INSURANCE COVER FOR LIABILITY FOR ABUSE

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Scope of "Abuse"

The form of abuse which has been most frequently reported recently is sexual abuse. This is committed not just by individuals (e.g. certain well-known celebrities) but also and more extensively by those responsible for the care of children or other vulnerable persons. In addition to abuse by those responsible for the care of children or other vulnerable persons, there can be instances of abuse by third parties of children or other vulnerable persons in the care of others.

Whilst recent publicity has been about sexual abuse, there have also been instances of physical abuse by those responsible for the care of children or other vulnerable persons, including the elderly and mental patients.

Categories of Insured exposed to Liability

These can extend to:

- Local authorities;
- Care homes;
- Voluntary organisations;
- Schools;
- Religious institutions;
- Police authorities (e.g. in grooming cases).

Voluntary organisations can include youth groups and charities caring for the young or vulnerable.

In relation to police authorities, it should be borne in mind that whilst the police do not owe a duty of care in relation to the investigation of crime,[1] the police can nonetheless be liable in damages in relation to the investigation of crime under the Human Rights Act 1998 for breach of Article 3 - "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" - as was held in *DSD, NBV v The Commissioner for Police for the Metropolis*.[2]

Limitation

It needs to be borne in mind that abuse claims may relate to incidents and injury going back many years. Limitation is perhaps unlikely to operate as a bar given that firstly time does not run against minors and persons under a disability and secondly and in any event the Courts have a discretion to extend the limitation period, which may well be exercised in circumstances where there are understandable reasons why a victim might not have felt able to come forward any earlier with allegations of abuse. For example, a Judge is likely to be sympathetic to the plea that the Claimant felt too ashamed of what had happened to him/her to say anything about it until he/she heard that someone else had had the courage to come forward.

Types of Responsive Policy

Typically a public/general liability policy will be involved. However, in cases where some form of medical care is being provided there may well be a medical malpractice policy which could respond to cases of abuse.

Ambit of "Insured"

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[1] *Hill v. Chief Constable of West Yorkshire* [1989] AC 53.

[2] [2014] EWHC 436 (QB), [2014] EWHC 2493 (QB) and [2015] EWCA Civ 646.

The ambit of an "Insured" under a policy will be the subject of definition in the policy. A definition could be any one of the following:

- The policyholder;
- The policyholder and its directors/partners;
- The policyholder, its directors/partners and employees;
- The policyholder, its directors/partners and employees and other persons from a list of categories for whom the Insured may request indemnity.

Trigger of Cover

By the trigger of cover is meant what must occur during the period of the policy in order to trigger the insuring clause. This could be specified as being:

- An occurrence;
- The happening of injury;
- The happening of accidental injury;
- The making of a claim or the notification of a circumstance.

(1) Occurrence

In this context, the word "occurrence" could mean the occurrence of actionable conduct or the occurrence of injury to a third party. In the absence of a policy definition, and without any other context to assist in ascertaining which meaning is intended, ordinarily it will be construed to mean the occurrence of actionable conduct.[3] However, even in the absence of a policy definition, the context may make it clear that what is being referred to is the occurrence of injury rather than the occurrence of actionable conduct.

(2) Injury

This means actionable injury. If no actionable injury occurs, the policy is not triggered. Furthermore, the policy trigger operates when the injury first occurs and there is no repetition of the trigger merely by virtue of the deterioration of the third party victim's condition.

In the context of abuse, the infliction of unlawful physical contact will be the tort of battery. Physical contact is unlawful if it is in excess of what is generally acceptable in everyday life and without lawful consent. However, battery is actionable without proof of actionable injury and accordingly a tort may be committed for which damages are recoverable without the policy being triggered.

In cases of physical abuse there will usually be an actionable injury on each occasion of abuse and the abuse may span policy periods. On that basis, successive policies may be triggered by a series of instances of abuse and there may be multiple triggers within each policy period.

As regards sexual abuse, any non-consensual sexual touching (which includes sexual touching of the young and vulnerable whose "consent" to or acquiescence in what is happening to them would not be true consent) will be actionable as battery. However, the "abuse" may or may not cause actionable injury for policy purposes. Yet again, there may be repeated instances of abuse spanning successive policy periods.

