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Tort liability in a pandemic environment: Exploratory thoughts

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Introduction

In a matter of months, the emergence and spread of the coronavirus has massively disrupted and radically changed life, causing untold suffering and staggering losses. It will be some time before the pandemic ends and the world returns to normal or, more likely, move to a new normal. Since the beginning of 2020, health authorities and governments worldwide have devoted huge amounts of resources studying the science surrounding the coronavirus – its origin, spread, mutation, symptoms, treatment, containment and the like – and taking regulatory action to manage the crisis.

The outbreak of the virus and the attendant governmental measures have resulted in severe disruptions within and across borders. Individuals in society, concerned for personal safety and disincentivized by the prospect of legal sanction, have complied with restrictions and measures such as masking, social distancing and restrictions on movement and on travel. Myriad contractual dealings have been severely affected and lawsuits for breach of contract are mounting. Financial default and insolvency have risen sharply as businesses and entities continue to struggle as they adopt measures and strategies to avoid or reduce liability. There are implications in many realms of the law.

This paper focuses on the tort implications. It explores the overarching objectives, obstacles and tensions as tort principles are applied to the chaotic and changing circumstances to scrutinize the conduct of individuals, businesses and public bodies and to ascertain the appropriate balance of liabilities and rights in a time of unprecedented upheaval. The exploration proceeds as follows:

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- contextual dynamics,
- tort law implications,
- issues and challenges in negligence, and
- concluding remarks.

Contextual dynamics

Mysteries of the virus

The starting point of the enquiry must be the context and this backdrop is a very complicated labyrinth of events and responses, and the picture, as it unfolds, is one of uncertainty, volatility and evolution. At the centre of this crisis is the challenge of understanding the epidemiology of the virus, the key aspects of which are the incidence, distribution and control of the disease. The world continues to be inundated by new advisories and revelations from medical experts, research institutions, governmental authorities and the World Health Organization on a wide range of matters, of which the following are typical:

- manner of transmission,
- effectiveness of preventive devices,
- incubation period and symptoms,
- potency of the virus,
- effective and accurate testing,
- effectiveness of social distancing,
- kinds of effective treatment,
- herd immunity as an approach,
- recurrence of disease, and
- development of a vaccine.

The abounding diversity and contradiction of views suggest there is no clear consensus even among the experts on several important scientific aspects, with the accuracy of ascertainment being complicated by the differing factual matrices of the locations where infection occurred. Relevant considerations include the age and health profiles of the infected and the conditions of the living and work habitats. The reality is that many questions relating to the science of the virus remain mysteries for now.

Governmental action

Acting on extant findings and perceptions of the epidemiology of the virus, governments around the globe introduced a spectrum of restrictive measures, ranging from very drastic ones, such as closure of businesses and places of social activity, home confinement and banning air travel, to less severe ones such as safe distancing and the wearing of protective gear. The responsibility of each government is a heavy and difficult one as it seeks to balance competing interests – medical versus commercial, short-term versus long term and society versus the individual. In the balancing of these interests, pragmatism, compromise and sacrifice are involved.

The actions of governments have been far from uniform or coordinated.[618] This was due largely to differences in many aspects, such as the phase of contagion, profiles of the population, availability and quality of medical facilities, budgetary constraints and, not least of all, the view and conviction of the country's medical authority on the epidemiology of the virus and, sometimes, the political climate as well. On this last point, it is noted that the positions taken by different countries have quite often been at variance with the view taken by the WHO.[619]

Like all governments, the Singapore government had the arduous task of finding a delicate balance between social and economic policies. In April 2020, it imposed an almost complete lockdown (called Circuit Breaker) for 8 weeks, closing industries and activities save those considered to be essential, and on the condition that safety measures be taken. Regulations and advisories were issued[620] and constantly revised. Then followed a structured, multi-phase reopening of the economy and resumption of daily activities.

Response of individuals and businesses

The experience of living in the pandemic era has largely been about compliance with governmental directives and making adjustments and decisions in respect of social, work and business aspects of life. In personal and social life, suddenly, there have been restrictions to daily living – of movement, of socializing and of health safety. In the realm of work, there have been massive job losses, both permanent and temporary, while those fortunate enough to retain their jobs have to adapt to new requirements of workplace requirements of health safety. Those working from home

[618] The discrepancy is accentuated in large countries, such as the US, where state-specific efforts to curb the virus have been extremely different.
[619] A notable example of this is Sweden's herd immunity strategy, which appears to be a failure.
[620] The spectrum of advisories includes: a) safe distancing measures which require individuals to maintain a distance of at least 1m from other individuals and for the capacity of premises to be regulated based on the size of the compound, b) precautionary measures for individuals to limit their movement out of their residence to essential activities, c) precautionary measures for businesses to defer travel abroad, provide sanitation and protective equipment and enforce working from home, and d) sustainability measures for businesses such as implementing Business Continuity Plans (e.g. staggered work timings and split-team arrangements).

have had to adapt and face challenges that may be present in the home environment, such as space constraints and the ability to work in peace and quiet.

