

# **Draft guidance: Business interruption insurance test case - proving the presence of coronavirus (Covid-19)**

11 December 2020

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# 1 Summary

## About this guidance consultation

- 1.1 Following the onset of the coronavirus (Covid-19) pandemic we received many complaints from small and medium enterprise (SME) policyholders, MPs and other stakeholders. They complained about insurers taking a narrow reading of whether their business interruption (BI) policy wordings, which did not require damage to the insured premises, would provide cover in response to the situation. Our supervisory work confirmed that insurers were refusing the large majority of these SME BI claims, with genuine debate as to the meaning of some policies.
- 1.2 We decided that the quickest route to resolving the issue and providing certainty for all parties was to go to the High Court to seek a declaration on what the wordings covered. Given the potential harm for SMEs arising from the pandemic, we have been clear throughout that our overarching aim has been to achieve a final outcome with clarity and to do so at speed. This is to enable eligible policyholders to receive claim payments as early as possible.
- 1.3 In June, we began a test case in the High Court. Our counsel reviewed over 500 policy wordings to arrive at the 21 representative policy 'types' issued by the 8 insurers included in the test case. We selected wordings that were representative of the key issues in dispute between policyholders and insurers, which led to us deciding which insurers we would invite to participate in the test case. These 21 policy types have 3 types of cover wording:
  - (i) cover for business interruption caused by an outbreak of disease within the vicinity of premises
  - (ii) cover for business interruption caused by denial of access to premises, following public authority action, taken due to an emergency
  - (iii) 'hybrid' wordings which combine a requirement for both outbreak of disease and public authority denial of access to premisesOur role was to put forward the best policyholder arguments. We used the court's Financial Markets Test Case scheme, as it offered the quickest way to get an authoritative ruling.
- 1.4 The High Court judgment (*FCA v Arch and others* [2020] EWHC 2448 (Comm)) handed down on 15 September, provided authoritative guidance for the interpretation of the approximately 700 policy wordings identified as affected by the test case by about 60 insurers. 12 out of the 21 policy types tested were found to have the potential to provide cover in response to the pandemic; 9 were not.
- 1.5 Some business interruption insurance policies require the policyholder to prove the presence of a disease within a particular area around their premises. As part of its decision, the High Court made declarations as to the types of evidence which policyholders can use to prove the presence of Covid-19, and the methodologies they may use in that process.

- 1.6 Aspects of the High Court judgment are under appeal to the Supreme Court, from which judgment is expected by January 2021. But the declarations of the High Court relating to proving the presence of Covid-19 and covered by this draft guidance are not under appeal and not expected to be affected by the judgment of the Supreme Court. By issuing this document, we are not pre-judging the outcome of the appeals to the Supreme Court. Should that outcome affect the draft guidance, we will amend it accordingly.
- 1.7 In this document, we consult on draft guidance for policyholders, insurers (including managing agents at Lloyd's) and insurance intermediaries on how the presence of Covid-19 in a particular area may be proved, based on the High Court's judgment and declarations and in the context of insurers' obligations under our rules to handle claims fairly. We also explain types of evidence and methodologies which policyholders may use, together with links to further useful information for policyholders. This is intended to:
- (i) provide clarity for all parties;
  - (ii) help ensure that the process of proving the presence of Covid-19 is made as simple as possible for eligible policyholders; and
  - (iii) enable those policyholders to receive claim payments as early as possible if the Supreme Court upholds the High Court's decision that relevant policies potentially provide cover in response to the pandemic.

## Who this applies to

- 1.8 This draft guidance is for policyholders, insurers (including managing agents at Lloyd's) and insurance intermediaries.
- 1.9 For insurers and insurance intermediaries, this document contains draft guidance on firms' obligations under:
- the FCA Principles for Businesses (PRIN), in particular Principles 6 and 7
  - the Insurance Conduct of Business sourcebook (ICOBS), in particular ICOBS 2.2.2R, ICOBS 2.5.-1R and ICOBS 8.1
  - the Dispute Resolution: Complaints sourcebook (DISP), in particular DISP 1.4 and DISP 1.6.

## What this document sets out

- 1.10 **Chapter 2** sets out how policyholders can use this guidance.
- 1.11 **Chapter 3** sets out our guidance for insurers and insurance intermediaries in relation to proving the presence of Covid-19.
- 1.12 **Chapters 4 to 9** set out our guidance on the specific evidence that policyholders can use to prove the presence of Covid-19 in the Relevant Policy Area (RPA) applicable to their policy and claim.
- 1.13 The methodologies in Chapters 8 and 9 were discussed during the High Court trial and at a consequential hearing on 2 October 2020. If insurers continue to doubt the appropriateness of these methodologies for enabling policyholders to satisfy the minimum requirements of their policy (normally to prove the presence of just one

case of Covid-19 in their RPA, not the precise number of cases), this consultation provides an opportunity to explain why this is the case.

- 1.14 There is no statutory requirement to prepare a cost benefit analysis for guidance and we have not prepared a cost benefit analysis for this draft guidance. In any event, we consider that issuing this guidance would not increase costs overall, or any cost increase would be of minimal significance. It is more likely that issuing the guidance would reduce costs overall by reducing further disputes, increasing consistency of claims and clearly setting out in one place for the benefit of policyholders, insurers and insurance intermediaries alike types of evidence for the presence of Covid-19.

## Which insurance policies this guidance consultation is relevant to

- 1.15 The High Court test case related to how and to what extent the policies in the representative sample of 21 policy types may respond to non-damage BI losses arising from UK Government action primarily in March 2020 in response to the national Covid-19 pandemic. This guidance relates to proving the presence of Covid-19 in relation to such losses for the purpose of making a claim under an insurance contract that was in force during those events and which requires the policyholder to prove the presence of Covid-19 within a particular area around their premises.
- 1.16 The first case of Covid-19 in England and Wales was recorded on 31 January 2020 and the disease spread rapidly in the following months before the Government ordered the first national lockdown in late March 2020, which ended on 4 July. So the guidance will be most relevant to such insurance contracts in force during any part of the period between 31 January and 3 July 2020. It may also be relevant to losses from later events such as 'local' lockdowns or subsequent national lockdowns.
- 1.17 The High Court's judgment and declarations relate to the laws of England and Wales, but provide persuasive guidance that can be taken into account in other court cases including in Northern Ireland and Scotland, and by the Financial Ombudsman Service and by the FCA in looking at whether insurers are handling claims fairly. Most of the sources of evidence referred to in this document are available throughout the UK, but some are not relevant to Wales, Northern Ireland and/or Scotland. In those cases, during the consultation period, we intend to liaise with the authorities in those nations to ascertain whether additional, equivalent evidence is available for policyholders in those nations.

## Proposed duration of the guidance

- 1.18 If we proceed to issue guidance following this consultation, we propose it would come into effect as soon as it is issued and cease to have effect on 31 December 2021 – we expect that all claims to which the guidance could be relevant would have been resolved by that date.

