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Workers' Compensation, Return to Work, Behavioural Health and COVID-19 in Australia

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The COVID-19 pandemic has highlighted a range of challenges for the participants in Australian workers' compensation schemes. Although there are some jurisdictional differences in legislation operating at sub-national levels, this article addresses some common themes that have emerged since the outbreak of the pandemic in Australia in early 2020. One of the major concerns which has emerged is the issue of proving the causal link between COVID-19 and work. In some jurisdictions, legislation has specifically addressed these causation concerns. While the number of workers' compensation claims overall is low, there are specific industries which have been heavily affected by the pandemic which may result in a spike in claims in areas such as aged care and the medical and allied professions. We speculate that a number of legal and practical concerns will emerge that may in time contribute to some new jurisprudence in the workers' compensation arena.

Keywords: *COVID-19; workers compensation; isolation; anxiety; causation*

Introduction

This article will canvas a range of legal and behavioural health issues that have arisen due to occurrence of the COVID-19 pandemic. It specifically focuses on workers' compensation and return to work issues in Australia as a case study. It does not attempt to describe in detail legislative provisions operating in each State and Territory but attempts to canvas some of the issues which have arisen at the time of writing. This article firstly sets out to describe the aetiology of COVID-19 and some of the physical and behavioural health aspects of the virus. It then identifies a number of issues likely to arise for workers attempting to make workers' compensation claims in this environment, including misclassification of the employment relationship, concerns in relation to causation of injury and disease, difficulties with return to work, and legislative exclusion of claims in some circumstances. We then consider a range of challenges arising from the pandemic for employers, insurers, and legislators. We conclude by noting some similarities with the 2008 global financial crisis (GFC); but predict the range of issues arising from the pandemic is much broader and more likely to have a significant enduring effect.

The COVID-19 Virus

COVID-19 is part of a large family of viruses can cause illness in humans and animals. Human coronavirus illness is generally mild, such as the common cold; however, some coronaviruses can cause severe diseases. Severe Acute Respiratory Syndrome (SARS) and Middle East Respiratory Syndrome (MERS) were identified in 2002. A novel coronavirus was identified in Wuhan in the Hubei Province, China sometime in December 2019.[1] This new strain of coronavirus was not previously identified in humans, though it is closely associated with SARS. The symptoms of this virus include coughing, running nose, loss of sense of smell or taste, and shortness of breath often accompanied by a fever,

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[1] TP Velavan and CG Meyer, "The COVID-19 Epidemic" (2020) 25(3) *Tropical Medicine International Health* 278 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7169770/>.

though there has been transmission of the virus from asymptomatic carriers.[2] In some cases, it can cause severe pneumonia or other life-threatening conditions, including a "cytokine storm"[3] that leads to organ failure and death. Symptoms start between two and 14 days from exposure to the virus. The virus is spread from person to person and can occur when a person is in contact with the respiratory secretions of an infected person such as through coughing and sneezing. The virus spreads through close personal contact, usually where a person is face to face. The virus can also be spread to individuals who touch objects or surfaces contaminated from a cough or a sneeze from an infected person and then touch their face or mouth. Older persons, those with compromised immune systems, and Indigenous people over 50 years of age[4] have significantly higher risks of contracting the more serious form of the disease.

THE PSYCHOLOGICAL ASPECT OF COVID-19 (MIS) INFORMATION AND MEDIA

The circumstances of the COVID-19 pandemic have created an unusual cluster of psychological impacts about which little has been written to date. Uniquely, among diseases that have posed serious and widespread health threats, COVID-19 started as a disease that was not well understood. The lack of information about transmission, treatment, or immunisation arguably left sections of the public without consistent information about effective strategies to help mitigate the risks or sense of threat. The disease spreads through a mechanism that seemingly defies easily defined steps for achieving safety. Different surfaces have different characteristics regarding holding the virus in a transmissible state. Australian cases were traced initially to overseas travellers, which created a sense of security that rapidly disappeared when the risk of community transmission became significant, as seen in Victoria during late June and early July 2020. While there are known steps for minimising the likelihood of infection, no method other than total isolation is guaranteed to prevent community transmission of the disease. In addition, the disease has asymptomatic expression in some people, which only exacerbates uncertainties about the prevalence of COVID-19 in the wider community, and the apparent possibility of transmission from pre-symptomatic infected people to healthy people may create the impression exposure to any other person is potentially dangerous.[5]

The potential for COVID-19 to be a deadly disease has been communicated through numerous public service announcements, news reports,[6] and the official COVIDSafe smartphone application promoted by the Australian Government.[7] Although the death toll due to COVID-19 in Australia is low by world standards, the initial traditional media reporting to highlight the need for physical distancing was represented with images of a health system unable to cope with the demand[8] and the possibility of death due to lack of available treatment. These warnings were underscored by restrictions on freedom of movement and access to services unparalleled in recent memory, and government control over the right to travel and conduct business reflects a constantly changing landscape of government plans and

[2] Y Bai et al, "Presumed Asymptomatic Carrier Transmission of COVID-19" (2020) 323(14) *Journal of American Medical Association* 1406.

[3] F Coperchini et al, "The Cytokine Storm in COVID-19: An Overview of the Involvement of the Chemokine/Chemokine-receptor System" (2020) 53 *Cytokine & Growth Factor Reviews* 25; P Mehta et al, "COVID-19: Consider Cytokine Storm Syndromes and Immunosuppression" (2020) 395 *Lancet* 1033.

[4] CDC COVID Response Team, "Severe Outcomes among Patients with Coronavirus Disease (COVID-19) United States, February 12-March 2020", *Center for Disease Control and Prevention* <http://www.ecie.com.ar/images/paginas/COVID-19/4MMWR-Severe_Outcomes_Among_Patients_with_Coronavirus_Disease_2019_COVID-19-United_States_February_12-March_16_2020.pdf>; Australian Government Department of Health, *Coronavirus (COVID-19) Resources for Aboriginal and Torres Strait Islander People and Remote Communities* <https://www.health.gov.au/resources/collections/coronavirus-covid-19-resources-for-aboriginal-and-torres-strait-islander-people-and-remote-communities>.

[5] A Van Dorn, RE Cooney and ML Sabin, "COVID-19 Exacerbating Inequalities in the US" (2020) 395 *Lancet* 1243.

[6] "Coronavirus Pandemic: Tracking the Global Outbreak", *BBC News*, 16 July 2020 <https://www.bbc.com/news/world-51235105>.

[7] Australian Department of Health, *COVIDSafe App* <https://www.health.gov.au/resources/apps-and-tools/covidsafe-app>.

[8] E Litton et al, "Surge Capacity of Australian Intensive Care Units Associated with COVID-19 Admissions" (2020) *Medical Journal of Australia* <https://www.mja.com.au/journal/2020/surge-capacity-australian-intensive-care-units-associated-covid-19-admissions>.

roadmaps.[9] While the Federal government provided initial daily briefings about the nature of the disease and strategies to minimise risk of community spread and has maintained oversight of international travel restrictions, individual State/Territory governments have managed the disease at local levels under declarations of states of emergency and disaster that came into effect in mid-March 2020. The closure of State borders and temporary lockdown of residents in COVID-19 "hotspots" restrictions on the numbers of people allowed in community settings, and restricted access to access facilities and services assessed as having high risks of community transmission, continue to be managed by State/Territory governments relative to the spread of the virus within their jurisdictions. Some governments have exhibited an unsettling willingness to change the rules, as evidenced by the closing of the border between Victoria and New South Wales on 8 July 2020; while the Western Australian State government maintained its hard border closure for a lengthy period.[10]

The sense of threat from COVID-19 was exacerbated by the style of news reporting during the pandemic, the global and rapid spread of information via social media, and in some cases misinformation.[11] Although during the early days of the pandemic, the broadcast media spent significant time and energy with public service messages declaring "we're all in this together",[12] the nature of the news reporting focused on the number of new cases (incidence), deaths, and numbers of people in intensive care units. It was many weeks before the media broadcast routinely information about the number of active cases (prevalence) or the number of people who had recovered. The focus on negative news resulted in added significance being given to that aspect of the story.[13] While adopting a strategy focused people on the risk which might have been beneficial to "flattening the curve", it had an unintended consequence of increasing the perception of threat of infection.[14] Additionally misinformation concerning COVID-19 was rampant early in the pandemic and attracted the term "infodemic" to describe the rapid spread of dangerous or useless advice.[15] Sources of bad information included many self-appointed "experts"[16] including statements by the President of the United States that were not substantiated by health experts.[17] Even when the sources were informed and trusted, such as the World Health Organization, the information

[9] Australian Human Rights Commission, *Community Update: COVID-19 (April 2020)* (19 April 2020) <https://humanrights.gov.au/about/news/e-bulletin/community-update-covid-19-april-2020?_ga=2.216136022.1593941882.1597291971-419974205.1571366595>.

[10] Australian Interstate Quarantine, *State and Territory Border Closures Due to COVID-19* <https://www.interstatequarantine.org.au/state-and-territory-border-closures/>.

[11] As predicted by HJ Larson, "The Biggest Pandemic Risk? Viral Misinformation" (2018) 562(7726) *Nature* 309; "Editorial: COVID-19: Fighting Panic with Information" (2020) 395(10224) *The Lancet* P537 <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30379-2/fulltext>; G Pennycook et al, "Fighting COVID-19 Misinformation on Social Media: Experimental Evidence for a Scalable Accuracy-nudge Intervention" (2020) 31(7) *Psychological Science* 770<https://journals.sagepub.com/doi/full/10.1177/0956797620939054>.

[12] E Pederson, "CBS Launches 'We're All in This Together' Campaign as Coronavirus Fears Continue", *Deadline*, 17 March 2020 <https://deadline.com/video/coronavirus-psa-cbs-were-all-in-this-together-campaign/>; "Industry Super Fund Campaign Reminds Australians 'We Are All in This Together'", *AdNews*, 14 April 2020 <https://www.adnews.com.au/campaigns/industry-super-fund-campaign-reminds-australians-we-are-all-in-this-together>.

[13] S Soroka and S McAdams, "News, Politics and Negativity" (2012) *Journal of Political Communication*, CIRANO – Scientific Publications 2012s-14 <https://ssrn.com/abstract=2075941> or <http://dx.doi.org/10.2139/ssrn.2075941>.