Psychiatric injury will be actionable injury. If physical injury is followed by psychiatric injury and the Insured is liable in respect of the physical injury, the relevant policy will be that in force when the actionable physical injury occurred. However, if the psychiatric injury is not preceded by any physical injury or if the Insured is liable in respect of the psychiatric injury but not the physical injury, the policy will be triggered when the psychiatric injury occurred. It must be borne in mind that the psychiatric injury may well have occurred before it is actually diagnosed. If the Insured is held liable merely for the exacerbation or prolongation of a period of psychiatric injury, the exacerbation or period of prolongation of the psychiatric injury may be treated as the happening of injury.

[3] *Forney v Dominion Insurance Co Ltd* [1969] 1 Lloyd's Rep 502.

In cases where the Insured is not vicariously liable for the abuse (e.g. in cases where there is grooming by outsiders of children in the Insured's care leading to sexual abuse by those outsiders and/or others associated with them):

- The Insured's liability will be for its failure to protect the victim from such grooming;
- The Insured's negligence will become actionable when the first injury caused by such negligence occurs and subsequent injury may be treated as merely a development of the initial injury;
- Alternatively, the facts may justify the conclusions that there was a continuing breach of duty by the Insured such that each injury resulting from the continuing breach is separately actionable against the Insured;
- Which policy or policies are triggered and how many times will be dictated by the appropriate factual and legal analysis of what has occurred.

(3) Accidental Injury

If the policy requires the injury to be "accidental" the question whether or not the injury was "accidental" will be judged from the perspective of the Insured. In cases where the Insured is vicariously liable for deliberate conduct by its employees, the injury to the victim will nonetheless be "accidental" from the perspective of the Insured unless the conduct of the employee(s) in question is pursuant to a policy laid down by the Insured.[4] However, deliberate conduct by a person who owns or controls the Insured will not be "accidental" from the perspective of the Insured.

(4) Claims Made/Circumstances Notified

A "claim" is a demand for or an assertion of a right to compensation or damages.[5] A claim is made by being notified to or otherwise brought to the attention of the person against whom it is asserted.[6]

As regards the notification of circumstances, the scope of any notification will determine whether subsequent claims date back to the date of notification. A "hornet's nest" or "can of worms" notification is permissible.[7] There must be a causative link between the circumstances notified and the subsequent claim(s).[8]

Proof of Cover

If the policy is triggered by actionable injury, the injury may have occurred many years ago and the Insured may not be able to find a record of cover. If the Insured cannot prove the existence of the insurance for the period when the actionable injury occurred, it will not be able to claim indemnity.[9]

Relationship of Abuse to the Activities or Business of the Insured

The Insured will be vicariously liable for abuse by employees, even if acting for their own ends or selfishly and gratuitously as long as the abuse was committed in the course of their employment. If the Insured is vicariously liable, the abuse will be sufficiently related to the activities of the business of the Insured for the purposes of any insurance policy which requires the liability of the Insured to arise out of the carrying on of the Insured's business.

For the purposes of a medical malpractice policy, the abuse will be covered if it is committed in the course of the Insured's services to the victim, as such a policy would usually require.

Retention and Limit of Indemnity

[4] *Hawley v Luminar Leisure Ltd* [2006] Lloyd's Rep IR 307.
[5] *West Wake Price & Co v Ching* [1957] 1 WLR 45.
[6] *Robert Irving & Burns v Stone* [1998] Lloyd's Rep IR 258.
[7] *Kajima v The Underwriter Insurance Co* [2008] Lloyd's Rep IR 391.
[8] *Kajima v The Underwriter Insurance Co* [2008] Lloyd's Rep IR 391.
[9] See, eg, *Spriggs v Wessington Court School* [2005] Lloyd's Rep IR 475.

(1) "Per Occurrence"

As in the case of the use of the word "occurrence" in relation to the policy trigger, this may mean the occurrence of actionable conduct or, when construed in context, the occurrence of injury. In either case (subject to any policy definition of "occurrence"), there must be something happening at a particular time and place and not some continuing state of affairs or process.

(2) "Per Claim"

There will only be one "claim" where a Claimant seeks a remedy against the Insured for a series of instances of abuse even if each instance of abuse gives rise to a separate cause of action.[10]

(3) Aggregation

A common form of clause is one which provides for a single retention and/or limit of indemnity where there is a series of occurrences/claims arising from one source or originating cause.