In the commercial realm, business owners have faced tremendous challenges as they changed their mode of conducting business to comply with regulations, made tough decisions as to deployment of staff, considered the financial implications and gave serious consideration as to how to change, perhaps radically, their business model and, even, whether to end the business venture.

There were two key problems for individuals and businesses as they responded to governmental action. The first was that while some directives were mandatory, others were advisory in nature, where expressions such as ‘advised’, ‘encouraged’ and ‘urged’ were used. Similarly, a fair amount of uncertainty was generated where the directive referred to the taking of action that was ‘feasible’ or ‘possible’. In these situations, it was difficult to ascertain what the appropriate response should be.

The second problem was that the directives were constantly updated, partly in response to new knowledge as to the epidemiology of the virus. It was a real challenge as individuals and businesses sought to respond to these changes and additions.

For everyone, it was, and still is, a time of great disruption and distress.

Tort law implications

Compensation philosophies

In compensating deserving victims, tort law’s primary philosophy or approach is corrective justice – that the party at fault should compensate the victim. A key challenge here is the ascertainment of fault. The usual difficulty of the task is exacerbated by the continuing uncertainties surrounding both the epidemiology of the virus as well as the considerable pragmatic challenges in complying with and adapting to the changing governmental directives.

In addition to corrective justice, distributive justice (along with all the controversy of what this notion entails) may come into play. In some situations, the victim deserves compensation even if the defendant’s fault may be doubtful or less than substantial. Deterrence may also surface and complicate the exercise.

Underlying realities and challenges

Justice and law are always very dependent on context. The context is a pandemic environment – something rare in occurrence in the long march of history. Whilst some countries have had experience with epidemics in recent decades, the last pandemic occurred a century ago. So, apart from what may be gathered from archives and anecdotal accounts, the experience is new to all. As mentioned above, much remains uncertain and unknown in terms of scientific knowledge, and the range and depth of governmental action around the globe has been diverse and varied. As individuals and businesses form their own view of the coronavirus and respond to governmental action and regulation, there is much anxiety and stress. In seeking a fair resolution of disputes in a pandemic environment, an appreciation of the underlying realities is critical.

Tort liability, negligence liability

One can expect, over the coming months and years, a deluge of tort claims caused directly or indirectly by the virus, the consequences of governmental action and the responses thereto. Some cases may involve intentional tortious harm, such as in the tort of *Wilkinson v Downton*,[621] or of stricter or strict liability, such as in the tort of breach of statutory duty and the tort of *Rylands v Fletcher*.[622] There may also be a fair amount of defamation litigation arising from the deluge of commentary in relation to the COVID-19 crisis. But, without a doubt, taking centerstage in tort litigation would be the tort of negligence - the complaint that the defendant did not take reasonable care and as a result caused harm to the claimant. Categories of complainants could include students, patients, employees, customers, commuters and participants of events. The losses claimed could involve pecuniary and non-pecuniary losses.

This paper focuses on the tort of negligence. Before that, a brief comment should be made on the tort of breach of statutory duty. A prominent feature of governmental action is the passing of specific regulations in terms of health safety measures and of restrictions and curtailments on activities in the social, business and other realms. These new regulations raise the possibility of actions being commenced under the tort action of breach of statutory duty. A claimant would have to surmount the usual obstacle of showing that Parliament intended, in addition to imposing criminal sanctions, to confer a private right of action in tort. This genus of action may be particular relevance to workplace health and safety.

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[621] *Wilkinson v Downton* [1897] 2 QB 57, where the common law first recognized the tort of intentional and indirect infliction of physical or psychiatric harm.

[622] *Rylands v Fletcher* [1868] LR 3 HL 330. The rule in *Rylands v Fletcher* covers situations of damage to the plaintiff-landowner arising from the escape of dangerous things in the course of the defendant's non-natural use of land.