[14] See, eg, D Schulte, "The Novel Coronavirus Is a Serious Threat. We Need to Prepare, Not Overreact", *STAT*, 16 March 2020 <https://www.statnews.com/2020/03/16/coronavirus-serious-threat-prepare-not-overreact/>. The author states, "The Covid-19 epidemic is something like sepsis: the reaction by the media and government is likely to produce more harm to societies around the globe than the virus, possibly for many years to come".

[15] S Khan et al, "Impact of Coronavirus Outbreak on Psychological Health" (2020) 10(1) *Journal of Global Health* 010331 <http://jogh.org/documents/issue202001/jogh-10-010331.pdf>.

[16] "During the COVID-19 pandemic, false information is being circulated about treatments such as drinking bleach as a cure, and stories incorrectly linking 5G networks to the virus", see Australian Communications and Media Authority, *Supporting Australians during the COVID-19 Pandemic* <https://www.acma.gov.au/articles/2020-04/supporting-australians-during-covid-19-pandemic#four>.

[17] R Rider, *Trump's Statements about the Coronavirus* (19 March 2020) FactCheck.ORG <https://www.factcheck.org/2020/03/trumps-statements-about-the-coronavirus/>.

was subject to constant revision as greater clarity was developed, leaving the general public unsure as to whom to trust about the crisis.[18]

Added to the sense of fear about the virus is the indirect threat caused by the safety measures undertaken in response to COVID-19. Unemployment in Australia during the pandemic has reached numbers not seen since 1992 and the country has experienced its first recession since that time.[19] Notwithstanding significant economic support and stimulus programs put in place by the Federal and State/Territory governments, the sense that individual economic standing is under threat is significant with as many people believing the economy is in long-term trouble as those thinking "it will bounce back".[20]

COVID-19 Physical and Mental Effects

The side-effects of the social isolation associated with pandemic-related restrictions include symptoms of depression and anxiety, troubled sleep, adjustment disorders, fear, and hopelessness.[21] Psychological distress in connection with prior pandemics is well-documented.[22] In Australia, there is some evidence of a tendency to medicalise psychological symptoms in some contexts, such as workers' compensation. This may create conditions where symptoms of psychological distress are labelled and treated as entrenched mental health disorders, instead of as transient reactions to the pandemic.[23]

The factors referred to in the preceding paragraph may create an environment that is psychologically challenging in ways which are now emerging as unique and it is important to explore these in detail as we posit the blurring of work and non-work related issues that might generate questions of liability for compensation. The combined effects (ie physical, social, economic, and psychological) of the COVID-19 pandemic may be perceived as potentially life-threatening.[24] Such perceived threats activate the autonomic nervous system, and in particular the section that evolved to deal with threats. The colloquial name for this cluster of reactions is "fight or flight" although the technical term is activation of the sympathetic nervous systems.[25] The fight or flight response is triggered in the amygdala, followed by a neural response in the hypothalamus in the presence of a perceived threat or frightening occurrence, and to a lesser extent by the sense of impending danger. When our ancient ancestors had to flee or fight predators to stay alive, the fight or flight reaction mobilised gross muscular and hormonal changes to increase their chances of survival. The COVID-19 pandemic presents as a modern-day perceived threat to a stressor to emotional stability and physical welfare.[26]

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[18] See, eg, World Health Organisation, *WHO Advice for International Travel and Trade in relation to the Outbreak of Pneumonia Caused by a New Coronavirus in China* (10 January 2020) <https://www.who.int/news-room/articles-detail/who-advice-for-international-travel-and-trade-in-relation-to-the-outbreak-of-pneumonia-caused-by-a-new-coronavirus-in-china>.

[19] N Khadem, "Australians Are Hurting from the Coronavirus-led Recession, but We Fare Better Than Most Countries", *ABC News*, 5 June 2020 <https://www.abc.net.au/news/2020-06-05/australia-coronavirus-recession-compares-international-countries/12322260>.

[20] McKinsey & Company, *Survey: Australian Consumer Sentiment during the Coronavirus Crisis* (6 August 2020) <https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/survey-australian-consumer-sentiment-during-the-coronavirus-crisis#>.

[21] Khan, n 15.

[22] E McMahon and E Minney, "Psychological Distress and COVID-19: A Review of the Literature and Suggestions for Clinical and Forensic Practice" (2020) *Government of South Australia* <https://groups.psychology.org.au/Assets/Files/Psychological%20Distress%20and%20COVID19_McMahon%20and%20Minney_FINAL.pdf>; RP Rajkumar, "COVID-19 and Mental Health: A Review of the Existing Literature" (2020) 52 *Asian Journal of Psychiatry* 102066 <https://www.sciencedirect.com/science/article/pii/S1876201820301775>.

[23] R Aurbach and L Kertay, "'You'll Be Fine – You've Only Sprained Your Brain': Practical Steps toward Normalization of Expectations and Improvement of Treatment for Emotional Harm" (Paper presented at the 2019 Injury and Disability Schemes Seminar, November 2019) <https://actuaries.logicaldoc.cloud/download-ticket?ticketId=91bf3fd3-f54b-475a-8e9d-9486b1863d08>

[24] B Pfefferbaum and CS North, "Mental Health and the COVID-19 Pandemic" (2020) 383 *New England Journal of Medicine* 510 <https://www.nejm.org/doi/full/10.1056/NEJMp2008017>.

[25] WB Cannon, *Bodily Changes in Pain, Hunger, Fear, and Rage* (D Appleton-Century-Crofts, 1915) 211.

[26] R Aurbach, "Fighting Fight or Flight" (Paper presented at the Annals of the Australian Actuaries Institute Scheme Design Seminar, 12–14 November 2017) <https://www.actuaries.asn.au/Library/Events/%20InjuryDisabilitySchemesSeminar/2017/FightingFightorFlightPaper.pdf>.

In the context of the discussion below it is necessary to understand a little more about the nature of the significant physiological changes caused by subsequent activation of the sympathetic nervous system to ready the body for immediate action if required in response to a perceived threat. A releasing hormone from the hypothalamus causes the pituitary gland to release adrenocorticotrophic hormone that stimulates adrenaline (epinephrine) production in the adrenal gland.[27] Adrenaline binds with liver cells to form blood sugars (glucose) available as an immediate energy source. Cortisol is released by the hypothalamus-pituitary-adrenal axis and turns fatty acids into energy distributed to muscles in the body. Heart and breathing rates are elevated to provide the muscles with oxygen. Blood is rechannelled from the brain, digestive system, surface skin, and other parts of the body that are not "critical" for survival to the extremities where the blood supply is available for running or fighting.[28]

The indirect impacts of these physiological responses are also significant. As the brain reroutes blood to large muscles, and blood sugar and oxygen levels suffer temporary depletion, the brain's ability to process information is compromised. When survival is on the line, an individual's thinking is often reduced to binomial "black and white" categorisations: friend or foe, safe or unsafe, trust or distrust. Behavioural responses in fight or flight situations are also shaped by non-physiological cognitive and emotional components. Individuals in fight or flight react either with heightened behaviours or by withdrawing. There is evidence of increased thought focus on negative stimuli[29] or perceiving ambiguous stimuli as negative. Individuals with lower emotional regulation to control their emotional arousal in the presence of a perceived threat or stressor, and those with high emotional intensity (emotional reactivity) may be more susceptible to anxiety or aggressive behavioural responses. Those who under- or over-estimate their sense of control during stressful events may also demonstrate heightened anxiety or aggression, respectively.[30] The panic buying of toilet paper and food items, and uncivil behaviours towards service providers experienced early in the pandemic are likely to have been a reflection of these survival-based heightened behaviours.[31]

Cortisol is widely referred to as the "stress hormone". Stress is defined as "threats or anticipation of threats to an organism's homeostasis".[32] In an adaptive response to a stressor, cortisol increases energy levels required for the fight or flight response to the stressor, and can remain in the blood stream for a period of time after the perceived threat has passed. Although cortisol is constantly regulated in the body to maintain homeostasis, long-term elevated levels of cortisol are associated with reduced immune function, increased blood pressure and blood sugar, weight gain, diabetes, increased risk of heart disease, insomnia, depression, anxiety, and other mental illness.[33] By any account, these co-morbidities can be expected to make recovery from musculoskeletal injury more complex and difficult.

The reason why the biological nature of the reaction is important is that the source of psychological symptoms such as depression, anxiety and insomnia occur has both legal and therapeutic significance. From the therapeutic perspective, the body has a balancing system (known as the parasympathetic nervous system, or more colloquially, the "rest and digest" response) that evolved to bring the body back

[27] DY Lee, E Kim and MH Choi, "Technical and Clinical Aspects of Cortisol as a Biochemical Marker of Chronic Stress" (2015) 48(4) *BMB Reports* 209.

[28] P Kandhalu, "Effects of Cortisol on Physical and Psychological Aspects of the Body and Effective Ways by Which One Can Reduce Stress" (2013) 18(1) *Berkeley Scientific Journal* 14.

[29] S Reid, K Salmon and P Lovibond, "Cognitive Biases in Childhood Anxiety, Depression, and Aggression: Are They Pervasive or Specific?" (2006) 30(5) *Cognitive Therapy and Research* 531.

[30] M Brendgen et al, "Is There a Dark Side of Positive Illusions? Overestimation of Social Competence and Subsequent Adjustment in Aggressive and Nonaggressive Children" (2004) 32(3) *Journal of Abnormal Child Psychology* 305, DOI: 10.1023/B:JACP.0000026144.08470.cd.

[31] C Prentice, J Chen and B Stantic, "Time Intervention in COVID-19 and Panic Buying" (2020) 57 *Journal of Retailing and Consumer Services* 102203 <https://doi.org/10.1016/j.jretconser.2020.102203>.

[32] IN Karatsoreos and BS McEwen, "Psychobiological Allostasis: Resistance, Resilience and Vulnerability" (2011) 15 *Trends in Cognitive Science* 576 <https://doi.org 10.1016/j.tics.2011.10.005>.

[33] Kandhalu, n 28.

to homeostasis when the risk was over.[34] Notwithstanding cortisol is metabolised more slowly, meaning that transient psychological symptoms that are recognised as sympathetic in origin can be treated much more simply, if not misdiagnosed and medicalised as continuing psychological disorders. The parasympathetic nervous system can be activated through a number of avenues, including mindfulness and other relaxation or meditative disciplines and David Rock's SCARF™ protocol.[35] These approaches allow the body to return to homeostasis, and allows the symptoms of psychological distress to dissipate unless they are otherwise reinforced.[36] Treating sympathetic nervous system symptoms in the same manner as more common "stress" and "anxiety" reactions is likely to be ineffective without addressing the underlying hormonal process.[37]

The legal significance of the above excursus is the symptoms of psychological distress emanating from COVID-19 clearly arise from the situation in which the threat was known to some degree. The degree of contribution of workplace exposure to that perception of threat is unlikely to be easily quantifiable, but workplace exposure may be a significant added factor with regard to compensability for physical and/or psychological ill health.