The word "series" has been said to require some connecting factor which links occurrences which would otherwise be separate: see *Countrywide Assured Group Plc v Marshall*.[11] However, in *Countrywide* reliance was also placed on *Distillers Company Bio-Chemicals (Australia) Pty Ltd* v *Ajax (Insurance) Company Ltd*[12] in which the majority held that a number of events sufficiently similar kind and following one another in temporal succession would form a series and on the assumed facts in *Countrywide*, on the basis that the claims might all be described as occurrences of misspelling of pensions, the claims were held to be sufficiently related to form a series, regardless of whether or not they were attributable to one source or original cause.

Furthermore, in *Municipal Mutual v Sea Insurance Co Ltd*,[13] a succession of individual acts of pilferage and vandalism by a number of individuals, probably acting independently of one another, over a period of 18 months was held to form a series of occurrences. Similarity and temporal succession is probably therefore sufficient in order for there to be a "series".

The words "one source or originating cause" have been the subject of the following judicial comments:[14]

> "A cause is to my mind something all together less constricted. It can be a continuing state of affairs; it can be the absence of something happening. Equally, the word "originating" was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate."[15]
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> "The word "event", occurrence or claim describes what has happened; the word "cause" describes why something has happened. The words "one source or original cause" are, as Hobhouse LJ said [in the *Municipal Mutual* case] "why". It is, I think, the force of the word "original" or "originating" … that entitled one to see if there is a unifying factor in the history of the claim with which the Claimants were faced …"

Examples of the application of such an aggregation clause are:

- A port's continuing want of care in not having adequate regard to its responsibilities as the bailee of goods and having no adequate system to protect the goods from pilferage and vandalism constituted a "single source or original cause" of the pilferage and vandalism that occurred at the port (*Municipal Mutual*);
- Lack of proper training of the Insured's selling agents and selling employees was a single source or original cause of their individual mis-selling of pension products (*Countrywide*);
- The marketing of an investment fund as a safer investment than was in fact the case was a single source or original cause of the mis-selling of the fund notwithstanding that it was

[10] *Haydon v Lo & Lo* [1997] 1 WLR 198.
[11] [2003] Lloyd's Rep IR 195.
[12] [1974] 130 CLR 1.
[13] [1998] Lloyd's Rep IR 421.
[14] *Axa Reinsurance (UK) Plc v Field* [1996] 1 WLR 1026 at p 1035, Lord Mustill.
[15] *Countrywide Assured Group Plc v Marshall* [2003] Lloyd's Rep IR 195, at para [15].

marketed over a period of years to many thousands of customers through numerous different channels using many different forms of marketing literature (*Standard Life v ACE European*[16]).

An important issue may be whether it can be said that there is some systemic organisational failure which provides an underlying cause for the abuse. In this regard it must be borne in mind that the fact that several individuals are guilty of the same culpable failures is not of itself sufficient to demonstrate that there was a common source or original cause. There has to be some common underlying cause of their failures (e.g. arising from some discussion between them or from a single source document or from some underlying systemic failure) and it will not be sufficient if their common failures were merely due to their separately having the same mis-appreciation or applying the same flawed line of reasoning.[17]

If there is a high level systemic failure which results in abuse at institutions under the control of local managers, that will be a sufficient "originating cause" for the purposes of such an aggregation clause so as to permit aggregation of the abuse claims emanating from the institutions under the control of those local managers. As regards claims referable to a particular institution, the acquiescence by managers of that institution in a culture of abuse or in a culture that facilitates abuse would be a sufficient "originating cause" so as to permit aggregation of such claims. On an individual level, the pre-disposition of a particular individual to commit abuse will be a sufficient "originating cause" so as to permit aggregation of claims relating to abuse by that particular individual. As regards those responsible for investigating or taking action in respect of victims' cases, a systemic failure which results in victims' cases not being treated as worthy of investigation for action will be a sufficient "originating cause".

Exclusions

(1) Professional Services Exclusion

Such an exclusion may be found in a public/general liability policy and may exclude liability for abuse in care homes for the sick, mentally ill and elderly if the abuse was in the course of providing care services.

(2) Deliberate Misconduct Exclusion

In *KR v Royal & Sun Alliance*[18] it was held that an exclusion of deliberate misconduct by the Insured (a company running care homes) excluded abuse by an individual who was not just the managing director and majority shareholder of the company but also treated the company as his own, with nothing of consequence happening without his say so. A later expansion of the exclusion so as to apply to the Insured's directors and managerial employees was held to exclude abuse by the principals of the Insured's care homes.

(3) Proof of Application of Exclusions

The basis on which a claim is put against an Insured and even the basis on which the Insured is held liable to a Claimant is not conclusive for the purposes of policy coverage.[19] It is therefore always open to Insurers to prove that the true basis of liability falls within the ambit of an exclusion.