Justiciability of governmental action

It is conceivable that in some countries, negligence claims may be brought against governmental agencies. Such claims face challenges on several fronts. In the first place, there is general reluctance to impose a duty of care on public bodies on account of various policy concerns. Then, there are principles and concepts favorable to public bodies which the claimant needs to surmount. Thirdly, there is often legislation governing the public body in question which gives immunity or substantive protection to the body; it is conceivable that some countries may introduce legislation specifically to confer immunity during this time. Lastly, a pandemic is a time of great testing and stress. As governmental decision-making takes into account so many competing interests and considerations, and given the variances in governmental approaches and responses around the world (such as on closing and re-opening[623] the economy), a court would be slow to conclude that the government or a governmental body had not acted with reasonable care. For all these reasons, the prospect of a successful lawsuit against a public body is dim.

Issues and challenges in negligence

Reasonableness of action

A claim in negligence is, in essence, an assertion that the defendant did not exercise the care that a reasonable layperson or professional, as the case may be, would have exercised. It is subject to the composite and elaborate framework of principles of the tort, comprising duty, breach, causation and remoteness. The claimant also has to overcome the defences pleaded by the defendant. In this paper, we consider the more salient issues and challenges that may arise.

Duty of care - foreseeability, proximity and policy

A foundational element of the duty laid down by Lord Atkin in *Donoghue* is the foreseeability of harm.[624] The question is whether the tortfeasor could have foreseen that if he did not take reasonable care, the claimant would be harmed as a result. In view of the uncertainties and unknowns surrounding the science of the virus and the changing and at times conflicting governmental directives, the foreseeability question will often not be easily or confidently answered.

[623] In some instances, in spite of a rise in the number of infections.
[624] *Donoghue v Stevenson* [1932] AC 562, the landmark decision where Lord Atkin laid down the principle that a person has to take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure persons who are so close and directly affected by his act.

The second aspect of the duty of care – proximity – has to be addressed, particularly where the relationship between the claimant and the defendant is an indirect or remote one. However, the matter should not pose especial difficulty.

The third element or stage of duty – policy (also called, rather controversially, the 'just, fair and reasonable' requirement) – demands close analysis. Many types of policy come into play and their interactions create tensions. Social policy emphasizes health safety while economic policy stresses the importance of economic continuation and sustenance. You could say it is a matter of life versus livelihood. Legal policy also figures prominently as courts ponder over considerations such as floodgates[625] and, more broadly, whether in a pandemic environment, certain types or situations of harm or loss are but part of the vicissitudes of living in such unprecedented times. Moral policy and political policy may also enter the discussion.

In summary, at the duty of care stage,[626] a claim in negligence may face intractable challenges as regards foreseeability and policy.

Standard of care analysis

The greatest difficulty, though, is likely to be the ascertainment of the applicable standard of care. In applying the relevant factors to the situation at hand and, in the balancing of these factors, much difficulty is likely to be encountered. Further, central to the task of establishing responsibility and liability on the part of the defendant and right and entitlement to remedy on the part of the claimant is the issue of fault, and this involves the delicate and controversial exercise of tempering objectivity with subjectivity. The characteristics of the defendant - in terms of knowledge, skill, experience and resources – and the particularities of the claimant – in terms of fortitude and sensitivities – need to be adroitly counterbalanced to arrive at a fair and optimal legal position.

Additionally, there is a need to guard against the danger of hindsight bias. The defendant should be judged by the state of knowledge at the time of his alleged careless conduct.

Ascertaining risk

Risk of harm has two aspects – likelihood of harm and seriousness of possible harm. Of course, the greater the risk, the greater the amount of care that needs to be taken. As regards likelihood,

[625] There may be concerns of the courts being deluged with frivolous claims and having its limited legal resources severely strained.

[626] *Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency* [2007] 4 SLR (R) 100 is the leading authority on the framework for establishing the duty of care in Singapore. There, Andrew Phang JA laid down a two-stage test of proximity and policy consideration which is preceded by a threshold requirement of foreseeability.

it is noted that, even now, there is significant ambiguity on epidemiological aspects such as manner of transmission, viral viability (how long the virus stays alive), incubation period, asymptomatic spread as well as effectiveness of different kinds of preventive measures such as protective devices (like masks, shields, gloves and hazmat suits), sanitation procedures and safe distancing practices.

As regards seriousness of harm, there is reasonable consensus that for the vulnerable groups, namely the elderly and the physiologically weak (in particular those who have respiratory limitations), death or substantial impairment of bodily function may result. To this must be added the caveat that serious consequences could also occur where infection takes place in the non-vulnerable groups, albeit with a much lower probability; in this regard, one might have to answer the difficult question – who is the foreseeable plaintiff? Gauging the risk of harm in respect of potential victims can be a formidable exercise.