The impact of sympathetic nervous system activation has both physical and mental components. People in "fight or flight" experience psychological changes but they also have direct physical reactions to the hormones released into the blood stream during the reaction. This makes the experience of the COVID-19 pandemic into a mixed psychological and physical reaction that may affect a previously injured worker's recovery. It may also be a contributing or participating factor in the development of new physical ailments. In some instances, the old phrase "worried sick" may in fact be the consequence. Given that the degree of "contribution" by the workplace necessary to establish causal connection for compensability varies by jurisdiction, the development of jurisprudence to guide the claims process for COVID-19 psychological claims, or psychologically precipitated physical injury or illness claims, is likely to be slow.

There are at least two other kinds of potential psychological impacts associated with the COVID-19 pandemic. Social isolation over an extended period of time is a separately recognised source of depressive symptoms.[38] Moreover, isolation potentially becomes habituated, and can result in fear of going out in public including fear of return to the workplace (agoraphobia) or fear of being in close proximity to others (anthropophobia). These conditions may present as resistance to return to work, or to requests for remote work locations as an accommodation. Agoraphobia and anthropophobia can become serious and debilitating conditions in their own right. Similarly, since the nature of the isolating threat is biological and the general public advice has recommended significantly increased hygienic measures, it is possible that some people will develop an irrational fear of germs (germaphobia) or uncleanliness (mysophobia). To the extent that the workplace or transport to and from the workplace include exposures to others, or unclean or unhygienic areas or working conditions, these anxiety symptoms may become debilitating. Workers' compensation claims or sick leave absences may increase from individuals who are unwilling to return to the workplace after physical distancing restrictions are partly or fully lifted due to their belief that they will suffer illness if they do so. Heightened anxiety symptoms may also become complicating factors for previously injured or ill claimants who are otherwise ready for a return to work.[39]

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[34] S Kreibig, "Autonomic Nervous System Activity in Emotion: A Review" (2010) 84(3) *Biological Psychology* 394.

[35] D Rock, "SCARF: A Brain-based Model for Collaborating with and Influencing Others" (2008) (Issue One) *Neuroleadership Journal* <https://pdfs.semanticscholar.org/ac92/8982c7a7c3d694d8b53c1290673395795766.pdf?_ga=2.50457389.520158299.1597294489-521610874.1594800568>.

[36] For a more detailed explanation of the process by which psychological symptoms can be medicalised and exacerbated, see Aurbach and Kertay, n 23 and BB Kilburn, "Psychiatric Issues in Behavioral Health Disability" in P Warren (ed), *Behavioral Health Disability* (Springer, 2010) <https://doi.org/10.1007/978-0-387-09814-2_5>.

[37] Rock, n 35.

[38] J Gammon, "Analysis of the Stressful Effects of Hospitalization and Source Isolation on Coping and Psychological Constructs" (1998) 4(2) *International Journal of Nursing Practice* 84, DOI: 10.1046/j.1440-172x.1998.00084.x, PMID: 9748937.

[39] WS Shaw et al, "Opening the Workplace after COVID-19: What Lessons Can Be Learned from Return-to-Work Research?" (2020) 30 *Journal of Occupational Rehabilitation* 299 <https://doi.org/10.1007/s10926-020-09908-9>.

Some psychological consequences of illness and worklessness[40] remain the same during the COVID-19 pandemic, although they may be exacerbated. Social isolation due to pandemic physical distancing precautions and isolation from the workforce during illness or injury recovery are similar in nature, notwithstanding the difference in sources. Since interaction with others is an important part of the social fabric in Western cultures, deprivation of normal social interactions has negative consequences. Social deprivation was associated with lower levels of self-rated perceived function and higher levels of anxiety and depression among individuals with musculoskeletal injuries.[41] People who are workless have decreased life expectancy and increased frequency of co-morbid conditions.[42] They may experience isolation as associated with symptoms such as anxiety, depression, and a sense of loss of control. The sense of loss of control, in turn, may be interpreted as a perceived threat, invoking the sympathetic nervous system response discussed above.

Changes to the social dynamic at home during isolation related to fears about economic wellbeing, the ability to meet one's obligations, and simple boredom. These have similar psychological impacts regardless of whether the person experiencing isolation is doing so because of exposure to the virus, as a preventive action with respect to potential exposure, or as a result of an inability to maintain normal activity during recovery. These factors are also associated with poorer outcomes for previously injured workers.[43] Regardless of cause, staying at home for those who are not doing so by choice has a negative effect on physical and behavioural health,[44] and may result in exacerbation of existing claims, delayed return to work, or new claims of psychological harm among workers.

ELIGIBILITY FOR WORKERS' COMPENSATION

Against this background, we consider the legislative requirements of workers' compensation in Australia that are administered at a sub-national level by each State or Territory enacting legislation governing workers' compensation matters.[45] There is also a Commonwealth statute for workers employed by the Federal government.[46] While there are differences between the jurisdictions in relation to the precise legislative provisions, there is sufficient common ground across jurisdictions for generalisations as to the following matters. First, there are a number of thresholds that must be met before a worker can establish the necessary employment/worker relationship between themselves and their employer. Second, once this relationship is established, the worker must show that they have suffered an incapacity for work as a consequence of a work injury or the contraction of a disease contributed to by work. The level of work or employment contribution to compensable work incapacity varies across jurisdictions ranging from, for example, a requirement for a "significant contributing factor"[47] or "substantial contributing factor",[48] to the "main contributing factor"[49] or "major or most significant contributing factor".[50] Third, if

[40] BM Schulman, "Worklessness and Disability: Expansion of the Biopsychosocial Perspective" (1994) 4 *Journal of Occupational Rehabilitation* 113.

[41] MA Wright et al, "What Is the Impact of Social Deprivation on Physical and Mental Health in Orthopaedic Patients?" (2019) 477(8) *Clinical Orthopaedics and Related Research* 1825, DOI: 10.1097/CORR.0000000000000698.

[42] M Aylward and G Waddell, "Health, Work and Inactivity: Current Context and Developing Solutions – A UK Perspective" (2005) 15(Supp 1) *European Journal of Public Health* 47.

[43] Aurbach, n 26.

[44] Schulman, n 40.

[45] *Workers Compensation Act 1987* (NSW); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Workers' Compensation and Rehabilitation Act 2003* (Qld); *Workers' Compensation and Injury Management Act 1981* (WA); *Return to Work Act 2014* (SA); *Workers Rehabilitation and Compensation Act 1988* (Tas); *Return to Work Act 1986* (NT); *Workers Compensation Act 1951* (ACT).

[46] *Safety, Rehabilitation and Compensation Act 1988* (Cth).

[47] Commonwealth, Victoria, Queensland and Western Australia.

[48] Australian Capital Territory.

[49] New South Wales.

[50] Tasmania.

that incapacity for work is established, then in most instances the worker will be entitled to payments of compensation and other supports provided under workers' compensation law, which include payment of medical expenses and rehabilitation allowances that in time give rise to considerations of when, if ever, the worker can return to work. We will discuss each of these threshold issues below.

THE EMPLOYMENT RELATIONSHIP

As to the issue of the employment relationship, most jurisdictions rely upon the common law employment relationship as the primary relationship of entitlement.[51] That said, in most jurisdictions there are extensions of the common law employment relationship that allow for some contractors[52] to be entitled to compensation, and also coverage of particular classes of persons who have traditionally not been regarded as being in an employer–employee relationship.[53]

Various industries in Australia reduced or ceased operation following State government-imposed restrictions and "lockdowns" of people in various locations in the community to control COVID-19 virus spread. Entertainment, beauty, fitness, transport, travel, and hospitality businesses were unable to continue operation. Banking, education and non-acute health services considered essential were required to replace face-to-face interactions with consumers with online service delivery modes, contributing to the rise in numbers of employees "working from home". There were also contractions in a number of other industries. Notably many casual and part-time workers lost employment.[54] Some service industries found ways to adapt their business. For example, following government-mandated closure of restaurants, there was a rise in the public's demand for pre-ordered or take-away food for home delivery. Because of the growth in these market delivery services, employment of delivery drivers (car) and riders (motorcycle and cycle) increased.[55] An unexpected and unwanted consequence of the growth in cycle deliveries may have put some workers at risk of injury, as well as members of the public who might be injured from collisions with these workers.[56]

The growth in demand for delivery services has drawn attention to the so-called "gig economy" workers who work under contracts that provide payment on the delivery of a task, item, or product.[57] A question arises as to whether workers who are engaged on this basis, work under an employment contract and therefore, if they are injured, would be entitled to workers' compensation.[58] In 2001, the High Court of Australia determined in *Hollis v Vabu Pty Ltd* (*Vabu*) that workers engaged by Vabu Pty Ltd trading as "Crisis Couriers" to deliver parcels and other items using bicycles were engaged under a contract of employment. These workers supplied their own bicycles and were paid per item delivered. The respondent argued the workers were independent contractors and therefore it was not vicariously liable when one of the workers engaged by them struck and injured a pedestrian. The High Court held the workers were engaged under a contract of service, that is, they were employees, and therefore *Vabu* was liable for the injuries suffered by the appellant. This decision was made notwithstanding that the

[51] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; [2001] HCA 44.

[52] As in the case of Western Australia s 5 workers includes any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services.

[53] For example, *Workers' Compensation and Injury Management Act 1981* (WA) s 5.

[54] M Janda, "COVID-19 Cost More Than 700,000 Australians Their Jobs in a Week", *ABC News*, 21 April 2020 <https://www.abc.net.au/news/2020-04-21/covid-19-costs-6-per-cent-of-jobs-in-3-weeks/12168670>.

[55] G Hutchens, "Unemployment Fall Might Be Caused by Return of Gig Economy Jobs, Economists Say", *ABC News*, 18 September 2020 <https://www.abc.net.au/news/2020-09-18/unemployment-lower-due-to-returning-uber-drivers/12675592>.

