



Thoughts on Potential Liability Claims and Lawsuits Post-COVID-19

Tracey Christianson, Executive Director

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What kinds of liability claims might we expect post-COVID-19?

All discussions included in this paper are hypothetical situations and true coverage analysis cannot be done until we have actual claims and lawsuits, with consideration to the varying allegations and facts they will contain.

Claims from employees and their families for infections and death

As of April 2, 2020, Labor and Industries (L&I) website states it will accept workers compensation claims for COVID infection and death as workplace injuries for first responders and medical personnel who have been quarantined by a physician or public health officer. On L&I's website, under the Questions section, they answer the following question:

Can COVID-19 ever be allowed as a work-related condition?

Under certain circumstances, claims from health care providers and first responders involving COVID-19 may be allowed. Other claims that meet certain criteria for exposure will be considered on a case-by-case basis. In most cases, exposure and/or contraction of COVID-19 is not considered to be an allowable, work-related condition. Even for those claims L&I will accept, there must also be a documented or probable work-related exposure.¹

Without the protections afforded by workers compensation, employees who contract COVID-19 (along with families or estates) may attempt to hold the employer responsible. Causes of action might include simple negligence arguments to more complex intentional, willful, or wanton acts. Alleged damages may include medical costs related to bodily injury, loss wages, wrongful death, pain and suffering, future wage earnings, and loss of consortium.

What evidence is there to suggest this might happen?

Lawsuit already filed against Wal-Mart - Wal-Mart has already been served with a wrongful death suit related to an employee's death in a Chicago-area store. According to a news article, the suit, brought by the employee's family, alleges management at first ignored symptoms exhibited by the employee and other employees that were consistent with COVID-19. The employee was sent home on March 23 but found dead two days later. In an emailed statement to the news source, the sister of the employee said, "For weeks, my brother and his coworkers worked at Walmart without masks or gloves while thousands of customers came in every day. There was no enforced social distancing at the time and inadequate paid leave to make sure people weren't going to work sick."² Securing a copy of the lawsuit, allegations from the estate are wrongful death actions, negligence, violation of the duty of care, and willful and wanton

¹ Source: Washington State Department of Labor and Industries website, <https://www.lni.wa.gov/agency/outreach/workers-compensation-coverage-and-coronavirus-covid-19-common-questions>, accessed on April 2, 2020.

² Source: CBS news article, <https://www.cbsnews.com/news/coronavirus-walmart-sued-for-wrongful-death-by-family-of-worker-who-died-of-covid-19-complications/> accessed on April 9, 2020. Copy in Appendix.



disregard for the safety of others. The plaintiffs have sued Wal-Mart and the retail shopping center management company. For more information on the lawsuit, see the Appendix.³

Wrongful Death Statute Expansion in Washington Allows More Individuals to Sue – The Washington State Legislature recently expanded the wrongful death statutes. Wrongful death is when the death of a person is caused by a wrongful act, neglect, or default of another. The expansion, in conjunction with Washington’s existing joint and several liability laws, significantly broaden liability exposures for all entities, especially those with deep pockets. The US residency requirement was eliminated, and allowable beneficiaries expanded. Secondary beneficiaries no longer have the burden of showing financial dependence on the deceased to seek recovery. It also expands the available damages to include pain and suffering, anxiety, emotional distress and humiliation. For more information on the wrongful death statute expansion, see articles in the Appendix.⁴

Defenses

Should claims of this nature be sought there are defenses that should be available. For example, these claims would have to establish the same nexus to their employment to be a work-related injury. If that is part of the claim, there are defenses established in Washington law under Title 51 that may be available.

RCW 51.04.010

Declaration of police power—Jurisdiction of courts abolished.

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. **The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.**

It is not clear that a COVID-19 related infection or death will meet this definition.

³ Evans vs. Wal-Mart and J2M Evergreen, LLC, Case 2020L003938, Cook County, Illinois. Complete copy in Appendix.

⁴ See Articles in Appendix including 2020 04 09 ARTICLE Bullivant Houser entitled *Washington Enacts New Law Expanding the Scope of Wrongful Death Beneficiaries*, May 2019, accessed April 9, 2020; 2020 04 09 ARTICLE Washington State Hospital Association entitled *Changes to Wrongful Death Laws*, May 28, 2019, accessed April 9, 2020, and 2020 04 15 ARTICLE Foley & Gardner COVID-19 in the Workplace Lawsuits Already Coming. Copies in Appendix.