Balancing risk and costs of avoiding the harm

In arriving at the appropriate standard, there is an inverse relationship between the standard of care and the costs[627] of avoiding the harm; basically, the defendant is expected to adopt routine and inexpensive measures while measures which involve great expense or substantial disruption are not required unless the risk of harm is substantial. The measures in the COVID-19 environment range from temperature screening, sanitation, wearing of protective gear, safe distancing to very drastic action such as suspension or cancellation of activities. For businesses and enterprises, the cumulative requirements of all the due diligence measures can be staggering in terms of financial costs and business practicability. At what cost must preventive action be taken to prevent harm?

Relatedly, one faces the thorny question of whether the financial ability of the tortfeasor should be factored into the equation. For a particular scenario, such as one involving a supermarket, an eatery, a hospital or a school, is there a fixed standard of care? Or is it that those with greater financial ability (and knowledge or skill?) are held to a higher standard while those with lesser such ability are accorded the concession of a lower standard? These difficult questions will have to be revisited and in exceptional circumstances.

Economic and social utility

Difficulties in the complicated exercise are further compounded when considerations of economic and social utility are brought into the picture. The imposition of extremely burdensome measures

[627] A related consideration is practicality. Early in the crises, some hospitals in the US and in the UK directed their doctors and nurses not to wear masks so as not to frighten the patients!

may threaten the viability of a business venture and the livelihood of the employees; and prolonged and excessively harsh restrictions on freedom and movement can have deleterious emotional and psychological effect, and trigger conflict, depression and even suicide. Where the utility of an activity outweighs the risks of conducting it, a lower standard of care may be tolerated.

Compliance with regulations and guidelines

The balancing of factors in order to ascertain the standard of care takes place against the practical backdrop that a substantial part of the reality are the adjustments made by individuals and businesses in complying with and responding to governmental action.

Governmental directives may be categorized into proscriptions, prescriptions and recommendations, and may be couched in general and/or specific terms. For example, the directive may impose the concept of safe distancing and specify a distance of one meter (or more) or require the wearing of protective face wear and list several alternatives.

The manner and extent of compliance with the directives by individuals and entities has implications on liability under the law of negligence. As a starting point, one could say that compliance tends to insulate or protect one from liability whilst non-compliance tends to result in liability. But there are qualifications.

For one, the statutory standard may be indicative or suggestive but not determinative of the requisite standard of care; the standard which negligence law requires may be higher than what is common or industry practice. For another, whilst it is necessary to comply with the specificities of the detailed subsidiary legislation, it is also important to adhere to the principle encapsulated in the main statute. Finally, even where the directive takes the form of an advice or recommendation and consequently there is room for the exercise of discretion, it would probably be better to be cautious and to follow the advice wherever possible.

Outsourcing of safety measures

Where the safety and other due diligence measures are carried out by employees, the liability of the employer is determined in accordance with the concept of vicarious liability. In recent years, vicarious liability has been extended beyond employees to persons who are akin to employees. The big question is whether vicarious liability can be extended over acts of an independent contractor. So far, there has been judicial reluctance to expand the ambit of vicarious liability to such a degree.

For now, it appears an employer will not be held liable for an independent contractor's tort save where the employer had been negligent in the selection of the contractor or where the employer had a non-delegable duty, a concept which has been narrowly circumscribed.

The application and implication would be that where the measures are carried out by employees, the employer may rather easily be held liable whereas if the same measures were done by an independent contractor, the employer's risk of liability is substantially lessened.

Causation and remoteness

Readers familiar with this area of law will be aware of how scenarios of indeterminacy, in particular medical indeterminacy, have resulted in controversial legal improvisations. But-for causation, measured on the threshold of balance of probabilities, has at times been substituted by the amorphous concepts of material contribution to injury (MCI),[628] and material contribution to risk of injury (MCRI).[629] The further complication is that even where these apply, the claimant may yet receive full damages.

In disputes set in the pandemic environs, it would not surprise if the 'but for' test proves inadequate for ascertaining causation, bearing in mind multiple possible factual causes, such as absence or inadequacy of temperature-taking, masking, sanitizing, or safe distancing, as well as medical uncertainties and unknowns surrounding the science of the virus, such as manner of spread and methods of treatment. One wonders if and when courts would resort to MCI and MCRI to surmount difficulties of these factual or medical indeterminacies and, if so, whether full damages or proportionate damages will be awarded.