[56] H Scruby, "Delivery Riders Putting Sydney Pedestrians at Risk of Catastrophic Injury", *The Sydney Morning Herald*, 16 April 2020 <https://www.smh.com.au/national/delivery-riders-putting-sydney-pedestrians-at-risk-of-catastrophic-injury-20200416-p54kf8.html>.

[57] D Spurk and C Straub, "Flexible Employment Relationships and Careers in Times of COVID-19" (2020) 119 *Journal of Vocational Behaviour* 103435 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7204672/>; M Quinlan, "The 'Pre-invention' of Precarious Employment: The Changing World of Work in Context" (2012) 23(4) *The Economic and Labour Relations Review* 3.

[58] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; [2001] HCA 44.

workers had entered into contracts purporting to deem them to be independent contractors. They noted the high level of control that Vabu had over the riders, directing them as to the source and method of their work, and also the low capital outlays of the workers for their equipment. *Vabu* has since been relied on as a benchmark for distinguishing employees and subcontractors.[59] The significance of *Vabu* is that without other authority in Australia, gig workers such as Uber-eats and Deliveroo cycle riders would prima facie be regarded as employees, and would therefore fall under the protective umbrella as workers for workers' compensation purposes; notwithstanding contractual terms to the contrary, and notwithstanding the use of various telephone/internet applications as sources of work direction. In fact, in 2018 in *Klooger v Foodora Australia Pty Ltd* (*Foodora*)[60] the Fair Work Commission followed *Vabu* and held that a "delivery rider" engaged by the respondent was engaged under the contract of employment, notwithstanding contractual terms entered into by the parties that declare the applicant to be an independent contractor. A telling factor in this case was that the respondent (using a batching system) controlled the rostering system, which prevented the applicant from working outside rostered hours or choosing the location of his work. The applicant did not have a separate place of work or advertise his services and wore *Foodora* branded equipment and attire. As in *Vabu*, he did not make a substantial investment in capital equipment by using his cycle for deliveries.

The employment relationship is less clear in relation to Uber and other similar drivers who use motor vehicles for their work. In a series of cases before the Australian Fair Work Commission it has been held, applying the principles adopted in *Vabu* and having examined the relevant contractual terms in detail, that Uber vehicle drivers were not employees for the purposes of the *Fair Work Act 2009* (Cth).[61] The Fair Work Commission emphasised the lack of control Uber-Eats had over drivers, the lack of exclusivity demanded by Uber (ie, drivers could work for other ride-sharing companies), and the lack of identifying uniform/logo or other identification to link the work performed with Uber. These facts can be contrasted with the facts in *Vabu* where the riders were clearly identified as "Crisis Couriers" and relied upon by Vabu for exclusive direction in relation to their work tasks. Notably the recent decisions of the Fair Work Commission have been criticised by some Australian academic commentators because the decisions have overlooked the forms of control that software platforms exercise over gig workers, and inability of those workers to develop their own businesses independent of those platforms.[62] Application of these decisions to the workers' compensation context suggests that Uber vehicle drivers would not be classed as workers and would not be entitled to compensation in the event of a work-related injury.[63] The Australian decisions appear to be at odds with decisions in the United Kingdom, suggesting that the adjudication of these issues might be determined at higher court levels.[64] The death of two deliver riders at the time of writing has highlighted the ambiguity for dependents who may be seeking compensation as a result of injury or death of a wage earner. Perhaps in response to these issues, Uber has put in

[59] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; [2001] HCA 44.

[60] *Klooger v Foodora Australia Pty Ltd* (2018) 283 IR 168; [2018] FWC 6836.

[61] *Gupta v Portier Pacific Pty Ltd* [2019] FWC 5008; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Kaseris v Rasier Pacific VOF* (2017) 272 IR 289; [2017] FWC 6610.

[62] A Forsyth, "Playing Catch-up but Falling Short: Regulating Work in the Gig Economy in Australia" (2020) *Kings Law Journal* <https://doi.org/10.1080/09615768.2020.1789433>; A Forsyth, "The Identity of the 'Employer' in Australian Labour Law: Moving beyond the Unitary Conception of the Employer" (2020) 13(1) *Italian Labour Law eJournal* 13 <https://illej.unibo.it/article/view/11222>.

[63] *Hamdan v Uber BV*; *WorkCover WA* (Workers' Compensation Arbitration Service, Government of Western Australia, Registrar's Decision A31490, 22 June 2016); *Oze-Igiehon v Rasier Operations BV* [2016] WADC 174.

[64] *Uber BV v Aslam* [2019] 3 All ER 489; [2018] EWCA Civ 2748, a decision of the Court of Appeal United Kingdom, citing with approval *Autoclenz Ltd v Belcher* [2011] 4 All ER 745; [2011] UKSC 41 a decision of the Supreme Court of United Kingdom, see also J Kenner, "Uber Drivers Are Workers: The Expanding Scope of the Worker Concept in the UKs Gig Economy [2019] ELECD 1852" in J Kenner, I Florczak and M Otto (eds), *Precarious Work* (Edward Elgar, 2019) 197. Note also the use of share economy/gig workers poses some challengers for government in relation to loss of taxation revenue derived from payroll tax and income tax on wage earners and the like. See CO Migai, J de Jong and JP Owens, "The Sharing Economy: Turning Challenges into Compliance Opportunities for Tax Administrations" (2019) 16(3) *eJournal of Tax Research* 395, although note in *Uber BV v Federal Commissioner of Taxation* (2017) 247 FCR 462; [2017] FCA 110 it was held Uber proved a taxi service and was liable under the Australian taxation system to pay goods and service tax.

place some compensation coverage for their workers though these benefits are lower than most workers compensation benefits.[65]

Another related issue arising from the overlap of the rise of the gig economy and the outbreak of COVID-19 is the utilisation of the job classification of Uber driver for the purposes of testing capacity for work. Employers and insurers in all jurisdictions attempt to reduce claims costs by establishing that the injured worker is fit or partially fit for work. This determination is made by providing proof (usually through medical reports) that the worker is fit to perform certain job duties. One method frequently employed in the past was to obtain certification that the worker was fit for apparently "light" alternative work such as "car park attendant", "lift operator", or "light storeman's work". These classifications have little credibility or application today, because jobs of this kind have all but disappeared and tribunals no longer accept them as valid measures of work capacity. However, it is now often the case that "Uber driver" is touted as a form of alternative work/employment available to a worker who is the subject of a workers' compensation claim.[66] This issue will be developed below in relation to issues concerning return to work.

Prior to the COVID-19 pandemic, a considerable body of emerging research identified that "gig" workers are marginalised, non-unionised, and otherwise vulnerable.[67] This cohort of workers might now have been joined by a new group of workers displaced by the effects of closures in various industries arising from the COVID-19 pandemic. Vulnerable workers are notoriously unlikely to claim workers' compensation or other employment benefits due to their often blurred or misclassified employment status,[68] limited support networks, or generally powerless circumstances.[69] Given the possible emergence of a new group of "gig" workers displaced from other industries, there may be less reluctance to make a claim for a work-related injury. That said, it is noteworthy that even if casual, part-time, or rostered employees such as gig workers claim workers' compensation, their entitlements are usually severely circumscribed by statutory regulations controlling the payment of wages for those classifications of workers; usually limiting payments to a fraction of full-time wages.[70] We assert that given the increased engagement of displaced and other workers in the gig economy, there may be a rise in challenges to the classification of workers as contractors by employers seeking to evade liability and reconsideration of some of the authorities on these relationships.

While noting that several groups of workers have been unable to work due to COVID-19 lockdowns, other groups of workers have experienced pressure to work increased hours. Workers in essential services, such as health workers,[71] police,[72] emergency workers,[73] and a range of public servants have experienced

[65] N Zhou, "Deaths of Two Food Delivery Riders in Sydney Throws Spotlight on Gig Workers' Conditions", *The Guardian* (Australian edition online), 8 October 2020 <https://www.theguardian.com/australia-news/2020/oct/08/deaths-of-two-food-delivery-riders-in-sydney-throws-spotlight-on-gig-workers-conditions>.

[66] See, eg, the cross examination of the applicant worker in *Morrison v Rubicon Systems Australia Pty Ltd* [2019] VCC 1511, *Portingale v Victorian WorkCover Authority* [2017] VCC 1742, *Scully v BIS Industries Ltd* (2017) 157 ALD 549; [2017] AATA 185, *De Bono v Victorian WorkCover Authority* [2020] VCC 1342.

[67] ME Davis and E Hoyt, "A Longitudinal Study of Piece Rate and Health: Evidence and Implications for Workers in the US Gig Economy" (2020) 180 *Public Health* 1; U Bajwa et al, "The Health of Workers in the Global Gig Economy" (2018) 14 *Global Health* 124 <https://doi.org/10.1186/s12992-018-0444-8>.

[68] A Stewart and J Stanford, "Regulating Work in the Gig Economy: What Are the Options?" (2017) 28(3) *The Economic and Labour Relations Review* 420; I Campbell and R Price, "Precarious Work and Precarious Workers: Towards an Improved Conceptualization" (2016) 27(3) *The Economic and Labour Relations Review* 314.

[69] N van Doorn and F Ferrari and M Graham, *Migration and Migrant Labour in the Gig Economy: An Intervention* (8 June 2020) <https://ssrn.com/abstract=3622589>; A Aloisi, "Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of On-demand/Gig Economy Platforms" (2016) 37(3) *Comparative Labor Law & Policy Journal* 653.

[70] For example, *Workers' Compensation and Injury Management Act 1981* (WA) Sch 1.

[71] WHO, *WHO Calls for Healthy, Safe and Decent Working Conditions for All Health Workers, Amidst COVID-19 Pandemic* <https://www.who.int/news-room/detail/28-04-2020-who-calls-for-healthy-safe-and-decent-working-conditions-for-all-health-workers-amidst-covid-19-pandemic>.

[72] J Stogner, BL Miller and K McLean, "Police Stress, Mental Health, and Resiliency during the COVID-19 Pandemic" (2020) 45 *American Journal Criminal Justice* 718 <https://doi.org/10.1007/s12103-020-09548-y>.

