *unreasonable* to ask employees to work from the office? Precaution costs here depend on the nature of the job. In some industries, remote working entails higher social and economic costs. For the education sector, forced remote teaching may deprive an entire generation of conventional schooling.[203] Individual employees' transmission risk and disease vulnerability profiles would be relevant to the expected harm.

There is a final, somewhat contrived path to suing a corporation. This is to *attribute* X's tort to the corporation, as per the principle in *Moore Stephens v Stone Rolls Limited*,[204] by arguing that X embodies the directing mind and will of the corporation. But this path, which is related to though distinct from the corporate law concept of lifting the corporate veil, lends itself better to theoretical meditation than practical success,[205] and at any rate falls beyond this essay's scope.

Conclusion

This essay examined how far tortious liability for the transmission of COVID-19 should and does exist, particularly under Singapore law. While most existing measures have taken the form of *ex ante* public regulation, the economic case for complementary *ex post* private liability is clear. By addressing known shortfalls of regulation, (corporate) liability can incentivize more calibrated and cost-efficient precaution/activity levels. However, while establishing a prima facie case for intentional as well as negligent transmission appears relatively straightforward, questions surrounding the causation of damages present obvious obstacles. The same applies to potential corporate (vicarious) liability claims. Thus, it may currently be prohibitively costly for victims to pursue otherwise meritorious disease transmission claims. If judgments cannot be obtained, all defendants are as good as judgment-proof, and the complementary deterrent effect of liability is obscured. As the legal epidemic looms,[206] courts and policymakers may consider clarifying the legal uncertainties raised by potential COVID-19 claims.

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[203] Though the social effects thereof, for better or worse, are difficult to measure. Some students (and teachers) may well thrive in an online environment.
[204] *Moore Stephens v Stone Rolls Limited* [2009] 1 AC 1391.
[205] On the practical unlikelihood of lifting the corporate veil see Walter Woon, 'The Teaching of Company Law - Reflections on Past and Future' (2017) 2017 Sing J Legal Stud 258, at p 261.
[206] VK Rajah and Goh Yihan, 'The COVID-19 Pandemic and the Imminent Legal Epidemic' (*The Straits Times*, 7 May 2020) <https://www.straitstimes.com/opinion/the-COVID-19-pandemic-and-the-imminent-legal-epidemic>.