Further, where the loss of chance argument is raised, courts may have to revisit the simplistic stance that only chances which satisfy the threshold of balance of probabilities may be claimed, a position supportable by neither logic nor common sense.

On the associated matter of remoteness, judges may have occasion to debate anew the thin-skull rule. To what extent would the deficiencies in fortitude and resilience of the claimant,[630] whether in

[628] MCI is used to bridge the evidential gap where it is not possible to establish 'but for' causation, such as where there are multiple possible causes. The test considers whether the defendant's breach materially contributed to the damage to the plaintiff. Essentially, causation is substituted by the lesser concept of contribution.
[629] MCRI deals with the even more challenging situation where one does not know how a particular injury, such as an illness or disease (like mesothelioma), develops or occurs: see e.g. *Barker v Corus (UK) plc* [2006] 2 AC 572. In asserting MCRI, the plaintiff only has to show that the defendant's breach materially contributed to the risk of the injury which occurred. This is an even lower threshold than MCI.
[630] Such as a pre-existing condition that renders him especially susceptible to the virus.

terms of bodily or mental strength or some other relevant circumstance, be taken into account in deciding that the defendant should be liable in negligence?

Consent, exclusion of liability and contributory negligence

No doubt, in virtually every COVID-19-related claim, defences will be raised. We consider briefly the defences of consent, exclusion of liability and contributory negligence.

In consent, the principle is that the claimant freely and voluntarily, with full knowledge of the nature and extent of the risk, agreed to incur it. The constituent elements of full knowledge and voluntariness, in a COVID-19 scenario, are not easily fulfilled and the defendant has a heavy burden. Cursory or nominal efforts at giving notice are unlikely to meet the requirements. More attention has to be given to appropriate due diligence measures such as giving clear explanation and ensuring the absence of coercion.

Relatedly, the defendant may plead exclusion of liability. Such a plea is subject to the regime of protection afforded by the Unfair Contract Terms Act. In a nutshell, in this regime, liability for death and injury resulting from negligence cannot be excluded while liability for other damage may be excluded only if it is reasonable to do so. Hence, the defendant's ability to escape liability through exclusion is severely curtailed. In short, the defendant's conduct will still be tested in the crucible of reasonableness.

Finally, contributory negligence – the idea that the claimant had, through his own fault, contributed to the incident/accident or to the loss. In the COVID-19 environment, all and sundry are aware of the dangers of the virus and are exhorted by the authorities to exercise care and to adopt self-protection measures. It is expected that many a defendant will raise the defence of contributory negligence and the litigants and the court will be engaged in the difficult exercise of ascertaining if, and the extent to which, the claimant had contributed to the loss. So, one is drawn, in each dispute, into detailed debate as to what the claimant, as a reasonable person, knew of the complex epidemiology of the virus and the efficaciousness of the measures taken by the defendant, and what self-protective measures that he, as claimant should have taken. In extreme situations, an argument of *novus actus interveniens*[631] may even be made out, nullifying the negligence claim altogether.

[631] Where a subsequent cause interferes with and overwhelms the consequences of the defendant's negligent act.

Concluding remarks

A pandemic environment is characterized by disruption, chaos, change and uncertainty on a massive scale. The behaviour of individuals and entities is driven and influenced by instincts of panic, anxiety and stress; their reaction and response, at both the public and the private levels, take place against a backdrop of unprecedented dislocation and distress. The balancing of interests, at both levels, is done in very challenging circumstances and requires pragmatism, compromise and sacrifice. Hence, it would be unrealistic and unfair to measure reasonable conduct against yardsticks which obtain in times and circumstances of normalcy.

In a dispute, the simple question – did the defendant take reasonable care towards the claimant – leads to an elaborate legal framework where several components are themselves controversial and unsettled. This framework has to be applied to the particular dispute scenario set within the very complicated and complex COVID-19 environment. It would not be surprising, that, on the whole, there may be a lowering of expectations, perhaps substantial, as to the standard of care or that the amount of compensation may be significantly lowered on account of the claimant's contributory fault.

If so, there will be a significant shortfall in compensation and many deserving claimants in tort actions will not receive appropriate redress. It appears that, to fill this gap, state compensation schemes, such as free medical treatment and financial grants, have to be provided.

Unprecedented times bring great challenges. As tort law is brought to bear in resolving a multitude of disputes in a wide range of circumstances, one must be prepared to be overwhelmed by the unique unpredictability and complexity involved in producing a just and optimal outcome.