[73] P Wankhade, "Emergency Service Workers Are Already at High Risk of Burnout – Coronavirus Will Make This Worse", *The Conversation*, 21 April 2020 <https://theconversation.com/emergency-service-workers-are-already-at-high-risk-of-burnout-coronavirus-will-make-this-worse-136006>.

increased workloads and may seek to claim compensation on the basis that the increases in job demands have caused a work-related injury. It may be that there is a surge in claims from these workers with established worker–employer relationships. This aspect is discussed below in relation to the issue of causation. Finally, as previously noted, certain industry groups have been disproportionately affected by physical distancing requirements, lockdowns, and closures of businesses. A full analysis of the gender issues that arise in these circumstances is not possible in this article, but it is important to note that certain industries such as nursing, aged care, childcare, and hospitality employ high proportions of female workers. Subsequent to financial losses incurred by lockdowns and temporary government-mandated closures, some employers will cease operating their businesses altogether. This will disproportionately affect women, return-to-work following injury, and a range of other issues.[74]

CAUSATION OF INJURY OR DISEASES

Once the employment or worker/employer relationship is established, the worker must establish they have sustained or contracted a work-related injury or disease. During the COVID-19 pandemic, it has become apparent that contracting the virus would affect the broad community well outside the boundaries of the work place. There are now reported incidents of claims for compensation being made in New South Wales and Victoria, these being the two jurisdictions with the highest rate of work-related infections.[75] In Victoria in particular, it is likely there will be an "uptick" in claims by workers in aged care and health care that have become infected with COVID-19.[76]

In general terms, the concept of physical injury (or injury simpliciter) requires the worker to establish they have suffered a sudden and unexpected physiological change as a consequence of a particular work incident.[77] In most instances, this refers to a physical trauma resulting in a wound, fracture, or some other physical manifestation of harm. Injury simpliciter is contrasted to disease, which is generally defined as any physical or mental ailment, disorder, defect, or morbid condition; whether of sudden or gradual onset.[78] In broad terms, all Australian jurisdictions provide compensation for work-related injuries where the injuries do not have to have occurred at a specific workplace but in the course of performing work duties and diseases where the work has contributed (at varying levels) to the contraction of the disease.[79] The effect of these disease thresholds is important in the context of COVID-19 because, as noted in the introduction, COVID-19 is a virus spread by various forms of contact. In other words, most workers will have to show that their work duties contributed to the contraction of the virus at the required statutory standard rather than a mere temporal connection.

We identify four likely avenues of claims for workers' compensation arising from the COVID-19 virus:

(1) An injury arising from specific contact with virus-carrying materials or substances (injury simpliciter).
(2) Contraction of the virus by contact with infected co-workers and/or third parties (such as patients) in the work place (disease to which the employment contributes).

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[74] "Pink Collar Recession: Data Reveals Women Have Borne the Brunt of the Pandemic", *The New Daily*, 16 July 2020 <https://thenewdaily.com.au/finance/work/2020/07/16/pink-collar-recession-coronavirus/>; E Dawson, "The Case for the Pink Stimulus Shot", *Australia Financial Review*, 3 August 2020 <https://www.afr.com/policy/economy/the-case-for-a-pink-stimulus-shot-20200803-p55hwk>.

[75] Statistics as of this writing available through the official COVID-19 application.

[76] C Wahlquist, "Four out Five Health and Aged Care Workers in Victoria with COVID-19 Contracted It at Work", *The Guardian*, 25 August 2020 <https://www.theguardian.com/australia-news/2020/aug/25/four-out-of-five-health-and-aged-care-workers-in-victoria-with-covid-19-contracted-it-at-work>.

[77] *Kavanagh v Commonwealth* (1960) 103 CLR 547; A Clayton, R Johnstone and S Sceats, "The Legal Concept of Work-related Injury and Disease in Australian OHS and Workers' Compensation Systems" (2002) 15 *Australian Journal of Labour Law* 105.

[78] See, eg, *Workers' Compensation and Injury Management Act 1981* (WA) s 5 which is typical of the definition of disease adopted in all jurisdictions.

[79] *Workers Compensation Act 1987* (NSW) s 4; *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 40(2), 40(3); *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 32(1); *Workers' Compensation and Injury Management Act 1981* (WA) s 5; *Return to Work Act 2014* (SA) s 7; *Workers Rehabilitation and Compensation Act 1988* (Tas) s 3(2A); *Return to Work Act* (NT) s 4(6); *Workers Compensation Act 1951* (ACT) s 31(2); *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 5B.

(3) Development of behavioural health concerns connected to workplace conditions arising from increased work pressures, and/or exposures to people or conditions feared to be hazardous (disease to which the employment contributes).
(4) Development of behavioural health concerns related to conditions arising from workplace adjustments such as working from home in isolation (disease to which the employment contributes).

An Injury Arising from Specific Contact with Virus-carrying Materials/ Substances (Injury Simpliciter)

Notwithstanding the most likely form of workers compensation claim is through the contraction of a COVID-19 as a work-related disease, there have been several reported incidents where workers have suffered COVID-19 infections by reason of an injury simpliciter at work. This would arise, for example, where a worker was directly infected by a specific incident in which they were spat at or deliberately coughed upon by an infected person.[80] There have been a number of instances reported where emergency or transport workers have been spat at or deliberately coughed upon by persons know they are infected with COVID-19. Should the worker become infected as a result of these specific events, causation from this event would be established as an "injury" since the saliva or blood (as the case may be) striking the skin of the worker would constitute an injury giving rise to a physiological change; namely the contraction of the virus. A range of criminal laws were implemented subsequent to this increased risk, to protect some public officers from such uncivility.[81] In this group of claims, it is likely that the cause of virus contraction also involves some criminal behaviours or some reckless disregard for the safety of others. The incidence of events such of these has been low, but proof of causation for instances of this kind are unlikely to present significant hurdles for injured workers.

Contraction of the Virus by Contact with Infected Co-workers or Third Parties (Such as Patients) in the Workplace (Disease to Which the Employment Contributes)

A worker may become infected with COVID-19 from contact with an infected person in the course of their employment, where no specific infection incident can be identified. This is likely to occur in the case of health care workers and aged-care workers, who have direct contact with infected persons in the course of their employment. There has also been fewer anticipated workplace infections of this kind, such as the outbreak at Cedar Meats abattoir in Melbourne where an infected worker who was unaware of his infection status returned to work and subsequently infected a number of co-workers and a treating nurse.[82] In such cases, the source of the infection was identified as a co-worker as opposed to a member of the wider community, and therefore the causal connection with work is likely to be established and meet the statutory standard of work contribution.

[80] J Murray, "Police Close Case of Rail Worker's COVID-19 Death after Spitting Incident", *The Guardian UK*, 30 May 2020 <https://www.theguardian.com/uk-news/2020/may/29/police-close-case-of-rail-workers-COVID 19-19-death-after-spitting-incident>; S Murphy, "Tributes Paid to Cab Driver Who Died of COVID-19 after Being Spat At", *The Guardian UK*, 23 May 2020 <https://www.theguardian.com/uk-news/2020/may/22/tributes-paid-to-cab-driver-who-died-of-covid-19-after-being-spat-at>; "Whyalla Man Accused of Coughing in Police Officer's Face and Claiming to Have Coronavirus", *ABC News*, 21 April 2020 <https://www.abc.net.au/news/2020-04-21/sa-man-charged-over-coronavirus-claim/12169538>; "William West 21, Sentenced for Coronavirus Coughing Stunt at Coffs Harbour Police Station", *ABC News*, 19 May 2020 <https://www.abc.net.au/news/2020-05-19/man-fined-over-coronavirus-coughing-stunt-at-police-station/12263872>.

[81] For example *Public Health Act 2010* (NSW) s 10 – offence of intentionally spitting on a public official so as to cause fear and *Public Health (COVID-19 Spitting and Coughing) Order 2020* (Qld), *Public Health Act 2005* (Qld) (Protecting Public Officials and Workers (Spitting, Coughing and Sneezing) Direction (No 3). In addition, the usual laws of assault, creating false belief and threats would apply.

[82] "Coronavirus Cluster at Melbourne's Cedar Meats Abattoir Grows to 62 as 13 More Cases Confirmed", *ABC News*, 7 May 2020 <https://www.abc.net.au/news/2020-05-07/coronavirus-cases-increase-at-melbourne-meatworks-cedar-meats/12219472>.

Contact tracing[83] is a public health response that has been used to contain the spread of rare or emerging communicable diseases[84] including the novel coronavirus, COVID-19 and has created an additional layer of possible proof of causation. In cases where contact tracing had indicated the workplace as the probable source of the infection, we expect this information will assist in establishing that it is more probable than not that the infection was contracted at the workplace. Where that is sufficient under the law of the particular State/Territory to establish legal causality for workers' compensation, contact tracing will be particularly significant and may obviate the need for legislative adoption of a presumption concerning the impact of contact tracing. An additional tool in the contact tracing arsenal is genomic tracing. In some instances, the specific genetic sequence of the virus present in an individual can be identified to a particular source and distinguished from virus samples in other locations by small variations in the composition of the virus particles. This is because the virus mutates quickly allowing tracing of different genetic lines.[85] The presence of genomic tracing that establishes the linkage between the workplace and the infection that is the subject of the complaint may be decisive with regard to proof of causation, if it is understood and accepted by the courts.

In contrast, there are instances where a worker may become infected but is unable to identify the source of the infection, and it would be difficult for that individual to establish the infection was work-related. Since the outbreak of the pandemic, the profile of cases in Australia has changed over time. Among the generally low rates of community infection to date, the majority of cases were initially infected overseas travellers arriving in Australia and co-workers with work-related infections such as occurred in the Cedar Abattoirs case. However, in mid-2020 this profile altered due to outbreaks among staff and residents in aged-care facilities, particularly in Victoria. There has also been an increase in community transmission of the virus from September 2020.[86] In addition there have been instances of work-related infections arising from contact with overseas travellers. This has happened in the context of workers who have had direct contact with infected travellers in the course of carrying out their work duties, as opposed to contact through the general community. Likewise, significant outbreaks have occurred in the case of security officers having (illicit) direct contact with travellers in government-mandated quarantine. A number of issues arise in relation to these workers and are discussed below in the context of disqualifying behaviours.

Development of Behavioural Health Concerns Connected to Workplace Stress Conditions Arising from Increased Work Pressures, and Exposures to People or Conditions Feared to Be Hazardous

At the time of writing, the State of Victoria is experiencing a number of "hot spot" infection areas around Melbourne, although few of those infections appear to be work-related.[87] That said, businesses

[83] CDC, *Coronavirus Disease 2019 (COVID-19)* <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/contact-tracing.html>.