## How to respond

- 1.19 We are asking for comments on this guidance consultation by 18 January 2021.
- 1.20 You can email your response to [biinsurancetestcase@fca.org.uk](mailto:biinsurancetestcase@fca.org.uk) (with '**Guidance consultation - comments**' in the subject line).

1.21 Responses to consultations are available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure. We may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

## 2 How to use this guidance

### Introduction

- 2.1 As set out above, some BI insurance policies require the policyholder to prove the presence of a disease within a particular area before the policy will respond. This guidance is intended to help policyholders in this process.
- 2.2 The first step for policyholders is to determine whether the relevant coverage clause in the BI insurance policy being considered has wording that:
  - requires the presence of disease within a particular distance, zone or radius from the premises – see, for example, the ‘disease clause’ in ‘Argenta Type 1 of 1’ or ‘QBE Type 1 of 3’ in the representative sample of policy wordings considered in the test case;
  - requires the presence of disease within a vicinity or area where events that occur within such area would be reasonably expected to have an impact on the policyholder – see, for example, the ‘disease clause’ in ‘RSA Type 4 of 4’ in the representative sample of policy wordings considered in the test case; or
  - requires the occurrence of a notifiable disease without specifying a particular vicinity or area within which the disease needs to occur.
- 2.3 If the policy does not contain one of those types of wording, then this guidance is unlikely to assist. In particular, if the wording requires Covid-19 to be present ‘at the premises’, this guidance will not assist.
- 2.4 If the policy contains one of those types of wording, the policyholder should follow the steps set out under the relevant subheading below.

### Policies requiring the presence of disease within a particular distance, zone or radius from the insured premises

- 2.5 Some BI insurance policies which the High Court decided should, in principle, provide cover in relation to the pandemic require the policyholder to demonstrate that there was at least one case of Covid-19 in a specific zone relative to the insured premises, for example within a 25-mile or 1-mile radius from the premises. In this document, that zone is called the Relevant Policy Area, or ‘RPA’.
- 2.6 Whether you need to prove the presence of a case on a particular date will depend on the policy wording. For most policy types, the policyholder will need to be able to show that a case occurred at any time prior to the interruption of their business in order to claim.
- 2.7 This guidance sets out four types of evidence on which a policyholder may rely to establish the presence of Covid-19 in their RPA. We suggest that a policyholder seeks to use these types of evidence in the order set out below, starting with the ‘Specific evidence’ and so on. However, policyholders with a 1-mile radius RPA may wish, after considering ‘specific evidence’, to move to ‘Reported Cases by Middle Super Output Area’ in Chapter 7, before resorting to NHS data and so on as for other policyholders.

1. Specific evidence (for example, media reports of a case near the premises) – see Chapter 4
  2. NHS data on deaths due to Covid-19 – see Chapter 5;
  3. Office of National Statistics (ONS) data on deaths due to Covid-19 – see Chapter 6;
  4. reported cases of Covid-19 in different areas (for example, local authorities) – see Chapter 7.
- 2.8 If none of those four types of evidence is sufficient to prove the presence of Covid-19 in the RPA, for example because the evidence provides data for cases which could be inside or outside the RPA, this guidance describes two methodologies which a policyholder may adopt to nonetheless prove the presence of Covid-19 in their RPA:
1. The geographical distribution methodology, where reported cases of Covid-19 are ‘averaged’ across an area, weighted according to population size – see Chapter 8.
  2. ‘Uplifting’ the number of reported cases using an undercounting ratio, where a measure is used to assess the likely true number of cases of Covid-19 in an area, since not all cases were detected by the UK Government – see Chapter 9.

**Policies requiring the presence of disease within a vicinity or area where events that occur within such area would be reasonably expected to have an impact on the policyholder**

#### *Policyholders in England and Wales*

- 2.9 The High Court confirmed that the particular definition of ‘vicinity’ in the disease clause of the policy type underwritten by Royal & Sun Alliance Insurance plc (RSA) and various other insurers and branded Marsh Resilience, referred to during the test case as RSA4, meant that, for that policy type, Covid-19 occurred within the ‘vicinity’ of all premises in England and Wales on 31 January 2020 (Court declaration 4) – the date of the first positive test for Covid-19 in England. Policyholders with this type of policy do not need to prove the presence of Covid-19.
- 2.10 The definition of ‘vicinity’ in RSA4 is ‘an area surrounding or adjacent to an Insured Location in which events that occur within such area would be reasonably expected to have an impact on an Insured or the Insured’s Business’. Where other policies require the presence of Covid-19 within an area defined in a similar way to the definition of ‘vicinity’ in RSA4, the FCA considers the same approach should be used as for RSA4.

#### *Policyholders in Northern Ireland and Scotland*

- 2.11 For policyholders in Northern Ireland or Scotland, the guidance for policyholders in England and Wales above is also relevant, except that Covid-19 should be treated as having occurred, for the purposes of the disease clause in RSA4 and similar clauses in other policies, within the ‘vicinity’ of all premises in those nations when the first positive test for Covid-19 occurred in those nations, which is:
- in Northern Ireland, 11 January 2020 (see [Covid-19 Testing Details](#))



- in Scotland, 28 February 2020 (see [Daily Update](#))

## Policies requiring the occurrence of a notifiable disease

### *Policyholders in England and Wales*

- 2.12 The High Court confirmed that Covid-19 'occurred' on 5 March 2020 in England and on 6 March 2020 in Wales within Hiscox1-3 (hybrid clauses) (Court declaration 3). Policyholders with these policies will not need to take any further steps to prove the presence of Covid-19. Where other policies have similar wording, the FCA considers the same approach should be used as for Hiscox1-3 (hybrid clauses).

### *Policyholders in Northern Ireland and Scotland*

- 2.13 For policyholders in Northern Ireland and Scotland, Covid-19 should be treated as notifiable for these types of policies when it became notifiable in those nations:
- in Northern Ireland, 29 February 2020 (see The Public Health Act (Northern Ireland) 1967)
  - in Scotland, 22 February 2020 (see Public Health (Scotland) Act 2008).

# 3 Guidance for insurers and insurance intermediaries

## Rules this guidance relates to

- 3.1 For insurers (including managing agents at Lloyd's) and insurance intermediaries, this is guidance on obligations under:
- the FCA Principles for Businesses (PRIN), in particular Principles 6 and 7
  - the Insurance Conduct of Business sourcebook (ICOBS), in particular ICOBS 2.2.2R, ICOBS 2.5.-1R and ICOBS 8.1
  - the Dispute Resolution: Complaints sourcebook (DISP), in particular DISP 1.4 and DISP 1.6.