RCW 51.08.100

"Injury."

"Injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.

And, there is another RCW that says:

RCW 51.24.020

Action against employer for intentional injury.

If injury results to a worker from the **deliberate intention** of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

I asked one of our defense attorneys, Kris Bundy, from the Kulshan Law Group, if there have been any cases that helps to define this area of intentional injury. Here is what he had to say:

There's a Supreme Court case, *Birkland v. Boeing*, 127 Wn.2d 853 (1995) that expanded the intentional tort exception under Title 51. In summary, Boeing was exposing workers to chemicals that it knew would make them sick. The court found this was enough to meet the intentional tort exception, saying that "actual knowledge that an injury was certain to occur and willfully disregarding that knowledge" is enough. **Given the extreme infectious nature of this virus, I imagine some plaintiffs' lawyers will try this theory on behalf of an affected driver.**

So, there is a narrow theory for infected drivers to try to make a tort case. But they still have huge causation burdens and the current circumstances are so different with transit agencies (e.g., we're in a worldwide emergency and public transportation is required to operate and is a vital resource for the public, particularly the poor).⁵

What will be important to defend such matters?

We may be fortunate to be able to exit lawsuits with legal maneuvering (summary judgement motions). But if for some reason a claim survives that may go to a jury then **it will take a good record of what the transit agency did, when they did it, and why to help keep perspective for a jury showing what the transit agency knew at that moment in time and explaining why they took or did not take a certain action.**

⁵ Kris Bundy, Kushlan Law Group, email dated April 1, 2020.



Most transit agencies are tracking costs. WSTIP recommends you also track your decisions including timing of decisions, circumstances surrounding that decision, guidance you used to make your decision, and how and to whom the decision was communicated. It would be best to do that now, in real time, rather than re-create the timeline after this crisis has passed.

Coverage, Exclusions, and Limits for Wrongful Death Claims

WSTIP Coverage Documents - If allegations are like the *Evans v. Wal-Mart* lawsuit, coverage would likely fall under the WSTIP General Liability Coverage Document. This coverage will pay for losses specific to bodily injury, and according to our coverage attorney, it likely will meet the definition of an occurrence. Also, there is carve-back in exclusion B which says:

Workers Compensation – Any obligation under a workers' compensation law or any similar law. **This exclusion does not apply when an employee of *member* is injured in the course of such employment where it is determined that the employee is not entitled to workers' compensation benefits.**

There are exclusions for intentional acts, fine or punitive damages, and terrorism. It is not clear if any of these exclusions would come into play. The limits of liability for one occurrence is the limit shown on the Coverage Summary, and assuming a date of loss potentially within 2020, would be \$25 million.

Although the allegations asserted in the Wal-Mart lawsuit might sound like a wrongful act claim there is an on-point exclusion for bodily injury that appears to be a total bar for coverage within that document. Again, staff are making a lot of assumptions here, and a true analysis cannot be done until a claim is presented.

Evaluation of GEM, Reinsurance and Excess Insurance Agreements – As I was researching this topic, I did some looking at how traditional insurance carriers are responding to claims and lawsuits. I saw a trend that traditional insurers are using the “force majeure” clause to deny claims. Force majeure is defined by Black’s Law Dictionary as an “event or effect that can be neither anticipated nor controlled.” A force majeure clause allocates risk among the contracting parties if performance becomes impossible or impracticable because of such an event.

What evidence is there that this might happen? There is a class action lawsuit in Canada against top insurers for using force majeure clauses to deny coverage for claims, although it appears mostly related to business interruption claims.⁶

I asked Brian White to review all our reinsurance and excess insurance agreements to determine if they have force majeure clauses. His review did not find any within the agreements WSTIP has with their reinsurance or excess insurance carriers.

⁶ Insurance Journal article entitled *Canadian Insurers Hit with Lawsuit on Refusal to Pay COVID-19 Business Interruption Claims*, accessed 2020 04 15. Copy in Appendix.