[84] MJ Keeling, TD Hollingsworth and JM Read, "Efficacy of Contact Tracing for the Containment of the 2019 Novel Coronavirus (COVID-19)" (2020) 74 *Journal of Epidemiological Community Health* 861, DOI: 10.1136/jech-2020-214051.

[85] L Hamilton-Smith, "How Serology and Genome Testing Are Tracking the Origins of Queensland's Coronavirus Youth Detention Centre Outbreak", *ABC News*, 25 August 2020 <https://www.abc.net.au/news/2020-08-25/coronavirus-queensland-the-science-of-genome-testing-explained/12587484>.

[86] The data on this is varied. In Victoria increases in community transmission lead to lockdowns in July 2020 for some months See J Taylor and M Davey, "Coronavirus Australia; Melbourne in Six-week Lockdown after Victoria Records 191 New Cases", *The Guardian*, 7 July 2020 <https://www.theguardian.com/australia-news/2020/jul/07/coronavirus-victoria-update-191-new-covid-19-cases-as-community-transmission-soars> while much lower rates of community transmission continued in other States particularly Western Australia see Australian Government, Department of Health, *Coronavirus (COVID 19) Situation and Case Numbers* <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>.

[87] With the exception of those infections to workers in aged and health care.

have been advised of the potential for an increase in workers' compensation claims.[88] Notably of the claims lodged, a considerable number related to mental health conditions arising from the social and environmental conditions brought about by COVID-19, rather than viral infections.[89] It is not known the approach advanced with respect to those cases. It seems reasonable to anticipate that some claims will be attributed to "stress" and related reactions, as those approaches have been successfully advanced in the past.[90] Nonetheless, current legal and medical practice recognises the interplay of neurobiological components of the stress response[91] in ways not reflected in claims lodged. Some of these aspects have been discussed above.

The concept of mixed physical and behavioural reactions caused by the fear of infection or by reactions to the sense of threat often experienced while living in pandemic circumstances is novel in the context of the Australian workers' compensation system. The novelty of the grounds for assertion of causality may limit the frequency with which such assertions are made. However, cases arising out of the COVID-19 pandemic represent an opportunity for the establishment of jurisprudence regarding the handling of "stress claims" more in line with current knowledge concerning behavioural health.[92]

Anecdotally, some claimants have expressed a fear of returning to the workplace after working remotely, because either the workplace itself or the conditions of travel to and from the workplace may subject the worker to an increased risk of infection. The reasonableness of the fear may be considered by the tribunals dealing with occupational health and/or employment matters; where reasonableness is judged on a case-by-case basis, given the nature of the demand for attendance at the worksite, the rate of community transmission at the time, and the specific conditions of transport and work at the workplace. This would appear to be a more sensible route for adjudicators to take than blanket acceptance of claims particular workers are incapacitated by the thought of returning to the workplace. Moreover, given the general tendency of familiarity to bring increased levels of comfort, the probability this sort of claim will be asserted seems likely to diminish with time.

Development of Behavioural Health Concerns Related to Conditions Arising from Workplace Adjustments (Such as Working from Home in Isolation)

There is an additional consequence of industrial lockdown that is reasonably predictable. As noted above, people who have been isolated from the environmental supports that contribute to their identity (such as the work environment) sometimes suffer from adverse reactions.[93] These reactions can manifest as failure to recover as expected, resistance to return to work, and/or secondary psychological complaints. This "secondary psychological overlay" has usually been compensated along with the underlying claim. We would expect this practice to continue. The extent to which this expectation will impact existing claims and claims initiated under lockdown conditions is not known at this time, but it may impact insurer economic results beyond that which is discussed below.

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[88] For example C Theakstone, "Businesses Warned of Rise in COVID-19 Workers' Compensation Claims", *Insurance Business Australia*, 29 April 2020 <https://www.insurancebusinessmag.com/au/news/breaking-news/businesses-warned-of-rise-in-covid19-workers-compensation-claims-220905.aspx>.

[89] Theakstone, n 88.

[90] "Stress" is not a diagnosable condition nor a mental health condition, but rather an environmental factor that may or may not be related to diagnosable conditions. See, eg, B Kilburn, "Psychiatric Issues in Behavioral Health Disability, Section 8.5.2, Overmedicalization in the Mental Health Disability Process" in P Warren (ed), *Handbook of Behavioral Health Disability Management* (ISpringer International Publishing, 2018) 189–190, ISBN 978-3-319-89859-9. Nonetheless, it is reported here, because it is currently accepted by many tribunals as a theory of harm and often used as a shorthand means of describing a range of diseases.

[91] JI Cohen, "Stress and Mental Health: A Biobehavioral Perspective" (2000) 21(2) *Issues in Mental Health Nursing* 185.

[92] Kilburn, n 90.

[93] R Aurbach, *Your Biggest Unmeasured Cost, Insurance Thought Leadership* (7 January 2015) Insurance Thought Leadership <http://insurancethoughtleadership.com/your-biggest-unmeasured-cost/>.

Aside from the implications of isolation and lockdown on existing claims, it is possible the habituated social distancing and hygiene practices developed during lockdown will spawn mental health conditions related to the habituation of those practices. These mental health conditions may include fear of close contact with others and fear of germs or uncleanliness. Such fears can be expressed at the level of disabling phobias. While we are unaware of any claims being lodged on that basis, some of the reported fear of people who have been working remotely to return to the workplace[94] is likely to be attributable to this indirect consequence of the pandemic. Unlike fear of returning to the workplace after working at home without infection, this exacerbation of an existing claim appears to have greater viability. The compensated underlying claim has already been attributed to work, so the exacerbation of it need only be related to the conditions of recovery, which necessarily include the psychological impacts of the pandemic.

PRESUMPTIVE TESTS

The situation in Australia is somewhat unique in comparison to other countries where infection via community transmission has become commonplace. Where community infection levels are at a much higher rate, it would be more difficult for infected workers to establish an infection is work-related. This is particularly true in the absence of a well-developed program of contact tracing. While there is no scope in this article to review the international situation, it is notable that in the United States, where infections have been widespread in the community, some actions have been taken in a number of jurisdictions to insert "presumptive" provisions into workers' compensation laws that would deem workers in certain industries who contracted COVID-19 in the course of the employment when undertaking specified work, to be eligible for compensation.[95] There have been denials of liability in some United States jurisdictions that have not adopted presumptions that appear to establish undesirable social outcomes.[96] As noted below, one solution to the demand for certainty in causation issues is for legislative changes to deem that there is a presumed causal relationship between certain forms of work and COVID-19. If a worker falls within a category of worker listed in a schedule, then they are relieved of the burden of proving causation.

WORKER (IN)CAPACITY

As noted in the introduction, the symptoms of COVID-19 infection may take a number days to become evident. Once evident, the period of incapacity that may arise from COVID-19 infection is likely to vary. Many people with COVID-19 infection have been asymptomatic and do not suffer any incapacity for work but are required to isolate themselves and remain away from the workplace. By contrast, other infected individuals have been hospitalised and required considerable medical attention. The cohort with the highest rate of infection in Australia are international travellers who have required hospitalisation. There are no current data relating to workplace incapacity arising from COVID-19, though recording this information is likely to present some technical issues. For example, it is likely incapacity for work will be interpreted to include periods of self-isolation as this is consistent with the required management of the virus. The duration of symptoms is unclear and variable, with some commentators opining there will be long-term health effects might produce permanent total or partial incapacity.[97] Death through

[94] Shaw et al, n 39; C Sheedy, *Returning to Work after Lockdown? Prioritise Psychological Safety* (20 May 2020) HRM <https://www.hrmonline.com.au/covid-19/returning-to-work-psychological-safety/>.

[95] A useful guide to the approach in the United States is found at Ogletree Deakins, *Orders and Other Authority or Guidance to Provide Workers' Compensation (WC) Coverage for COVID-19* <https://ogletree.com/app/uploads/covid-19/COVID-19-Workers-Compensation-Coverage.pdf?Version=12>; and also Oliver Wyman, *COVID-19 Workers Compensation Regulatory Update* (16 June 2020) <https://www.oliverwyman.com/content/dam/oliver-wyman/v2/publications/2020/jun/covid-19-wc-legislation-06-16-2020.pdf>.

[96] "Families of Health Workers Killed by COVID Fight for Denied Workers' Comp Benefits", *Kaiser Health News*, 13 July 2020 <https://apple.news/AyQvgwBQaTDutKSaUjTROYQ>; R Wilson, *Yes, Virginia, There Is an Insanity Clause* (13 July 2020) <https://www.workerscompensation.com/news_read.php?id=36373>.

[97] Mayo Clinic, *COVID-19 (Coronavirus): Long-term Effects* <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351>; D Yelin et al, "Comment: Long-term Consequences of COVID-19:

work-related disease gives rise to claims by a worker's dependents, so workplace death caused by COVID-19 infection would be compensable. Where permanent incapacity or impairment results from infection some workers may have claims for lump-sum payments based on permanent impairment under the various schedules in the relevant legislation in each jurisdiction.

A successful return to work following a work-related injury, illness, or disease often depends upon access to appropriate medical and rehabilitative treatment. Community lockdowns in some jurisdictions, temporary cessation of elective surgeries in over-worked hospitals systems, and a fear of infection when accessing health services in person may prevent injured workers from accessing timely medical care. Greater use of telemedicine and digital mental health resources have been noted during the pandemic are indicative of this problem.[98] In addition, a range of challenges emerge due to employers' cessations. While workers compensation payments continue notwithstanding the employer ceasing trading,[99] the inability for return to work with a former employer is regarded as a major hurdle in injury management and often delays return to work. Maintaining the individual's perception of himself or herself in a worker role instead of as a patient is a key factor for a timely and successful return to work.[100] The daily habits of a patient (convalescing at home and attending medical appointments) are incongruous with the daily habits of a worker (having a routine involving access to the workplace). Promoting a worker role can be achieved through a graduated return to work program at the workplace performing tasks matched to the worker's current level of functional capacity.[101] At the very least, the worker should have opportunity to maintain regular in-person or telephone contact with their co-workers and supervisor.[102] Mandated self-isolation can disrupt progression in the return to work activities of COVID-19 infected workers with new or existing work-related injuries and restrict opportunities to remain connected to the workplace. This is likely to be considerably more challenging if the employer ceases trading. Claims management is also hindered if the employer is not operating because information about wages, hours of work and the like, have to be obtained from the injured worker's employer.