## Insurers - general

- 3.2 Insurers should provide fair consideration and assessment of any evidence submitted by policyholders to prove the presence of Covid-19 where required under their policy. As part of that, we expect insurers to have regard to the guidance provided to policyholders in this document. Where a policyholder has provided cogent evidence in accordance with the approach in this guidance, insurers should accept that evidence as sufficient to handle claims fairly. If the insurer does put forward counter-evidence in response to cogent evidence from a policyholder, the FCA considers that fair claims handling means that:
- (i) the counter-evidence will need to be clearly more cogent than the evidence put forward by the policyholder to put the burden of proof back onto the policyholder; and
- (ii) the insurer will need to clearly explain to the policyholder the basis on which it considers that, in relation to the policyholder's particular claim, the policyholder's evidence does not discharge the burden of proof in relation to the minimal requirements of the policy and the insurer's counter-evidence is clearly more cogent.
- 3.3 We encourage insurers to adopt approaches that streamline and expedite claims handling. Accordingly, this guidance does not prevent insurers from adopting an approach to claims handling that facilitates policyholders in proving the presence of Covid-19 by particular dates. For example:
- (i) insurers may wish to propose to policyholders a suitable and reasonably assessed date that Covid-19 will be deemed to have been established in one or more RPAs, with policyholders able to prove an earlier case, where applicable;
- (ii) insurers may wish to publish on their websites records of the RPAs in which cases of Covid-19 have been proved by policyholders, to assist other policyholders when making claims (and subject to complying with any applicable laws regarding the publication of this data).

## Insurers – responsibility for delegated tasks or functions

- 3.4 Where an insurer delegates any aspect of claims or complaints handling to a third party and appoints the third party to carry out any task or function in relation to this guidance, the insurer should consider SYSC 3.2.3G. In particular, the firm should ensure that the third party is aware of this guidance and applies it as appropriate for any task or function they perform in relation to relevant non-damage business interruption policies on behalf of the insurer.
- 3.5 Insurers are reminded that they cannot contract out of their regulatory responsibilities (ICOBS 2.5.3G). So, for example, under Principle 3 an insurer should take reasonable care to supervise the discharge of outsourced functions by its contractor (SYSC 3.2.4G).

## Insurers - other policyholder evidence

- 3.6 Where one policyholder has proved that Covid-19 was 'sustained', or 'occurred', or 'manifested' in a particular location in respect of their policy, we consider that the insurer should not require its other policyholders also to prove that the disease was 'sustained', or 'occurred', or 'manifested' (as applicable) in the same location when making their claim. Instead, the insurer should accept the evidence it holds for one policyholder as sufficient for the others and tell the others that they do not have to prove the presence of the disease. This communication should be given at the time that the policyholder first notifies the insurer of the claim or, where the insurer becomes aware of the evidence during the claims process, in the next communication with the policyholder as part of the claims process (for example, when the insurer updates the policyholder on the progress of their claim).

For example, where a policyholder has proved that a case occurred within 25 miles of their premises in central Manchester, we consider that policyholders with a radius of cover around their premises that substantially overlaps should be told that they do not need to evidence the disease. We do not think it would be fair to put the policyholder to the task of proving this where the insurer already holds adequate proof. More generally, the same applies when a policyholder establishes an actual or assumed case of Covid-19 (through whatever method) within a specified distance of their premises (regardless of whether the terminology refers to sustained, occurred or manifested or otherwise).

## Insurance intermediaries

- 3.7 Insurance intermediaries assisting policyholders with making claims should have regard to the guidance provided to policyholders in this document. We encourage insurance intermediaries to adopt approaches that streamline and expedite claims handling for their clients. For example, insurance intermediaries may wish to publish on their websites records of the RPAs in which cases of Covid-19 have been proved by their clients, to assist their other clients when making claims (and subject to complying with any applicable laws regarding the publication of this data).
- 3.8 Insurance intermediaries helping insurers assess claims should have regard to this guidance in the same way as insurers.

## 4 Guidance for policyholders – Specific evidence

- 4.1 Court declaration 8.2(a) states that policyholders can use, to prove the presence of Covid-19 in their RPA:

‘specific evidence of a case or cases of Covid-19 in a particular location within the relevant policy area’.

- 4.2 The Court did not provide guidance on the types of specific evidence that might be used. It would appear reasonable for a policyholder to rely on, for example, their personal knowledge of somebody within their RPA who tested positive (together with accompanying evidence) or well-established media reports of cases of Covid-19 at a care home, hospital, restaurant, school or other business in the RPA.

# 5 Guidance for policyholders – NHS death data

## Policyholders in England

5.1 Court declaration 8.2(b) states that policyholders can use:

'data published by NHS England on a daily basis recording the number of individuals who died in NHS Hospital Trusts in England after testing positive for Covid-19 (NHS Death Data), where an NHS Hospital Trust has recorded such a death on a particular date and:

- (i) all hospitals in that Trust are within the relevant policy area; and
- (ii) since inferences can be drawn from the NHS Death Data as to when Covid-19 was present in that NHS Hospital Trust, an inference may be able to be drawn that Covid-19 was present in the relevant policy area at a particular date (this may be more obvious in some circumstances than others, for example if an individual died in early March 2020 after testing positive for Covid-19, it is prima facie likely that Covid-19 was present in the local area at the time of death).'

5.2 This means that policyholders can use data published by NHS England, on a daily and cumulative basis, about the number of people who died in each NHS Hospital Trust after having tested positive for Covid-19. NHS Hospital Trusts can run one or more hospitals, and the data do not always pinpoint the specific hospital where the death occurred. Therefore, the Court's declaration confirmed that a policyholder can rely on the NHS Death Data in respect of a particular NHS Hospital Trust where all the hospitals of that NHS Hospital Trust are located within the RPA.

5.3 The policyholder can then draw appropriate inferences from the data. For example, if an individual tested positive for Covid-19, was admitted to one of the Trust's hospitals and died in early March, it is likely that Covid-19 was present in the RPA at the time of death (provided that the Trust's hospital is within the RPA, or if there is more than one hospital, that they are all within the RPA). Policyholders are free to make arguments as to other inferences for insurers to consider.

5.4 For further information about using the data from NHS England:

- (i) See paragraphs 36 to 37A of 'Agreed Facts 3 – Prevalence of Covid-19', one of the documents in the Court proceedings, and the links there to the NHS Death Data, especially <https://www.england.nhs.uk/statistics/statistical-work-areas/covid-19-daily-deaths/>. That website includes a spreadsheet entitled, 'Covid-19 total announced deaths [date]', and Tab 4 of the spreadsheet lists 'Deaths by trust'.
- (ii) The NHS website contains details of how many hospitals are in each NHS Hospital Trust, and their locations; see <https://www.nhs.uk/servicedirectories/pages/nhstrustlisting.aspx>. For example, clicking on 'North West Anglia NHS Foundation Trust' in that list, and then the 'Hospitals and clinics' tab, shows that there are currently seven hospitals in that Trust. If that Trust recorded deaths due to Covid-19, and all

seven hospitals are in the policyholder's RPA, then the policyholder can rely on those data.

## Policyholders in Northern Ireland, Scotland and Wales

- 5.5 During the consultation period for this guidance, we intend to liaise with the authorities in Northern Ireland, Scotland and Wales to ascertain whether data equivalent to the NHS death data in England and Wales is available.