Non-Disclosure

In *Spriggs v. Wessington Court School*[20] it was common ground that an individual had not disclosed his abuse and ill-treatment of pupils or the abuse and ill-treatment of pupils committed by other members of staff of which he was aware and that the facts went to moral hazard and were material. The issue in the case was as to whether the Insurers had affirmed the policy. Affirmation was rejected on the facts. The Insured's duty to disclose a history of abuse may not arise if there was knowledge on the part of the Insurer prior to the placement of the

[16] [2012] Lloyd's Rep IR 713.
[17] *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437 (Phillips J) and *American Centennial Insurance Co v Insco Ltd* [1996] LRLR 407 (Moore-Bick J).
[18] [2007] Lloyd's Rep IR 378.
[19] See *MDIS Ltd v. Swinbank* [1999] Lloyd's Rep IR 516 and *Omega Proteins Ltd v Aspen Insurance UK Ltd* [2011] Lloyd's Rep IR 103.
[20] [2005] Lloyd's Rep IR 475.

insurance from publicly available information (e.g. an enquiry report) of the history of abuse or there may be affirmation if the Insurer becomes aware after placement from publicly available information of the history of abuse and the Insurer thereafter treats the policy as in effect.

In the context of a claims made policy, if there were circumstances known to the Insured prior to the inception of the policy which were capable of giving rise to a claim but were not disclosed to Insurers, (subject to any innocent non-disclosure clause) that might well entitle Insurers to avoid the policy. Circumstances will be capable of giving rise to a claim if there is a reasonable and appreciable opportunity of there being a claim against the Insured and the potential claim does not have to be a good claim.[21] Knowledge by an Insured of a history of abuse in its institutions would amount to knowledge of a claims-laden circumstance.

Strategy for Insurers

If the Insurer has exposure to abuse claims against its Insured under policies with an occurrence or injury trigger, the Insurer may have to await the development of the claim before being able to ascertain whether triggering events occurred during any relevant period of insurance and/or which periods of insurance are impacted.

If the Insurer has issued claims made/circumstances notified cover and is thereby on risk for all claims made in the period of insurance or claims made after the period of insurance but arising out of circumstances notified during the period of insurance, the Insurer needs to be alive to the prospect of there being other insurance for earlier periods written on an occurrence or injury trigger which may be liable to contribute.

Insurers also need to be alive to the potential for aggregation, although of course aggregation can only apply within a period of insurance unless there is some provision which, exceptionally, allows aggregation across periods of insurance. The facts relevant to aggregation may or may not form part of the basis for the Claimant's claim against the Insured.

Finally, Insurers need to be alive to potential policy defences or rights of avoidance which may also only emerge as claims develop.

In many cases Insurers may have to adopt a "wait and see" approach to issues of policy application and cover.

Conclusion

Whilst abuse claims do not give rise to any particularly novel insurance issues, they do have the potential to give rise to particularly complex questions as to how established insurance principles should be applied. Issues as to when injury has occurred are likely to be particularly complex, and may differ having regard to the basis of the Insured's responsibility for the abuse. For example the Insured liable in respect of the occurrence of the abuse will be responsible for the injury caused by the abuse whereas an institution (such as the police) responsible for the investigation of abuse may only be responsible for such additional injury as was caused by the failure to investigate the abuse, which may only be the exacerbation or prolongation of psychiatric injury. Aggregation issues may require the investigation of underlying causes of the abuse going beyond the ambit of what the Claimants have had to allege in order to plead their causes of action. Similarly, avoidance issues may require investigation going beyond the allegations made by the Claimants.

Attachment issues in particular could be the source of dispute between Insurers if the Insured has the benefit of policies of insurance which could respond to the claim with different Insurers. In such circumstances, it will be for Insurers to decide whether they wish to take every point available to them on attachment or alternatively to reach some accommodation with the other Insurers so as to achieve an orderly handling of the claim on a "rough and ready" apportionment as between Insurers. Whether such a "rough and ready" apportionment is possible may, however, depend on whether aggregation is an issue. If it is, the apportionment may have to be objectively justifiable rather than "rough and ready" if an aggregation case is to be sustained.

[21] *HLB Kidsons v Lloyd's Underwriters* [2008] Lloyd's Rep IR 237 (Gloster J); *Kajima v The Underwriter Insurance Co Ltd* [2008] Lloyd's Rep IR 391 (Akenhead J).