Payments of compensation are adjusted according to the period of incapacity experienced by the worker. The period of incapacity is likely to be increased because of the worker requiring isolation for a period following infection, and reduced opportunity to engage in workplace activities of graduated return to work programs. In other words, while the worker may have been physically capable of some work, they are required to remain isolated to prevent further infection to other persons and as a consequence it is likely there will be some increased duration in weekly payments as a consequence of the isolation procedures. In addition, all jurisdictions include legislative provisions mandating return to work plans. At the time of writing, it is unknown whether the rate of return to work has been affected by COVID-19 infections, but it seems likely, because of factors discussed above, that such impacts are likely to occur. It is also likely some industry lockdowns and work closures will delay immediate return to work for all workers, including infected workers and those with previous work injuries. For workers not receiving compensation at the time of an employer cessation or lockdown, the reduction in income (notwithstanding

Research Needs" (2020) 20(10) *The Lancet* 1115 <https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30701-5/fulltext>.

[98] JM Marshall, DA Dunstan and W Bartik, "The Role of Digital Mental Health Resources to Treat Symptoms in Australia during COVID-19" (2020) 12(S1) *Psychological Trauma; Theory, Research, Practice and Policy* S269 <https://psycnet.apa.org/fulltext/2020-38975-001.pdf>.

[99] All jurisdictions have arrangements where the insurer makes payments to workers direct in the event of employers ceasing to operate. See *Ball v William Hunt & Sons Ltd* [1912] AC 496; *Thompson v Armstrong & Royse Pty Ltd* (1950) 81 CLR 585; *Arnotts Snack Products Pty Ltd v Yacob* (1985) 155 CLR 171.

[100] G Kielhofner et al, "Outcomes of a Vocational Program for Persons with Aids" (2004) 58 *American Journal of Occupational Therapy* 64.

[101] C Cancelliere et al, "Factors Affecting Return to Work after Injury or Illness: Best Evidence Synthesis of Systematic Reviews" (2016) 24(1) *Chiropractic and Manipulative Therapy* 32, DOI: 10.1186/s12998-016-0113-z.

[102] C White et al, "The Influence of Social Support and Social Integration Factors on Return to Work Outcomes for Individuals with Work-related Injuries: A Systematic Review" (2019) 29 *Journal of Occupation Rehabilitation* 636 <https://doi.org/10.1007/s10926-018-09826-x>.

Federal Government support such as "Job Keeper") may prompt a "rebooting" of old claims by some workers in an effort to reduce the impact of job losses.[103]

Exclusions and Complications with Claims

In regards to the reports of security guards contracting COVID-19 infections from their direct contact, which may have included sexual contact, with infected travellers under mandatory government-supervised quarantine, a question arises as to whether some workers will be excluded or disqualified from claiming compensation due to their conduct.[104] All jurisdictions have provisions excluding claims by reason of the serious and wilful misconduct of the worker. In the workers' compensation context this is generally understood to be conduct showing a wilful disregard for one's safety by engaging in behaviour that has a likelihood of increasing the risk of injury, and where the worker has an appreciation of that risk.[105] In addition, as noted above, there is a requirement the injury or disease is work-related. In the case of an injury simpliciter, the injury must arise out of or in the course of the employment. In *Comcare v PVYW (PVYW)*[106] the High Court held a worker who was, with her employer's authority, staying in a hotel while performing work in regional areas was not entitled to compensation when she sustained injuries when injured when a light fitting fell and hit her on the face while she engaging in sexual intercourse with an acquaintance. The High Court acknowledged it is well established that a worker will be in the course of their employment during intervals between work, where those intervals are spent engaged in activities permitted or encouraged by the employer.[107] It was held that while the worker was in the course of her employment while accommodated in the hotel (as an activity encouraged by her employer), she took herself outside the scope of her employment when she engaged in activities that had no connection or association with her employment. *PVYW* suggests strongly security officers who have contracted COVID-19 as a consequence of sexual contact with travellers in mandatory quarantine have removed themselves from the course of the employment as they were not doing something connected or associated with the employment. Furthermore, given the strict instructions for physical distancing from isolating travellers, such behaviours would almost certainly amount to wilful misconduct. Alternatively, if infection arises due to a failure to wear personal protective equipment supplied by the employer the onus would be on the worker to show they had not engaged in wilful misconduct.[108]

A further complication for claimants may arise in relation to the causation and treatment of COVID-19. For example, what is the effect on a claim where a worker with a compensable claim prior to the outbreak of the virus was treated for that condition and in the process of receiving treatment was infected with COVID-19? In such a case, the viral infection may complicate treatment of the original injury and increase the period of incapacity. Is the employer liable for this? An employer/insurer might rely on the long established principle of novus actus interveniens to argue they are not liable for the effects of COVID-19 in these circumstances.[109] The question in effect is whether the worker should be compensated

[103] Australian Government – The Treasury, *Economic Response to the Coronavirus* (2020) <https://treasury.gov.au/coronavirus?gclid=Cj0KCQjwoJX8BRCZARIsAEWBFMIXTVogbAiKR6Fbuf_QMHte11EdkPkvRjaipJaRjxb13bfAHZbM85caAvDJEALw_wcB>.

[104] See generally "COVID-19 Hotel Quarantine Inquiry" <https://www.quarantineinquiry.vic.gov.au/> and a host of similar news bulletins such as "Breaches of Hotel Quarantine 'Let Victorians Down', Minister Says as Inquiry Launched", *ABC News*, 2 July 2020 <https://www.abc.net.au/news/2020-07-02/victoria-hotel-quarantine-breaches-inquiry-launched/12414612>.

[105] V Lambropoulos and R Guthrie, "Misconduct, Self-inflicted Injury and Suicide in Workers Compensation: A Review of the Australian Legal Framework" (2018) 26(2) JLM 389.

[106] *Comcare V PVYW* (2013) 250 CLR 246; [2013] HCA 41 and see the commentary in E Windholz, "Comcare v PVYW: Are Injuries Sustained While Having Sex on a Business Trip Compensable" (2014) 36(2) *Sydney Law Review* 345, L Grey, "The Course of the Employment after Comcare v PVYW: What Are You Doing Now?" (2015) 131(8) *Precedent* 18.

[107] *Hatzimanolis v ANI Corp Ltd* (1992) 173 CLR 473.

[108] "Victorian Hotel Quarantine Contract Reveals Security Company Had to Provided Infection Control Training", *ABC News*, 29 July 2020 <https://www.abc.net.au/news/2020-07-29/coronavirus-victoria-hotel-quarantine-security-contract/12503466>.

[109] *Dunham v Clare* [1902] 2 KB 292 (Lord Collins); *Doolan v Henry Hopes and Sons Ltd* 11 BWCC 93; *Laverick v William Gray & Co Ltd* 12 BWCC 176; *Gilmore v Garrallan Coal Co* 19 BWCC 683 these cases now well embedded in Australia workers

for the whole period of incapacity resulting from the original injury and its aggravation (by COVID-19) or only for the estimated period of incapacity resulting from the original injury alone which may in any event vary in the case of each worker. The argument for the latter is unlikely to succeed unless there is a clear break in the chain of legal causation between the original injury and the contraction of the virus.[110] In most cases it is likely contraction of COVID-19 while obtaining prescribed and competently administered treatment for the original injury would be regarded as a *sequelae* to the original injury and not breaking the legal chain of causation, and as such the employer would be liable for the additional incapacity caused by the infection.[111]

EMPLOYERS

One issue that has arisen for employers since the COVID-19 pandemic began has been the imperative to ensure compliance with occupational health and safety regimes. In some cases, employers had no choice but to cease work activities, particularly those in the entertainment,[112] hospitality, and retail industries;[113] while others were required to put in place COVID-19 compliant regulations to allow for physical distancing and infection control. This has meant some workers were directed by their employer or the government to work from home, raising concerns about the safety of home-based work environments. Intertwined with the increase in occupational health and safety imperatives are a number of workers' compensation issues. Where workers are working at home, the employer's liability for compensation is operative so the employer may be liable in the event a worker sustains injury in the course of their employment while working from home. It follows there is potential for increased liability for some employers of workers who have been working from home-based workstations. It might be expected that given the nature of home-based work, which for most workers is sedentary, generally speaking the risk of injury of such work is low. However even sedentary work has its dangers as new research on the dangers of prolonged sitting. Apart from using household furniture not designed for use with a computer and peripheral input devices, there can be reduced motivations for individuals working from home to take regular breaks in their work tasks, including incidental changes in postures required to attend face-to-face meetings. A lack of postural variability is a major risk factor for the development of musculoskeletal complaints in sedentary office workers.[114]

That said, there are a number of cases have emerged, which present some challenges for employers. In the recent decision of the New South Wales Court of Appeal in *Workers Compensation Nominal Insurer v Hill* (*Hill*),[115] the Court confirmed the dependants of a deceased worker employed in a family-owned company and who worked at home with her co-worker husband (who suffered from delusions), were entitled to workers' compensation when the worker was murdered at home by her husband. The Court found she was working and in the course of the employment at the time of her death. The *Hill* case dramatically illustrates the employer's obligation and liability may extend beyond ensuring home-based workstations are appropriately set-up and will extend to the risks of psychological stressors arising from home-based work. Notably Basten J said:

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compensation law. See, eg, *Rosmini v Chrysler Australia Ltd* (1973) 6 SASR 212, 215 (Bray CJ) who noted "a supervening factor, a *novus actus interveniens,* may operate so as to displace in the eyes of the law the original injury as the cause of the incapacity".

[110] As where the treatment is negligently administered per *Hogan v Bentinck West Hartley Collieries* [1949] 1 All ER 588 and *Rothwell v Caverswall Stone Co* [1944] 2 All ER 350, 365 more recently referred in *Baker v Willoughby* [1970] AC 467.

[111] As applied in *Migge v Wormald Bros Industries Ltd* [1972] 2 NSWLR 29, *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 and *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452.

[112] N Griffiths, "How Coronavirus Is Impacting the Music and Entertainment Industry", *The Music*, 6 March 2020 <https://themusic.com.au/news/coronavirus-travel-ban-australia-music/X917c3J1dHc/06-03-20/>.

[113] S Masige, Briefing: A Rolling List of Retailers That Have Shut Their Doors Amind the Coronavirus Outbreak (2 April 2020) Business Insider Australia <https://www.businessinsider.com.au/coronavirus-retail-shutdowns-2020-3>.

