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TORT LIABILITY IN A COVID WORLD PART 2: THE CASE OF WALMART

On April 6, 2020, the estate of a deceased Walmart employee who died from COVID-19 sued an Arkansas Walmart in negligence. Since the COVID-19 outbreak, the U.S. has seen thousands of complaints filed by employees under OH&S provisions that require employers to provide an environment “free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees”.¹ This case, however, appears to be the first COVID-19-related negligence lawsuit. There are bound to be more. While this is not a Canadian case, the claim is emblematic of the types of issues litigants are already grappling with and that are bound to arise in Canada.

The Claim

The claim states that as a direct result of Walmart’s negligence, Wando Evans was infected with the COVID-19 virus and ultimately died. The claim asserts that Walmart breached its duty to Evans to exercise reasonable care in keeping the store safe and healthy, and that Walmart knew, or should have known, that individuals at the store were at a very high risk of exposure to the COVID-19 virus due to the high volume of individuals circulating throughout the store daily. In particular, the claim asserts that, amongst other things, Walmart failed to:

- Properly cleanse and sterilize the store;
- Promote social distancing and health guidelines promulgated by the government²;
- Provide employees with personal protective equipment such as masks and gloves;
- Warn employees that various individuals were experiencing COVID-19 symptoms;
- Properly respond to employees complaining of COVID-19 symptoms;
- Cease store operations when it knew, or should have known, that various employees were experiencing COVID-19 symptoms;
- Follow guidelines promulgated by the Centre for Disease Control and Prevention (“CDC”) relating to:
 - Developing an Infectious Disease Preparedness and Response Plan;
 - Implementing basic infection prevention measures;
 - Conducting periodic inspections of the cleanliness of the store;
 - Providing employees with antibacterial soaps, wipes and other cleaning agents.

¹ OSH Act of 1970, 29 U.S.C. § 654

² Including as set out in “Guidance on Preparing Workplaces for COVID-19”

Walmart's Response

Walmart has publicly responded by stating that it reinforced its sanitization measures and passed both a third-party safety compliance assessment and a health department inspection. The store is also installing sneeze guards at registers, limiting the number of customers in the store at any given time, taking the temperature of employees at the beginning of shifts, providing protective gear to its employees, and other responsive measures.

Industry Standards and Staying Compliant

This suit represents the difficult circumstances that we find ourselves in. Essential businesses must remain open and endeavor to exercise reasonable care for the protection of those who are relying on them. Employees are asked to continue to work and individuals need to continue to obtain essential goods and services in the face of the risks associated with the pandemic.

Against that backdrop, there are some practical steps a business can take to protect itself from liability.

As a starting point, businesses must stay informed about industry standards. Minimally, they must continue to meet those standards, that may now be evolving rapidly. Beyond that, businesses must keep in mind that it is open to a court to find that a standard practice is in and of itself negligent.³ In other words, a court could find, that as a result of the conditions created by COVID-19, simply abiding by standard industry practice is not enough.⁴

Therefore, businesses would be well advised to critically assess the standard practices being adopted in their industry. For example, while a health recommendation from the government may not call for taking the temperature of employees, an employer may want to still consider implementing that measure, depending on the nature of its business and the extent of the risk faced by those who continue to make use of the services provided.

To ensure they remain current and can critically evaluate what is necessary to protect customers and employees, businesses may wish to employ a consultant, join an industry association, or attend (online) training. These can be effective ways of staying up to date on the constantly evolving expected standards and regulatory changes.

Depending on the likelihood and severity of risk, it may also be prudent to have an expert conduct an audit of current practices to identify areas of weakness in terms of compliance.⁵ A higher standard of care is applied to entities with specialized knowledge.⁶ Such specialized entities, including all businesses, are expected to critically analyze their responses to risky scenarios.⁷

³ See *Ter Neuzen v Korn* [1995] 3 SCR 674, para 64. See also *McCann v Hyndman*, 2004 ABCA 191, paras 5-6

⁴ Compliance with industry standards has weight, but is not conclusive in absolving a defendant from a negligence claim. See, e.g., *The Law of Torts*, P.H. Osborne, 4th ed, Irwin Law, 2011, p. 37

⁵ In the Securities Regulation context, this is sometimes mandated by the Investment Industry Regulatory Organization of Canada in order to help ensure compliance. See for example, [2008] IIROC No 27, para 12

⁶ *The Law of Torts*, p. 48

⁷ See *Waters v Wong*, 2019 ABQB 51, paras 263-266, where the court found that an emergency room doctor was required to "step back to reassess the situation" and "do a more thorough review" than her standard practice in order to meet the standard of care in a particular risky scenario.

If your business is concerned about protecting itself from liability claims the lawyers at JSS Barristers can provide you with advice on how to best protect you and your business in this ever-changing landscape.

Sources

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