# 6 Guidance for policyholders – ONS death data

## Policyholders in England and Wales

6.1 Court declaration 8.2(c) states that policyholders can use:

'weekly data published by the Office of National Statistics recording the number of deaths that have occurred in England and Wales each week by local authority or health board where the death certificate mentions Covid-19 (ONS Death Data):

- (i) where the local authority or health board was entirely within the relevant policy area; and
- (ii) taking into account all of the deaths involving Covid-19 in a particular week in a particular local authority or health board area, as representing active cases in that local authority or health board area on (at the latest) the first day of that week (and it may be that the deaths in a particular week can safely be treated as active cases many days before the beginning of that week but additional evidence would be required on that).'

6.2 This means that policyholders can rely on data published by the ONS, on a weekly basis, showing the number of deaths that have occurred in England and Wales in the year to date, including deaths where Covid-19 is recorded on the death certificate. The ONS publishes the data by local authority, health board and place of death – the ONS Death Data. The information is contained in a [spreadsheet](#) that can be filtered to show deaths involving Covid-19 by local authority or health board for a particular week of the year. Policyholders should open the spreadsheet and select the tab 'Occurrences – Pivot Table'. Policyholders should use the Cause of death drop-down to select 'Covid-19' and should also select a week number. The first week of January is Week 1. The week beginning 16 March 2020 is Week 12.

6.3 Based on the above declaration, to be able to rely on the ONS Death Data, the policyholder can only refer to the data where the local authority or health board in question was entirely within the RPA. That will ensure the relevant Covid-19 cases were in the RPA. Separately, where the RPA is entirely within, or straddles, the local authority, please see the section further below on geographical distributions, where a policyholder can use a distribution-based analysis to utilise ONS Death Data in that scenario.

6.4 The declaration at 8.2(c)(ii) refers to the fact that the infectious period for Covid-19 is, on average, 7-12 days. By proving the presence of at least one case of Covid-19 in the RPA in a particular week using the ONS Death Data, a policyholder can also prove the presence of at least one case of Covid-19 during the period immediately prior to that week (for example, if there was one case in the relevant local authority or health board in the week beginning 23 March, that proves the presence of at least one case by, at the latest, 23 March) – and possibly earlier than that, though the policyholder would need to provide additional evidence in relation to earlier dates.

6.5 For further information on the ONS Death Data, see paragraphs 38 to 40 of '[Agreed Facts 3 – Prevalence of Covid-19](#)', one of the documents in the Court proceedings.

6.6 Policyholders in Wales may also refer to the *Health in Wales website*, which provides information about the seven local health boards in Wales that deliver services in their areas. Also, Public Health Wales provides rapid Covid-19 surveillance data on its *website*, including ONS daily death data by health board (see 'ONS Deaths' tab and drop down box 'Select Wales or Local Health Board').

## Policyholders in Northern Ireland or Scotland

6.7 We consider that policyholders in Northern Ireland or Scotland may use the following data, similar to the ONS Death Data for England and Wales, to prove the presence of Covid-19 in a similar way to that described above for England and Wales:

- (i) Northern Ireland - the Department of Health releases *daily statistics* on Covid-19, including data of deaths by Local Government District. This daily update replaces the *Daily Bulletin* published by the Public Health Agency up to 19 April 2020;
- (ii) Scotland – NHS Scotland provides information about the 14 regional health boards on its *website*. Public Health Scotland provides a dashboard of information, including death information by regional health board on its *website*. The 'Trends and Demographics' tab provides two drop down boxes, one for 'Deaths (Covid confirmed)' and one which allows you to 'Select location' and choose one of the 14 NHS regional health boards, providing daily death information by health board. The National Records of Scotland also provides daily data on deaths involving Covid-19 on its *website*, including by NHS Board and Council Area of usual residence.



# 7 Guidance for policyholders – Reported cases

## Policyholders in all nations of the UK

7.1 Court declaration 8.2(d) states that policyholders can use:

'data published by the UK Government recording the number of daily lab-confirmed positive tests of Covid-19 in a particular nation, region, UTLA or LTLA (Reported Cases):

- (i) taking into account the Reported Cases on a particular date in a particular nation, region, UTLA or LTLA together with the Reported Cases two to three days either side of that day as being active on that particular date in that nation, region, UTLA or LTLA; and
- (ii) when taking into account the Reported Cases in a particular LTLA or LTLAs, the LTLA or LTLAs are entirely within the relevant policy area.'

7.2 Therefore, policyholders can rely on the UK Government's Reported Cases of Covid-19 in order to prove the presence of Covid-19 in an RPA, in certain prescribed circumstances, as explained further below.

## How to locate the Reported Cases for the Court declaration's areas

7.3 The Reported Cases are records published by the UK Government, stating for each day and cumulatively, the number of lab-confirmed positive tests of Covid-19 in each:

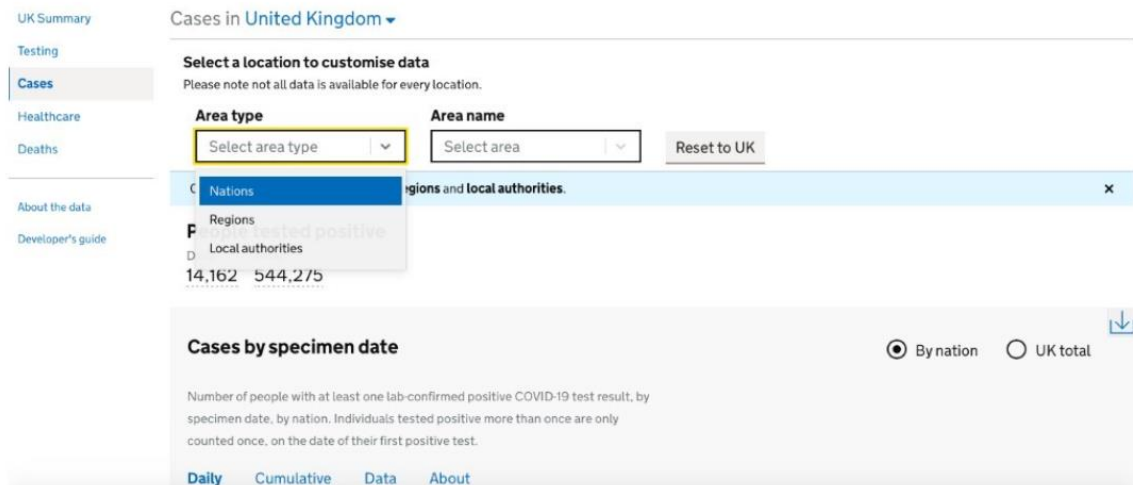
1. nation – England, Wales, Scotland and Northern Ireland;
2. region – East Midlands, East of England, London, North East, North West, South East, South West, West Midlands, Yorkshire and The Humber;
3. Upper Tier Local Authority (**UTLA**) – which includes Counties, Unitary Authorities, Metropolitan Districts and London Boroughs; and
4. Lower Tier Local Authority (**LTLA**) – which includes County Districts (Non-Metropolitan Districts), Unitary Authorities, Metropolitan Districts and London Boroughs. Examples of LTLAs are Luton and Stockport.