[114] K Davis and S Kotowski, "Postural Variability: An Effective Way to Reduce Musculoskeletal Discomfort in Office Work" (2014) 56 *Human Factors* 1249. DOI: 10.1177/0018720814528003.

[115] *Workers Compensation Nominal Insurer v Hill* (2020) 295 IR 172; [2020] NSWCA 54.

> There may, of course, be domestic violence between couples who work from home in the same business which would not attract liability on the part of the employer to pay compensation, because the violence had no connection with the work conditions of either party. However, on the findings of fact, that was not this case. The findings of fact demonstrated a palpable and direct connection between [S'] delusions, [M's] employment and the harm suffered by her.[116]

The impact of increased perception of an environmental threat and any subsequent sympathetic nervous system reaction that occurs would seem to be susceptible to the same reasoning. For some employers, the COVID-19 pandemic has presented challenges for return to work. The change in work schedules allowing workers to work from home has opened the potential for increased flexibility in work arrangements, forcing employers to reconsider work schedules and allow some workers to continue to work at home or to include time away from the employer's premises in their usual working week. As noted, above, where the worker has sustained an injury or disease directly related to COVID-19, the question arises for employers as to when it is safe for the worker to return to work. An employer who has received a claim from a worker with COVID-19 infection would be obliged to ensure the worker was safe to return to work; a decision based upon medical evidence the risk of infection for co-workers had ceased and the workers' current capacity for work.

There have been anecdotal reports of workers who have reacted to the prospect of return to the workplace with exaggerated fear responses due to concerns about exposure to COVID-19. It can be expected some workers will seek legal remedies, including applications to the Fair Work Commission to obtain permission to work from home over the objections of their employer. The extent to which employers will be forced to accommodate workers' fears and the necessary proof for assertion of such a right are presently unknown.

INSURERS

Similar to what occurred following the 2008 GFC, various sectors of the Australian economy have contracted, notably the entertainment and hospitality industries, as a result of Government regulations mandating lockdowns of residents in locations with infection outbreaks, restricted physical distancing requirements, and temporary cessation of operations in those industries. Workers' compensation insurance in Australia is compulsory and employers pay premiums based upon the number of employees and the risk assessment of a particular industry. One of the unexpected outcomes of the COVID-19 pandemic maybe that some insurers, such as health care and automobile insurers, have experienced windfall profits due to declining claims.[117] Contraction in certain industries has meant some insurers potentially benefited from having received premiums from employers who are then less likely to make claims on their policies because their businesses are not operating. There have been examples of windfall profits in the health insurance industry with reduced numbers of health rebate claims because less people are seeking routine and elective medical care. Similarly, the motor vehicle insurance industry has had to settle fewer claims related to motor vehicle accidents because less people have been travelling on the roads during lockdowns and border closures.

While there have been clusters of workers' compensation claims in the larger jurisdictions in Victoria and New South Wales, a number of those claims were not large and it is premature to expect workers' compensation insurers would be experiencing extreme pressures from those claims. Claims for injury simpliciter type claims are likely to be low, but the patterns of compensation since June 2020 suggest an increase in disease-type claims arising from infections in health- and aged-care industries. The impact of the psychological aspects of the pandemic, discussed above, cannot be determined at this time.

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[116] *Workers Compensation Nominal Insurer v Hill* (2020) 295 IR 172, [37]; [2020] NSWCA 54.

[117] For example in Health insurance see A Biggs, "COVID-19 and Private Health Insurance", *Parliament of Australia Flag Post* (10 June 2020) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/June/Private_health_insurance_and_COVID>; T Bowden and M McCarthy, "Calls for Private Health Sector to Hand Back Very Substantial Unexpected Profits during Coronavirus Crisis", *ABC News*, 30 April 2020 <https://www.abc.net.au/news/2020-04-30/coronavirus-calls-for-private-health-sector-to-hand-back-profits/12197990>; ValChoice Insurance, "$100 Billion in Profits Expected to Go to Auto Insurance Companies Due to COVID-19", *Business Wire*, 7 April 2020 <https://au.news.yahoo.com/100-billion-profits-expected-auto-120000565.html>.

It is likely workers and their representatives will experience delays in the resolution of claims due to the potential legal complications outlined above, mainly related to causation issues. In addition, other factors may influence claims determinations. The finance and insurance industries were early adopters of "working from home" approaches, noting a spike in customer contacts relating to a range of insurance issues.[118] It is likely claims processing will slow due to increased customer queries and possibly a decline in staff able to process claims due COVID-19 infections among insurance claims officers employed by Australian businesses but working in offshore locations, including the Philippines where virus infections in the community are not under control. Working at home may not always allow those workers access to all relevant databases to process and/or manage claims.

As seen at the end of the GFC, when the local economies are revitalised and workers re-enter the workforce, there is potential for an increase in injury and/or disease rates. This may occur because workers become deskilled or de-conditioned while away from the workplace[119] or young workers enter the workforce without sufficient training and experience. At the time of writing, it is too early to predict whether this will be a likely outcome of the COVID-19 pandemic.

Legislators and Regulators

The outbreak of the COVID-19 pandemic in New South Wales, Western Australia, and South Australia resulted in a speedy response by legislators, similar to that seen in some jurisdictions in the United States, to amend workers' compensation legislation so as to provide that certain classifications of workers who become infected are presumed or deemed to have contracted the virus in the course of their employment, thus relieving them of the burden of establishing the causal connection.[120]

In the absence of a presumption, legislation clarifying the evidentiary significance of contact and genomic tracing would be helpful. Since contact and genomic tracing are a governmental function in Australia and not subject to private manipulation, it would seem appropriate to provide by legislation that a contact or genomic trace finding that it is more probable than not that an infection was caused by a workplace exposure, is sufficient to establish causality under State or Federal workers' compensation statutes.

Conclusions

The COVID-19 pandemic will present some unique challenges to workers' compensation claims. One telling feature of the pandemic is that it has affected all jurisdictions simultaneously with an array of common workers' compensation issues, with some variation in intensity. It is likely claims involving COVID-19 infections will fall into a number of categories. Where infection is caused by specific contact such as contact by sneezing or where infection arises because of documented workplace contact, the chain of causation will be clearer and more easily established. More difficult will be the claims where the point of infection is unclear or complicated by potential community-based infections. The development and inclusion of contact tracing evidence is likely to affect these cases, and we anticipate the courts will accept this as sufficient evidence. The legislative adoption of presumptions with respect to some groups of workers will also affect causation with respect to infection cases. While a body of case law has assisted courts and tribunals in relation to causation in workers' compensation matters, we anticipate the unique nature of the spread of COVID-19 is likely to prompt at least some reconsideration of some of the principals of causation and possibly lead to some new jurisprudence in this area. At a minimum, courts and tribunals adjudicating workers' compensation disputes will be need to inform themselves on the nature and origins of the virus.

[118] KPMG, *COVID-19 Insurance Challenges* <https://home.kpmg/xx/en/home/insights/2020/04/covid-19-insurance-operations-challenges.html>.

[119] Shaw et al, n 39.

[120] *Return to Work SA (COVID-19) Amendment Bill 2020* (SA); *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Bill 2020* (NSW); *Workers Compensation and Injury Management Amendment (COVID-19 Response) Bill 2020* (WA).

In addition to claims related to COVID-19 infections, there are the likely claims for work-related stress arising from more difficult areas such as increased workload to manage changes in work demands or online delivery of services, added work pressures from the fear of infection, and need for additional personal protective equipment use, changed rosters, work patterns, and unanticipated additional duties as they arise. Australian workers' compensation systems are well attuned to dealing with disease claims arising from work-related stress; however, these claims are frequently challenged on causation grounds. As we have noted, stress is an anticipated threat to the body's homeostasis, and behavioural responses to stress is not an accepted diagnosis nor a disease in and of itself, notwithstanding the tendency of Australian tribunals to accept these claims. We speculate proof of causation difficulties associated with stress claims, especially given the well-documented occurrence of stress responses in the general community arising from lockdown conditions, may give rise to a closer look at the connection between experiences of stress and the genuine behavioural health conditions that are associated with it.

The COVID-19 pandemic has highlighted vulnerable worker groups including the increased use of gig economy workers to fill gaps in the transport of food and other home-delivery services. We also predict return to work for claimants will be attended with some gender issues given the disproportionate loss of employment for women in key affected industries.

We anticipate that similar to the GFC, there will be some patterns emerging with compensation claims. Contraction of employment in some industries, such as entertainment and hospitality, may result in a decline in claims during the periods of enforced furlough or lockdown. As workers gradually return to work in those industries, there is likely to be an increase in claims. In aged care, health care, and the meat industry that have accounted for the majority of work-based COVID-19 infections in Australia, there is likely to be a spike in claims. As a consequence, insurer profits may vary according to the industry covered by the insurer. It is conceivable some insurers may experience some mild increase in profits as they have taken annual premium income for period of declining employment and therefore declining claims. Some insurers, particular in Victoria and New South Wales, may experience uncertainty due to spikes in claims in some industries, although the complete shutdown of business in Victoria during response to its "second wave" may mitigate the increases.[121]

Employers in the aged care and health care sectors and some abattoirs will have experienced increased costs arising from staff absences through sick leave and the like. Additional costs incurred for the provision of additional personal protective equipment will also add to these costs. For some employers it is likely there will be unexpected increases in workers' compensation claims directly related to COVID-19 infection and indirectly to behavioural health issues and associated work-related stress responses.[122] For other employers, costs and premiums may fall because of workers being laid off or furloughed. The development and analysis of these trends, like the development of claims experience from workers presently working from their homes, will have to await further data. As a result of these uncertainties, the full impact of the pandemic on employers is uncertain at this time.

[121] R Guthrie, R Aurbach and A Fronsko, "Workers Compensation and Economic Downturn" in P Sadler (ed), *Contemporary Issues in Law & Policy* (Curtin University Applied Law & Policy Group, 2010) Ch 5.

[122] See Safe Work Australia, *Workers Compensation Claims Data Related to COVID 19 Now Available* (4 November 2020) <https://www.safeworkaustralia.gov.au/media-centre/news/workers-compensation-claims-data-related-covid-19-now-available> noting that as at November 2020 533 workers compensation claims had been lodged with 34% of those related to mental health impacts and 34% of claims from the health care and social assistance industry. Of the 533 claims made less than half had been accepted with 95 rejected and 185 pending decisions. Victoria accounted for 56% of the claims lodged as at November 2020.