What other claims might we expect post-COVID-19?

Claims from passengers for damages for infections and death

Passengers that contract COVID-19 may attempt to hold the transit agency responsible for contracting the virus while on their premises or on their bus. Claims might get stronger if they find out their bus driver drove while having an active infection, or maybe the bus was cleaned by transit agency staff that later contracted COVID-19 thereby confirming the bus as a possible infection site. These kinds of claims will be negligence-based claims.

Highest Degree of Care

It is well settled that public transportation companies are common carriers and have an enhanced duty of care toward its passengers.

“A bus system owes the highest degree of care toward its passengers commensurate with the practical operation of its services at the time and place in question.” *Price v. Kitsap Transit*, 125 Wn.2d 456, 465, 886 P.2d 556 (1994).

However, case law also says that this duty is not strict liability.

“A common carrier is not the insurer of its’ passengers safety, and negligence should not be presumed or inferred from the mere happening of an accident.” *Tortes v. King County*, 119 Wn. App. 1, 8 (2003).

What evidence is there to suggest this might happen?

Plaintiff firms forming COVID-19 Task Forces – It only takes a quick google search on COVID-19 lawsuits to see that many plaintiff firms have formed new practice groups around COVID-19. You may wonder if you as a governmental entity did all it could to prevent the spread of COVID-19.

Lawsuits already filed - Lawsuits have already been filed across multiple sectors. Of note, lawsuits have been filed against Princess and Costa (owned by Carnival) cruise lines and against airlines. Some Florida residents are already suing China for failure to disclose the crisis in a timely manner. Law firms detail more expectation of cases such a class action against employers from layoffs, furloughs, medical leaves, and another potential set of claims could be brought by employees for alleged failure to keep workplaces safe from the pandemic (back to our first topic). Basically, law firms are lining up to make sure they get a piece of the COVID-19 pie in whatever form it takes.

Defenses

Negligence cases from bus passengers will have numerous legal challenges, such as actually proving a transit agency’s failure to take precautions caused infection. The same defenses as listed above from the employee point of view hold true for bus passengers attempting suit.



What will be important to defend such matters?

We may be fortunate to be able to exit lawsuits with legal maneuvering (summary judgement motions). But if for some reason a claim survives that may go to a jury then **it will take a good record of what the transit agency did, when they did it, and why to help keep perspective for a jury showing what the transit agency knew at that moment in time and explaining what actions they did or did not take (see above).**

Most transit agencies are tracking costs. WSTIP recommends you also track your decisions including timing of decisions, circumstances surrounding that decision, guidance you used to make your decision, and how and to whom the decision was communicated. It would be best to do that now, in real time, rather than re-create the timeline after this crisis has passed.

Coverage, Exclusions, and Limits for Claims

WSTIP Coverage Documents - We do not have a lawsuit for a transit agency's negligence from a passenger for failure to provide safe transportation. Therefore, it is difficult to predict how to interpret the two liability coverage documents and which would apply. However, my initial guess is that, just in the like in the case of the employee suing their employer, the general liability document would apply. Occurrence is defined term within that document. Occurrence means an accident, including continuous or repeated exposure to the substantially the same general harmful conditions, which result in bodily injury. The word accident is not defined and therefore a general definition can be applied. Accident may mean any event that happens unexpectedly without a deliberate plan or cause. For more definitions of accident, see this footnote.⁷

Joint and Several Liability – Can we argue that joint and several liability does not apply? Information about COVID-19 was and is widely available and individuals should be held accountable for their own actions including the choice to ride public transportation. Therefore, there will be an argument that joint and several liability will not apply which likely will be helpful to the member's defense.

What other liability claims might we expect post-COVID-19?

Claims from passengers for denying service, forcing wearing of face coverings or who knows what other non-bodily injury type claims.

⁷ **Definition of Accident from Dictionary.com accessed April 9, 2020.** *noun*

- an undesirable or unfortunate happening that occurs unintentionally and usually results in harm, injury, damage, or loss; casualty; mishap: *automobile accidents.*

- *Law.* such a happening resulting in injury that is in no way the fault of the injured person for which compensation or indemnity is legally sought.

- any event that happens unexpectedly, without a deliberate plan or cause.