7.4 A map of local authority districts is available on the ONS [website](#).

7.5 Policyholders can locate the Reported Cases in the following ways:

1. When opening the 'GOV.UK, Coronavirus (Covid-19) in the UK' [webpage](#), the default shows Reported Cases on a UK-wide basis, but the drop-down arrow next to 'United Kingdom' in the heading of the webpage allows the user to search for a specific nation, region or local authority (incorporating both UTLAs and LTLAs):

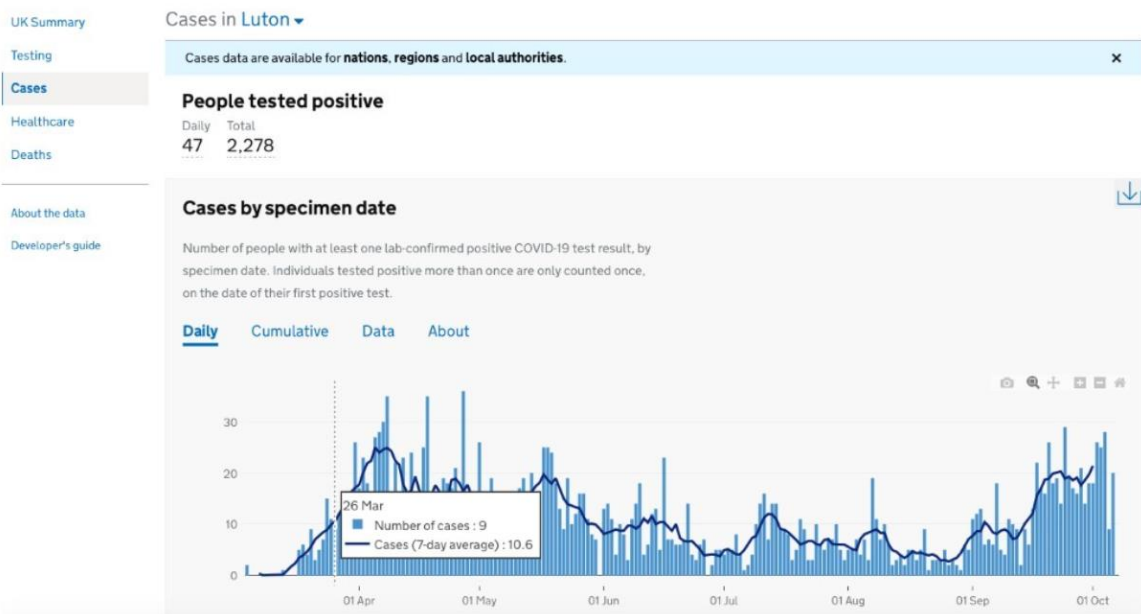
**Figure 1: How to search for a specific nation, region or local authority (incorporating both UTLAs and LTLAs)**



<https://coronavirus.data.gov.uk/details/cases> - Contains public sector information licensed under the [Open Government Licence v3.0](#).

- For example, if a policyholder wished to search for Reported Cases in the local authority of Luton, then in 'Area type' they would select 'Local authorities', and in 'Area name' they would select 'Luton'. Hovering the cursor over the chart, they can see cases for a particular date. For example, on 26 March 2020 there were 9 new Reported Cases in Luton (and the cumulative total of Reported Cases up to and including that date is available by clicking on 'Cumulative'):

**Figure 2: How to search for Reported Cases in the local authority of Luton**



<https://coronavirus.data.gov.uk/details/cases> - Contains public sector information licensed under the [Open Government Licence v3.0](#).

- Alternatively, policyholders can see the daily and cumulative Reported Cases for each UTLA and LTLA in a Gov.uk [spreadsheet](#). Under the heading 'Supplementary downloads' and under the sub-heading 'Legacy download of cases from the

previous version of the dashboard', click on 'CSV (stacked)' to open the spreadsheet. A screenshot of some of the data, shown as an example, can be found in Appendix A to 'Agreed Facts 3 – Prevalence of Covid-19', one of the documents in the Court proceedings.

## How to use the Reported Cases in proving the presence of Covid-19 in an RPA

- 7.6 Once a policyholder has located the Reported Cases for a given area, they can then rely on the Reported Cases for a specific day, and for the two to three days either side of that day, as demonstrating that there were Reported Cases of Covid-19 in that particular area, thereby proving the presence of Covid-19 in the area.
- 7.7 For example, if a policyholder wanted evidence of active cases of COVID-19 in Luton as at 26 March, then the policyholder can rely on the following data:
- (i) 26 March: 9 new Reported Cases
  - (ii) 23, 24 and 25 March (being the three days before 26 March): 33 new Reported Cases in total across the three days
  - (iii) 27, 28 and 29 March (being the three days after 26 March): 32 new Reported Cases in total across the three days.

Based on the above, the policyholder can rely on there being 74 active cases in Luton on 26 March.

- 7.8 The policyholder then needs to look at their policy to check the size of the RPA, for example a radius of 25 miles or 1 mile from the insured premises. If any single local authority they are considering is located entirely within the RPA, and has at least one Reported Case at the particular date including the three days on either side (which, for example, Luton did), then the policyholder will be able to prove the presence of Covid-19 in their RPA on that date. That is the situation whether the insured premises are located inside the local authority or outside it, as long as the local authority is entirely within the RPA.
- 7.9 If there is more than one local authority in the RPA, then the policyholder can prove the presence of Covid-19 in the RPA as long as there is at least one Reported Case at a particular date (including the three days on either side) in at least one local authority entirely within that RPA.
- 7.10 See paragraphs 20 to 31 of 'Agreed Facts 3 – Prevalence of Covid-19', one of the documents in the Court proceedings, for further information and examples, including at paragraph 24 a map with Luton as the example, and at Appendix F an administrative map of the UK from which the location of the LTLAs can be identified.
- 7.11 If the RPA is entirely within, or straddles, the local authority or region, then the approach for demonstrating the presence of Covid-19 in the RPA is more complex, and is described below, in the 'Geographical distribution methodology' section.

## Reported cases by Middle Super Output Area

- 7.12 Middle Super Output Areas (MSOAs) are small areas with an average population of around 7,200. The Government started publishing data for MSOAs relatively recently and the data is not mentioned in the Court declarations. Given its source, we

consider that the data can be used by policyholders in the same way as the Reported Cases data referred to by the Court. MSOA data is especially useful for policyholders with a 1-mile radius RPA, since it shows Reported Cases within a small geographical area.

