COVID-19 LIABILITY – WILL YOUR BUSINESS BE EXPOSED?

Tour operators and cruise ship operators have a potential financial exposure if a customer contracts COVID-19 whilst on holiday. It is almost certain that we will see claims being brought against tour operators or cruise ship operators, by customers who allege that they contracted COVID-19 whilst staying in a hotel or on a cruise ship, where there are allegations of failings on behalf of tour operators, cruise ship operators or their suppliers.

WHAT IS THE LEGAL BASIS FOR POTENTIAL LIABILITY?

Any potential Claimant will need to demonstrate that the exposure to virus has occurred at the accommodation provided as part of the holiday. Where sophisticated track and trace systems are in place that might prove straightforward. We have seen several recent examples of defined outbreaks where cruise ships, workplaces and universities have been identified as the centres for outbreaks. Whilst customers travel to and from accommodation and often leave the accommodation during the holiday and this provides for other possible sources of exposure, the courts look at such matters on the balance of probabilities. As such, a well-publicised outbreak at a hotel/ship is likely to attract the attention of claimant law firms.

If a claimant proves a failure to take reasonable care by the accommodation supplier that has caused his/her illness, Regulation 15 of the Package Travel Regulations 2018 extends the tour operator's liability to cover the failings of its suppliers, and liability will attach from breach of contractual duty. Ultimately, as a tour operator or cruise ship operator, you are heavily reliant on your supplier's actions during any illness outbreak or to avoid an outbreak occurring in the first place.

With regards potential claims relating to COVID-19, much can be drawn from an analysis of previous legal cases relating to Norovirus to assess the likely basis on which future claims may be brought.

Norovirus has long been a recognised risk associated with cruise ships, which is why the cruise industry was many years ahead of other leisure sectors in terms of outbreak management. As far back as 2007, official guidance was published for cruise ship operators on controlling Norovirus outbreaks, which was drawn from industry best practices at the time. Some core measures such as quarantine, hand hygiene and monitoring illness numbers are now the topics of daily conversation. This week we have seen the publication of new Covid 19 guidance for cruise ship operators from the UK Chamber of Shipping arising from a collaborative approach from operators looking at best practice.

Hotels have, of course, seen their fair share of Norovirus outbreaks over the years. Whilst most hotels have sophisticated outbreak management plans in place, tour operators have often still been involved in defending expensive group action litigation. Whilst the legal liability regimes for cruise ship operators and tour operators are very different, some of the fundamental principles are the same or similar.

There are two important Norovirus cases which demonstrate the way in which COVID-19 cases may be approached by the courts in future: ***Nolan & Others v TUI UK Ltd [2016] 1 Lloyds Rep 211*** and ***Swift & others v Fred Olsen Cruise Lines (2015) HHJ Robert Owen QC unreported.***

In ***Nolan***, which was a win for the cruise line, the court concluded that there was no liability largely due to two key factors. (1) there was an adequate outbreak management plan in place, and (2) that the outbreak management plan was implemented with due care and skill.

On the other hand, in ***Swift***, which was a loss for the cruise line, the court also found that the outbreak management plan itself was adequate (although there was some debate about its complexity). However, despite the huge amount of supporting documentary evidence produced by the cruise ship operator, the court found there had been a failure to adequately implement the plan, which had in turn materially increased the risk of infection of those on board. There were conflicting documents from the ship about implementation of their outbreak plan. The Court of Appeal declined to overturn that decision. Liability attached.

These two cases highlight the importance of documentation, clarity of outbreak management plans and the implementation of the plan by the management team. Having a hugely detailed and complicated outbreak management plan is of no benefit if the staff implementing it do not understand it, and/or if the compliance with the plan is not appropriately documented.

As a tour operator or cruise ship operator, if you are to successfully defend a claim, you will need to show that your suppliers had a good outbreak management plan in place, and they implemented the plan properly. You then need to be able to prove that it was implemented properly. If your business (or its suppliers) falls at any one of these hurdles, it is likely to be more difficult to successfully defend a claim.

However, even with the best measures in place, there can be no guarantee that customers will not be infected as this is simply the nature of a highly infectious viral illness, whether it is Norovirus or Coronavirus. That was expressly recognised by the judge in ***Nolan***. The duty owed is not an absolute one but, rather, whether reasonable steps have been taken to reduce the risk of exposure to the illness as far as is reasonably practicable. The Claimant in any given case still needs to prove the breach of contract, failure to take reasonable care &/or negligence.

We have seen attempts by those representing Claimants to circumvent that approach by trying to demonstrate, with expert evidence, that Norovirus originated from food served in the hotel. The purpose of that tactic is to seek to take advantage of the regime of strict liability laid down ***in Wood v TUI Travel plc t/a First Choice [2017] EWCA Civ 11***. (Note that case does not apply to liability on cruise ships). Studies have shown that the risk that food presents as a transmission route for Norovirus is quite low. Cold food theoretically presents as a contact surface area, but the most common transmission routes are still person to person whether directly or indirectly via contaminated environments or surfaces. The burden of proving all that rests with the claimant. Of course, at this stage, there are no studies relating to COVID-19 on this subject and it is a different type of virus. It may be an argument that is deployed by claimants at some stage in the future if there are studies which support that possible transmission route.