- chance; fortune; luck: *I was there by accident.*

- a fortuitous circumstance, quality, or characteristic: *an accident of birth.*



Transit agencies have reduced service, gone to reservation service, reduced destinations to essential trips, and denied rides to (particularly dial a ride) passengers that admit to COVID-19 positive. The question will be: has the transit agency discriminated against a passenger because of a perceived disability? Has the agency violated a passenger's civil rights or the ADA?

What evidence is there to suggest this might happen?

We have defended claims and lawsuits associated with other kinds of agency policies, sometimes successfully and sometimes not. A particular case in point was a passenger that alleged the transit agency's policy regarding no-shows was discriminatory. We successfully defeated that the suit and the ludicrousness of it lends credence to other individuals pursuing civil rights actions.

Defenses

FTA Circular (FTA C 4710.1, November 4, 2015) at Section 2.2 Nondiscrimination, cites 49 CFR Part 37.5 (a), which states "no entity shall discriminate against an individual with a disability in connection with the provision of transportation service."

The circular provides as examples of discrimination "refusing to provide service because of a person's disability" and "requiring individuals with disabilities to use seat belts or shoulder harnesses when other riders on the same vehicle are not also required to do the same."

Electronic Code of Federal Regulations, which indicates it is "current as of April 1, 2020" under Part 37 Transportation Services for Individuals with Disabilities (ADA), at section 37.5 (h) states:

It is not discrimination under this part for an entity to refuse to provide service to an individual with disabilities because that individual engages in violent, seriously disruptive, or illegal conduct, **or represents a direct threat to the health or safety of others**. However, an entity shall not refuse to provide service to an individual with disabilities solely because the individual's disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience employees of the entity or other persons.

Appendix D to Part 37.3 states:

The definition of "direct threat" is intended to be interpreted consistently with the parallel definition in Department of Justice regulations. That is, Part 37 does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.



It will be important to document your decisions, timing of those decisions, how they were communicated and how they were carried out. As mentioned previously, it will be important to develop that timeline as the crisis progresses. It will be very difficult to recreate such a thing in hindsight when the landscape is still changing.

Coverage, Exclusions, and Limits for Negligence Claims

Denying service to passengers can result in violations of a passenger's civil rights and violations of the ADA. These claims may more likely fall under the Public Officials Liability Coverage Document because it is an agency's decision and denial of civil rights or the ADA that may be causes of action. We have defended passenger civil rights violations pre-COVID-19. The Public Officials Liability Coverage Document is a claims-made policy. The limits of liability on the policy is the most WSTIP will pay regardless of the number of covered persons or the number of suits and claims. For 2020, that is \$25 million. Member agencies have a \$5,000 deductible.

What Does this All Mean?

As time evolves, we anticipate claims and lawsuits of a like we have not seen before. WSTIP anticipates coverage for defense, however, coverage analysis cannot be done until we have an actual case in hand. Until then, all we can do is speculate and watch developments. We can anticipate that agencies will need to provide detailed documentation about their actions (and even decisions not to take action) for every move during this crisis. The more those decisions can be in tandem with each other the more defensible the position may be.

For further claims, I have included in the Appendix a list of issues AGRIP has compiled that might be claims related,⁸ a good article from Gen Re entitled *COVID-19: Sorry, All our Actuarial Projections Were Wrong*,⁹ and a very well-done piece of work on this topic from our actuarial firm, PWC, entitled *COVID-19 and its impact on P&C insurance*.¹⁰ Not all of coverages or situations outlined in these articles would pertain to public transportation/transit.

One concern I have, is how the traditional insurance market will react should claims come our way that start hitting their layer. It may make an interesting renewal for 2021, and I expect we could see new limits or new exclusions related to pandemics in the reinsurance and excess insurance agreements.

/tc

⁸ AGRIP, *COVID-19_Claims_Considerations*. Accessed 2020 04 15. Copy in Appendix.

⁹ ARTICLE Gen Re, *COVID-19: Sorry your actuarial projections are all wrong*. Accessed 2020 04 15. Copy in Appendix.

¹⁰ REPORT PWC, *COVID-19 and its impact on P&C insurance*. Exposed P&C coverages. April 16, 2020. Copy in Appendix.