

Insurance Insights

How will Liability Insurance respond to COVID-19?

Key takeaways

- Insurer and reinsurer responses to COVID-19 are continuing to evolve.
- Critical to liability claims is likely to be the timing and content of government directives and an insured's response to them.
- An Insured will need to defend their actions in preventing the spread of the disease.
- The number and types of claims to emerge is still being revealed.
- Delays in Court hearings is inevitable.

Existing Liability Claims - Court Delays

During this time of uncertainty, one certainty has emerged - there will be delays in having cases heard and resolved.

Courts are operating, but far from capacity. With more people (including judges) working from home, delays in progressing matters is inevitable. Regional Court closures, reduction in daily Court listings and staggered listing times to allow for social distancing has reduced the number of cases able to be heard.

COVID-19 has resulted in the indefinite suspension of civil jury trials in Victoria. The Victorian Court of Appeal has recently ruled that civil jury trials, during social distancing, will be the exception rather than the rule. In deciding whether a matter should proceed as a jury trial, the courts will take, among others, the following factors into account:

- whether the matter has been fixed for trial, and if so how long;
- the likelihood of the matter being able to be heard as a jury with an appropriate timeframe; and
- the nature of the issues in the proceeding.¹

¹ *Cossari v Wells* [2020] VSCA 133, Beach, Kaye and Osborn JJA, at [39].

Parties could be disadvantaged by this situation if they feel that their case is better suited to a jury. With trial dates delayed, file duration will also be pushed out.

The Victorian courts have indicated that criminal trials will recommence in July using two court rooms to safely accommodate jurors. This in turn, will reduce the availability of court rooms for civil trials. There will be pressure from the Courts to continue conducting civil trials via Zoom due to the shortage of Courtrooms.

Future Liability Claims

While the effect on the insurance industry is continuing to evolve, liability insurers may experience new types of claims.

In late March 2020, the Commonwealth, states and territories introduced Stage 3 shutdown restrictions, limiting business operations, public gatherings and enforcing a largely stay at home directive. From late March, events, concerts, sports clubs, tennis, gyms and fitness studios ceased to operate by compulsion. Other businesses continued to operate, by requiring employees to work from home, isolating them from fellow employees and the public. Some businesses were unable to have staff work from home, such as supermarkets, food outlets, hairdressers, pharmacies and many health practitioners.

- In this context, should a reasonable occupier or business operator have introduced their own precautions (such as social distancing, handwashing, limiting numbers, preventing access, staff training, warning signs and masks) prior or during government-imposed restrictions?

Subject to claimants meeting relevant injury thresholds, claims may be made against occupiers and business operators for failing to adequately protect visitors, customers and employees during COVID-19 government imposed restrictions.

- Have continuing businesses taken reasonable precautions to protect visitors, customers and employees against COVID-19 as the government directives have changed?

There is no doubt precautions are increasingly visible, such as protective screens in supermarkets, hand sanitiser dispensers and floor markers at 1.5 metre intervals in many shops and businesses. There are also numerous signs warning the public to take precautions in retail and public spaces. Needless to say, business operators and occupiers who do not keep up with best practice are placing themselves at risk of a potential claim.

A return to work with physical distancing and hygiene is part of step 3 of the Commonwealth Government's plan. Compliance with procedures and policies for responding to COVID-19 will be critical. Guidelines and protocols issued by key industry associations, professional bodies and government across sectors will also be relevant for insurers to consider in assessing any claim against commercial or residential occupiers.

COVID-19 claims may be difficult to prove. That is, how can a person prove they contracted COVID-19 at a particular location? It will be interesting to see if and how the case law develops in this regard. It will also be interesting to see how the COVID-19 App and/or government agencies are approached in order to provide evidence which tracks the most likely source of a person contracting COVID-19.

The number of people who have contracted COVID-19 in Australia has been relatively small in comparison with the predictions made only weeks ago, so the volume of public liability claims is likely to be lower than estimated at the start of the pandemic. Even so, several class actions are emerging in relation to the infections on cruise ships, in nursing homes, and potentially schools, hospitals and hotels.

Liability policy exclusions

The Business Interruption (BI) exclusions that are currently the subject of much media speculation do not appear to apply to general liability policies. Unless the subject of a specific exclusion, a general liability insurance policy is unlikely to exclude cover for a pandemic or virus-related event such as COVID-19. Whether the policy responds depends upon the relevant policy wording and the facts.

Conclusion

COVID-19 has presented significant challenges to business owners and operators which will likely flow through to liability insurers. However, as has been the situation for regular liability claims, claimants will still need to prove that the defendant has breached its duty of care and that the alleged breach is the cause of the plaintiff's loss. It is likely that both breach (example, has a business complied with Guidelines?) and causation (example, how does a claimant prove s/he contracted the virus at the Insured's premises?) are likely to be hotly contested issues in future claims.



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