WHAT IS THE LIKELY VALUE OF THESE CLAIMS?

This to me is the most concerning feature that distinguishes a potential financial exposure to a claim for COVID-19 as opposed to that of a viral gastric illness claim. Whilst the vast majority of those infected with COVID-19 appear to have mild symptoms or no symptoms, the risk of an individual claim of significant value is higher. We have seen a small percentage of high value respiratory illness claims resulting from exposure to legionella bacteria where long recovery periods, long periods in hospital on ventilation and in some cases sadly death have meant that claim value is significant. COVID-19 patients in the high-risk categories exposed whilst staying in accommodation may generate high value claims and you take your victim as you find them.

The risks of financial exposure to group actions will, really, only apply to those companies with large numbers of customers in one location at any one time but the one-off large losses are difficult to predict and could expose any business to significant losses.

HOW CAN YOUR BUSINESS PROTECT ITSELF FROM CLAIMS?

There are several ways your business and its suppliers can mitigate the risks of claims being made by customers arising from a coronavirus (or any other) outbreak. As with all risk, the extent to which you will implement any of these will depend on the nature of your business, customer demographic, your relationships with customers, and suppliers and the economics of any mitigating factors. We would recommend that you consider each supplier's approach to the following:

(i) Does the supplier have an outbreak management plan in place? How are you able to establish whether it is adequate or not? Have the supplier's staff have been well trained in implementing it and has it been communicated properly to their staff? Do the staff understand their role in the event of an outbreak?

(ii) Is your supplier maintaining adequate records of that implementation and training?

(iii) Do you have a process in place so that, in the event of an outbreak, you are able to work with the supplier to ensure that they are implementing the outbreak management plan properly? Are you able to monitor that they are keeping appropriate records of the actions undertaken, including when they were taken and by whom?

(iv) Are you confident that the supplier will notify you of any outbreak promptly?

(v) If you have a limited relationship with a supplier (either because you do not use them often or because you have only recently started using them), how will you be satisfied that their outbreak management procedures are in place and that all of the above could be adhere to?

(vi) What level of risk are you prepared to accept if the supplier does not have these policies and is not willing or able to create and implement them? This will be particularly relevant in parts of the world where their approach to risk management may be different.

We fully appreciate that there are few easy and straightforward answers to any of these questions and operational challenges abound. Your approach with your suppliers will very much be impacted by your ability and willingness, as a business, to accept an increased amount of risk (financial or reputational) should an outbreak occur involving your customers.

From a practical perspective, there are several potential avenues for your business to help with managing this risk:

- Traditionally, one of the ways you would mitigate this risk would be through insurance. At the time of writing, however, the current appetite in the insurance market to cover this type of risk is limited. Some insurers are excluding cover for COVID-19 related injury or illness as well as issues relating to cancellations arising from COVID-related events. As such, insurance may not provide a complete solution for this type of risk in the short term. That position may change, should a safe and effective vaccine be developed, but for the moment businesses need to urgently look to reduce risk in other ways. Regardless of whether you have insurance or not, you still need to take steps to reduce the risk of a claim being made, it being successful and you being in a position to secure a recovery from your supplier where appropriate.

- If you do not have in-house resource available to review supplier documents and processes, you could look to outsource this work to hygiene consultants. Several hygiene consultancies have been advising hotels (and tour operators) and have developed COVID-19 outbreak management plans to allow for the safe opening of hotels in 2020. No doubt a lot will have be learned from this summer to further refine those plans for next year. There are various certifications and kitemarks for those hotels who have these outbreak control measures in place and that may give you a greater degree of comfort around those suppliers.

- Your contractual arrangements with your suppliers are also a key part of how you can manage the financial impact of a claim being made against your business. Lucy Schofield, our Commercial Lawyer, will shortly be releasing an article which will consider that further. Should you wish to discuss this with us in the meantime please do not hesitate to contact us.

It is important to note that, if your business does not have insurance to cover claims arising from COVID-19, you may still have claims made against you. We have extensive experience in defending these types of claims on behalf of tour operators, cruise operators and their insurers.

If you would like to discuss topic further please contact Mark Fanning mark.fanning@milesfanning.co.uk

Mark is the owner and Managing Director of Miles Fanning Legal. He has almost 30 years of experience as a solicitor. He specialises in handling complex international large loss claims and marine casualty claims, most of which are significant high-profile claims involving complex issues of law and jurisdiction. Mark holds a Highfield International - Supervising Food Safety Level 3 qualification and has considerable experience in defending group action claims involving food safety and hygiene issues and is no stranger to a ship's galley/kitchen. He has also been involved in defending claims involving fraud, fundamental dishonesty and gastric illness.