- 7.13 Reported cases by MSOA are available on the GOV.UK [website](#). We consider that policyholders may rely on the MSOA data to prove the presence of Covid-19 in their RPA as at a particular date, where during the week in which that date falls, the MSOA data show Reported Cases.
- 7.14 For the avoidance of doubt, policyholders – including those with a 1-mile radius RPA – will not be limited to the MSOA data, and may rely on the other sources and methodologies set out by the High Court and in this guidance. That is especially because the MSOA data are only available for restricted date-ranges, and only include data where three or more cases were reported. Policyholders need only prove the existence of one case of Covid-19 in their RPA; since the MSOA data does not show where either one or two cases have occurred, policyholders are entitled to rely on other data sources as well. If there is more than one MSOA within a policyholder’s RPA, the policyholder can rely on any or all of the data from the MSOAs in the RPA.
- 7.15 The ONS has also published [data](#) showing the number of deaths involving Covid-19 in MSOAs in England and Wales, on a monthly basis. A policyholder can enter the postcode of their premises in the search field, and see the number of Covid-19 deaths in the relevant MSOA associated with that postcode, for each of the months from March to July 2020. If there has been at least one Covid-19 related death in the MSOA(s) in the policyholder’s RPA (particularly a 1-mile RPA, but not limited to that) during March 2020, the FCA considers that the policyholder may rely on that as demonstrating the presence of Covid-19 in the RPA during March. In addition, if there has been at least one death in April 2020, we consider that the policyholder may also rely on that as demonstrating the presence of Covid-19 in the RPA during March, due to the lag-time between contracting the virus and death.

## 8 Guidance for policyholders – Geographical distribution methodology

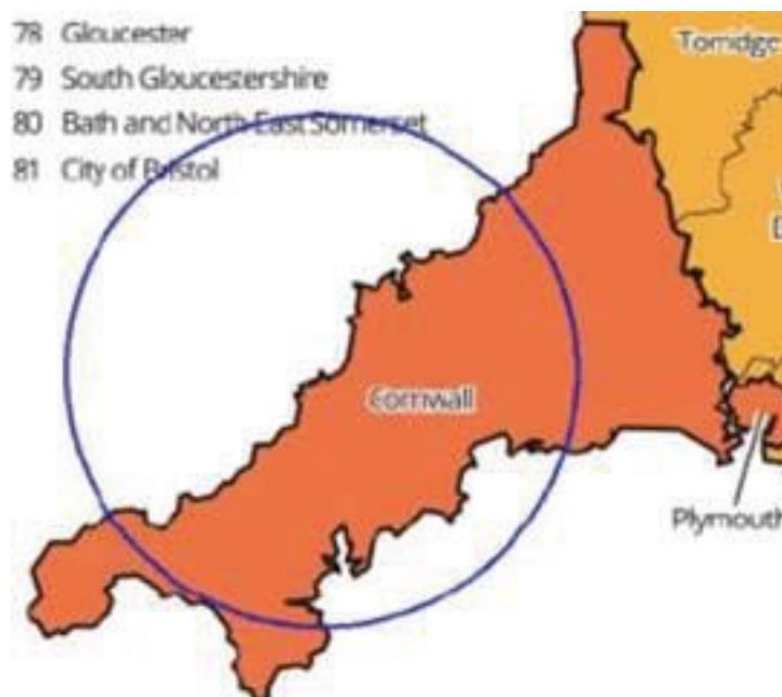
### Policyholders in all nations of the United Kingdom

8.1 Court declaration 8.2(e) states that policyholders can use:

'a distribution-based analysis – albeit absolute precision is not required to discharge the burden of proof – to demonstrate the geographical distribution of Covid-19 cases (where the policyholder relies on ONS Death Data or Reported Cases in an LTLA or another reporting area, and the relevant policy area is entirely within, or intersects, the LTLA or another reporting area).'

8.2 That declaration relates to the scenario where the RPA is entirely within, or straddles, the LTLA or region. As an example, in the map below, the 25-mile RPA from premises in Newquay (approximated by the circle) is entirely within the LTLA of Cornwall:

**Figure 3: Example of the 25-mile RPA from premises in Newquay**



Paragraph 32 of the Agreed Facts 3 – Prevalence of Covid-19 - <https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-agreed-facts-3.pdf> - Contains public sector information licensed under the Open Government Licence v3.0.

8.3 In that situation, some of the Reported Cases – or ONS Death Data – for the LTLA (in the above example, Cornwall) may have occurred within the RPA circle, while others may have occurred outside it. A policyholder can only rely on Reported Cases or ONS Death Data which have occurred within the RPA, as indicative of cases of Covid-19 in the RPA.

## Identifying Reported Cases or ONS Death Data within the RPA

- 8.4 The question is how to identify which of the LTLA's cases have occurred within the RPA circle. The Court's Declaration states that a policyholder may rely on 'a distribution-based analysis' to show the geographical distribution of Covid-19 cases (inside and outside the RPA), and that 'absolute precision is not required to discharge the burden of proof'.
- 8.5 The Court did not provide guidance on the particulars of the 'distribution-based analysis'. It is open to an individual policyholder to suggest a method – which may be based, for example, on population distribution or evidence that a hospital or other location in the RPA had cases of Covid-19. During the trial, we proposed a 'weighted averaging' approach (described below), which the Court did not specifically adopt or reject, but we consider it is a reasonable approach.
- 8.6 'Weighted averaging' operates as follows (with the description given in relation to Reported Cases, but it also applies to ONS Death Data):
- (i) Identify the Reported Cases for the LTLA for the relevant five to seven-day period.
  - (ii) Identify the location of the RPA and its population. The population of the RPA can be found by: (a) using a website showing the postcodes within a radius of a particular point (an example of which can be found [here](#)); (b) using Census data showing population per post code (an example of which can be found [here](#)); and (c) adding up the population data for the postcodes in the RPA.
  - (iii) Identify what proportion of the LTLA's population is located in the RPA, and apply an equivalent proportion of the Reported Cases of the LTLA as being in the RPA. For example, if two-thirds of the LTLA's population are located in the RPA, then regard two-thirds of the Reported Cases for the LTLA as being in the RPA.
  - (iv) Alternatively, a policyholder can refer to the geographical area of the RPA (in square kilometres or square miles) as a proportion of the LTLA, and apply an equivalent proportion of the Reported Cases for the LTLA to the RPA.

See, for further information and useful web links, paragraphs 32 to 34 of [Agreed Facts 3 – Prevalence of Covid-19](#), one of the documents in the Court proceedings.

- 8.7 Our rules require insurers to handle claims fairly. In that context, we consider the above methodology to be a cogent way of demonstrating the presence of Covid-19 in the RPA where it falls entirely within, or straddles, an LTLA. The insurer may seek to challenge whether the methodology discharges the policyholder's burden of proof, however:
- (i) The insurers in the trial sought a Court ruling that policyholders must prove the above methodology to be 'reliable', but the Court refused to make that ruling and it is not part of the Declaration. See pages 7 to 26 of the [transcript](#) of the hearing of the High Court on 2 October 2020.
  - (ii) The Court in its Declaration confirmed that 'absolute precision is not required to discharge the burden of proof', so an approximation – for example, assessing roughly what proportion of Reported Cases or ONS Death Data fall within the RPA – should be sufficient.
  - (iii) The Court in its [Judgment](#) stated, at paragraph 579: 'The concessions which have been made by the insurers are important. It is our hope and expectation

that in the light of them insurers will be able to agree on any issues of prevalence which actually arise and are relevant to particular cases.’ In addition, the FCA’s rules require an insurer to act fairly when assessing claims. Therefore, insurers are expected to provide fair consideration and assessment of any evidence submitted by policyholders.

