



Casualty Predictions 2020

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From mental health to air pollution claims, we offer our international experts' predictions on the opportunities and challenges that the casualty market may face in the coming year and beyond.

1. Focus will continue to fall on mental health, stress and protection from harassment

Over recent months, the Health and Safety Executive has increased its focus on mental health in the workplace and the importance of taking care for the wellbeing of employees has become more visible in many businesses. Claims for work-related stress and for failures to protect employees against harassment have become more prevalent and, as fixed fees have been introduced in lower value motor and casualty claims, the more lucrative fees available to solicitors presenting the claims have seen a number of firms of solicitors move into this area. We predict that the increased publicity around mental health in the workplace will see an increase in the number of claims presented, and insurers and their policyholders should seek to ensure that they take steps, for example providing support helpline services and mental health first aiders in the workplace, to protect their workforce and thereby reduce the risk of future claims.

2. Glyphosates - time for another round in the UK courts?

Glyphosate and its allegedly carcinogenic properties have been the subject of high profile litigation in the USA. Whilst causation, coupled with the epidemiology of non-Hodgkins Lymphoma, is still under debate, this has not deterred US juries from making headline-grabbing damages awards in excess of US\$2bn (£1.5bn). Similar claims have since been filed in Australia and Canada. Germany, France and Austria have also announced proposed bans on glyphosate products. However, the EU regulator maintains that glyphosate is safe to use. The current license for glyphosate expires in 2021 and chemicals regulation in the UK currently follows the EU guidelines. Although the post-Brexit approach to regulation is unclear, the approach of the English courts to potential claims is likely to be circumspect. In the early 2000s, the courts considered the alleged cancer-causing properties of organophosphates (sheep-dip products) and whether group claims could be brought. These applications were considered unviable, due to inadequate expert evidence and the considerable public expense a group litigation order would have involved. At the time, the claimants protested that it was unfair for the courts to consider the credibility of the scientific evidence, without a substantive trial. Twenty years on, with group litigation gathering pace and advances in scientific research, it remains to be seen if the courts will take a different stance to proposed group claims. It will certainly not be a surprise if UK claimant firms explore pesticides as a potential new "toxic tort" area alongside asbestos, particularly with the decline of industrial deafness claims and whiplash reforms.



3. Vicarious liability's boundaries continue to flex

The boundaries of vicarious liability and circumstances in which a business will be vicariously liable for the actions of its employees (or non-employees) will continue to be tested in the courts. In *Shelbourne v Cancer Research UK*, following an accident on the dancefloor at a Christmas party, the High Court held that as the incident was not sufficiently connected to the fellow party-goer's field of work the employer was not vicariously liable for his actions. The Claimant has been refused permission to appeal against this judgment. The question of whether an employer should be vicariously liable for the deliberate and criminal publication of employees' data by a rogue employee is the subject of a current appeal to the Supreme Court in *Wm Morrisons Supermarket plc v Various Claimants* and the decision is awaited. We predict that this area of law will continue to develop as further judgments are handed down, reflecting the evolving nature of the modern workplace.

4. Air Pollution: an Employers' Liability or Public Liability risk?

We are already starting to see some asthma claims where there is a combination of generic workplace fumes, including diesel exhaust fumes. These claims are governed by the COSHH Regulations 2002. At present there is no agreed limit for diesel fumes so they will fall under the generic dust and fume levels. The Regulations were introduced to control exposure to substances within the workplace. It remains to be seen whether there is an attempt to extend the application to cover atmospheric air pollution for employees who work in areas where pollution levels are exceeded. Issues of action against central government or local authorities for failure to implement clean air policies is also not clear. Claims in tort are difficult given that claims from individuals against public bodies for omissions have tended to fail and there is no clear route for claims under human rights legislation. However many medical experts seem willing to credit poor air quality to illness and reduced life expectancy and this is clearly a fast evolving area.

5. Health tech will improve risk data and fraud exposures, but privacy will remain the big issue

There is a wide range of health tech, including wearables, insertables and connected health monitors, contributing to the global pool of health data. New health tech will keep coming. For example, Google's sister company, Verily, is looking to turn contact lenses into devices that monitor diabetics' glucose levels. Insurers will compare an individual's health data to big data sets to assess their health risks. This will result in better risk modelling, new products including "just-in-time" cover, and improved fraud protection. Individual health data will also be used in court proceedings as evidence of activity levels or injury. Privacy will remain the big issue and the main legal battlegrounds will involve device security and the current ambiguities in privacy law.

6. A New Zealand Perspective: Sexual harassment claims will continue to rise and regulatory frameworks will be reviewed

Sexual harassment complaints remain severely under-reported so Employment Practices Liability claims will rise significantly in 2020. The #MeToo movement has empowered more people to launch claims. It has also resulted in the creation of organisations such as Time's Up in the US and NOW in Australia, which are providing litigation funding and pro bono legal services. Governments worldwide want to be seen as taking a strong stand in this area. Unreasonable behaviours at work are an emerging health and safety issue and the New Zealand Government will look at bullying, mental health and harassment when it reviews the Health & Safety at Work Act this year. This could include a new, low level disputes process to address issues at an early stage. In the meantime, WorkSafe is building its capability to deal with bullying and harassment and will investigate where a serious mental health condition has resulted. The New Zealand Government is looking into the possibility of extending ACC (no fault workplace accident compensation) to the victims of sexual harassment (it already covers criminal sexual offences). The current Sexual Violence Legislation Bill further aims to support sexual violence complainants giving evidence, which could also result in more sexual claims being pursued.



7. An Australian Perspective: Private social media content will become fair game as evidence in Employment Practices Liability claims

Following a NSW Supreme Court decision (*Gavan v FSS Trustee Corporation*), Australian courts now provide an avenue for Employment Practices Liability defendants to source private social media records to meet a claim. This form of evidence will become more common, making it important for insurers to quickly identify whether a claimant has a social media presence and be mindful of individuals managing multiple accounts, fake profiles and profiles with similar details. Insurers need to determine the relevance of the records, make a copy of the records (including date and time stamps), and formulate strategies to fill in gaps or seek sanctions for litigants who knowingly destroy evidence. Employers will also need to address private social media content in their policies.

8. The rise of flexible work arrangements will create new and heightened exposures for employers

Litigation funders looking for new sources of profit have found fertile ground in a number of recent employment law decisions in Australia. With a surge in employee class actions, insurers will not be immune to the trend. Companies operating in the gig economy that are reliant on pools of "on-demand" workers, and those using independent contractors and casual workers, risk engagements being re-classified and workers attracting historic entitlements. Employment Practices Liability policies will not meet some of the new forms of pleading and should be assessed for coverage they provide. With more people choosing agile working options, cyber exposures for employers will also rise as home wi-fi networks create gateways for ransomware leading to data theft from the office network.



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