- (iv) The Court also stated, at paragraph 578, that, although an insurer can challenge the evidence put forward by a policyholder, ‘if it does not do so, then it is much more likely that the court will find that the burden has been discharged’. Therefore, if the insurer does not put in counter-evidence, the policyholder is likely to have discharged the burden of showing the distribution of cases in the RPA.
- (v) If the insurer does put forward counter-evidence, we consider that fair handling of a claim means that:
  - the counter-evidence will need to be clearly more cogent than the evidence put forward by the policyholder to put the burden of proof back onto the policyholder; and
  - the insurer will need to clearly explain to the policyholder why, in relation to the policyholders’ particular claim, the policyholder’s evidence does not discharge the burden of proof in relation to the minimum requirements of the policy (normally just one case of Covid-19 in the RPA) and why the insurer’s counter-evidence is clearly more cogent.

# 9 Guidance for policyholders - Uplifting Reported Cases using an Undercounting Ratio

## Policyholders in the United Kingdom

### 9.1 Court declaration 8.2(f) states that policyholders can use:

'given the likely true number of cases of Covid-19 in the UK in March 2020 was much higher than that shown in the Reported Cases, an undercounting analysis – albeit absolute precision is not required to discharge the burden of proof – to demonstrate the likely number of actual cases of Covid-19 in the relevant policy area'.

### 9.2 The Court made a declaration that the true number of cases of Covid-19 in the UK in March 2020 was 'much higher' than the figure in the Reported Cases, because the Reported Cases represent individuals with a positive lab test result for Covid-19, and during March 2020, testing was focused on those who had gone to hospital with certain severe symptoms; testing capacity was low, and missed those who had not been hospitalised but still had some symptoms, as well as those who were asymptomatic. See paragraphs 2.2 and 10-13 of Agreed Facts 3 – Prevalence of Covid-19, one of the documents in the Court proceedings. The insurers in the Court case accepted that the true figure of infected was 'much higher'.

## How to estimate the likely true number of Covid-19 cases in an RPA

### 9.3 For policyholders whose business premises are located in densely populated areas, such as London, the FCA considers it is likely to be relatively straightforward to demonstrate the presence of Covid-19 in their RPA, particularly if their RPA has a large radius such as 25 miles, because there were sufficient Reported Cases to do so (even if those Reported Cases are a significant underrepresentation of the likely true number infected).

### 9.4 However, for policyholders in more rural locations, especially in early March (when testing was particularly low), there may be insufficient Reported Cases to demonstrate the presence of Covid-19 in the RPA during the relevant period.

### 9.5 In either case – whether in a densely-populated or less densely-populated area – the Court declared that policyholders can use 'an undercounting analysis – albeit absolute precision is not required to discharge the burden of proof – to demonstrate the likely number of actual cases of Covid-19 in the relevant policy area'.

### 9.6 The question is what sort of 'undercounting analysis' may be used to 'demonstrate the likely number of actual cases of Covid-19' in the RPA. Again, the Court declined to provide detailed guidance on that question, but it would involve a methodology for estimating the likely true number of infected individuals, relative to the figure in the Reported Cases – namely, the degree to which infected cases were 'undercounted'.

### 9.7 One approach proposed by the FCA in the Court proceedings would be to use an 'Undercounting Ratio',<sup>1</sup> and in our view it would be open to policyholders to propose

<sup>1</sup> Ecclesiastical/MS Amlin in their skeleton at paragraph 23 (representing other insurers on the subject of prevalence), stated: 'The use of an undercounting ratio to attempt to ascertain the likely number of actual cases of Covid-19 is



that approach to insurers. It involves finding an estimate of the likely true number of infected people in a particular region – for example, sourced from a published scientific report – and then comparing the number with the Reported Cases for the same region. The ratio of estimated cases to Reported Cases is the Undercounting Ratio. For instance, the ratio of estimated cases to Reported Cases for a particular region on a specific date in March 2020 might be 100:1. One could then apply that Undercounting Ratio to a given LTLA in the same region – if it had, for example, 3 Reported Cases, then applying the Undercounting Ratio, the likely true number of infected in that LTLA would be 300 cases of Covid-19. On that basis, the policyholder would be able to demonstrate 300 cases of Covid-19 in the LTLA on that date; and if the RPA were wholly inside the LTLA (or straddling it), then a distribution of the 300 cases along the lines discussed in Chapter 8 could be used.

- 9.8 In the Court proceedings, we identified two scientific reports as examples of estimates of the likely number infected in March, one of which was produced by Cambridge University in conjunction with Public Health England (Cambridge/PHE Report)<sup>2</sup>. The Court held that ‘the insurers have accepted that insureds can seek to rely on the specific reports identified in this case’<sup>3</sup> – being the Imperial Report and the Cambridge/PHE Report. Again, the insurers in the Court proceedings sought a ruling that policyholders be required to prove that any undercounting reports or methodologies on which they sought to rely were ‘reliable’, but the Court specifically declined to make a ruling or declaration to that effect (see paragraph 8.7(i) above).

## Policyholders in England

- 9.9 The Cambridge/PHE Report also estimated the likely true number of infected individuals during March 2020, for England and for each of England’s regions<sup>4</sup>. The work can be found [here](#), with the latest version of the report (as at the date of this Guidance) [here](#). In the ‘Infections and Deaths’ part of the report, it is possible to view the graphs based on, for example, Infection Incidence (daily totals) and Cumulative Infections (accumulated daily totals over time). For example, for the East of England region, hovering the mouse over 26 March in the ‘Infection Incidence’ graph shows a median estimate that there were 17,000 new infections that day:

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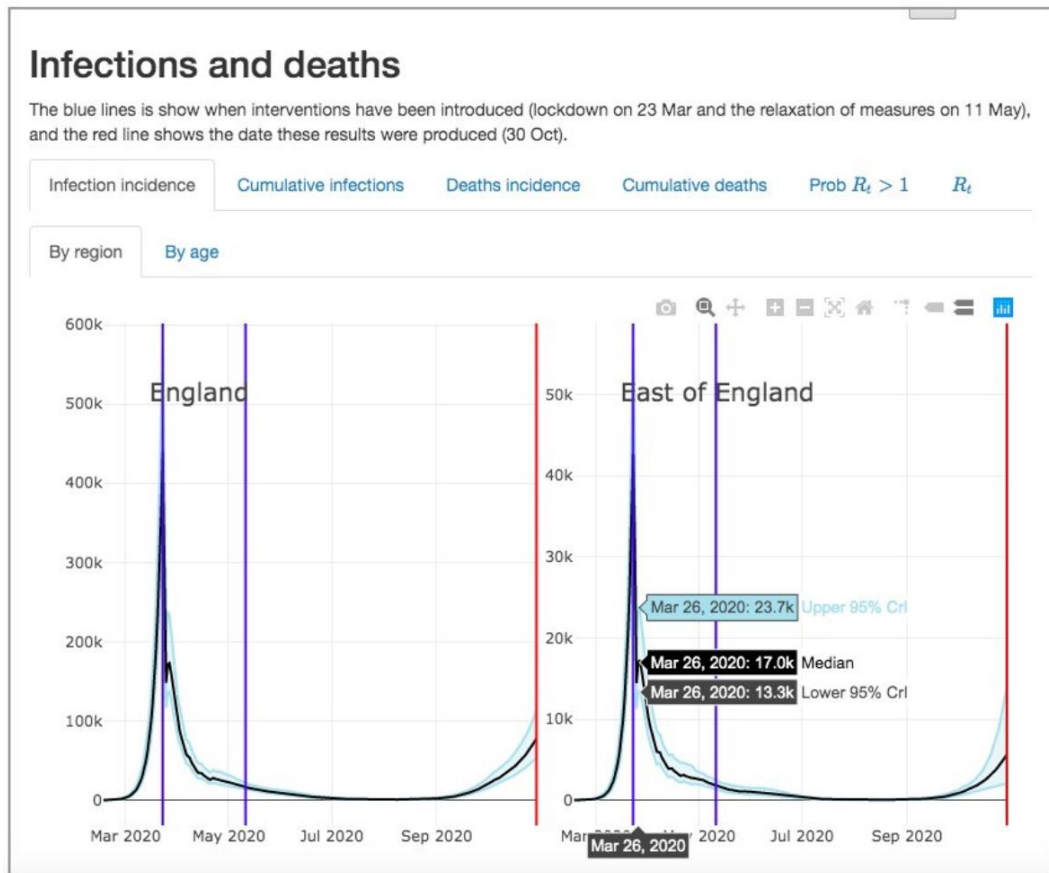
acceptable in principle, but only if an undercounting ratio can be identified that can produce a reliable (not just reasonable, see below) estimate’. As explained in paragraph 8.7(a), the Court refused to make a ruling that reliability must be proven and it is not part of the Declarations; and it remains the case that the defendant insurers in the test case accepted in principle the use of an Undercounting Ratio – this is a form of ‘undercounting analysis’, and the Court declared that an undercounting analysis could be used.

<sup>2</sup> The other report, produced by Imperial College London (Imperial Report), estimated the number of infections of Covid-19 during March 2020 in 11 countries, including the UK. Its initial report can be found [here](https://www.imperial.ac.uk/media/imperial-college/medicine/mrc-gida/2020-03-30-COVID19-Report-13.pdf) – <https://www.imperial.ac.uk/media/imperial-college/medicine/mrc-gida/2020-03-30-COVID19-Report-13.pdf> and its work on this subject was subsequently published following peer-review in Nature, a well-respected journal (see <https://www.nature.com/articles/s41586-020-2405-7>). The peer reviewing process means that the methodologies and results of the report have been scrutinised by other experts before permission has been given to publish the work in the journal. Imperial’s work influenced the UK Government in its approach to measures to be taken to prevent the spread of the virus and protect the NHS. Imperial concluded: ‘In all countries, we estimate there are orders of magnitude fewer infections detected than true infections, most likely due to mild and asymptomatic infections as well as limited testing capacity’. See also paragraphs 41 to 46 of ‘Agreed Facts 3 – Prevalence of Covid-19’, one of the documents in the Court proceedings.

<sup>3</sup> [Judgment](#) paragraph 579

<sup>4</sup> [Ibid](#), paragraphs 47 to 48 for further information about the Cambridge/PHE Report

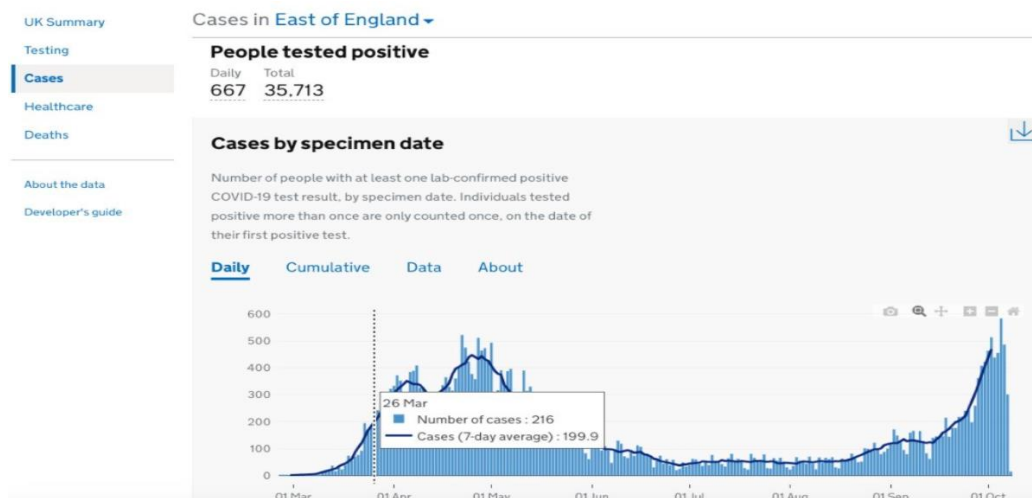
**Figure 4: Example of the 'Infections and deaths' part of the Cambridge/PHE report**



<https://www.mrc-bsu.cam.ac.uk/now-casting/report-on-nowcasting-and-forecasting-3rd-november-2020/>

9.10 By contrast, the figure for new Reported Cases for 26 March for East of England was 216:

**Figure 5: Example of the new Reported Cases for East of England on 26 March**



<https://coronavirus.data.gov.uk/cases> - Contains public sector information licensed under the [Open Government Licence v3.0](https://www.ogp.gov.uk/).

- 9.11 Therefore, comparing the figure of 17,000 estimated cases to 216 Reported Cases, the Undercounting Ratio for East of England for 26 March 2020 is 78:1.
- 9.12 If a policyholder wished to estimate the likely true number of infected people in a specific LTLA in East of England on a particular date, they could apply the ratio of 78:1 to the Reported Cases for that LTLA on that date, and if the RPA were wholly in the LTLA or straddling it, the policyholder could then apply a distribution analysis as described above.

At the date of this Guidance, we are not aware of any reports which have prepared estimates of the likely true number of Covid-19 cases at LTLA level. Our rules require insurers to handle claims fairly. In that context, we consider that a cogent method for deriving an estimate at LTLA level is by extrapolating from the Cambridge/PHE regional estimates, in the manner described above. To date, the insurers in the Court proceedings have not put forward any evidence as to estimates. Again, as per the Court's declaration, 'absolute precision is not required', and based on the Court's judgment, insurers will be expected to reach agreement with policyholders as to a suitable undercounting analysis where one is sought. It is open to an insurer to put forward counter-evidence. We set out in paragraph 8.7(v) the standard that we consider such counter-evidence should meet.

## Policyholders in Northern Ireland, Scotland and Wales

- 9.13 The Imperial Report, referred to in paragraph 9.8 and footnote 2 is relevant to the whole of the UK. During the consultation period for this guidance, the FCA intends to liaise with the authorities in Northern Ireland, Scotland and Wales to ascertain whether any reports materially similar to the Cambridge/PHE report are available for those nations.

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