



## **2014 CII NEW GENERATION BROKING FACULTY**

**The impact of scandals, claims and exposés in the care sector on the availability of liability coverage in the open market**

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## THE TEAM

### **Toby Clegg ACII**



### **Toby is a Director at Tradex Insurance Co Ltd & Lloyd's Broker Clegg Gifford**

Toby is a Director at a Lloyd's brokers who insure both commercial and personal risks. His main areas are in placing Motor Trade and commercial / liability risks, although he also has overall direction for marketing and the development of the firm's Internet facilities.

Toby also plays a key role in policy wording development and new business.

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### **Liz Denham Dip CII**



### **Liz is a Commercial Account Handler at Thompson & Richardson (Lincoln) Ltd**

Liz has over 14 years' experience in the insurance industry and is currently working towards her ACII qualification.

Liz has previously been a member of the Lincoln Insurance Institute Council and, in addition to her role as Commercial Account Handler, is her Company's representative for the Brokerability network.

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### **Rowanne Dicker Dip CII**



### **Rowanne is a Market and Broker Performance Manager at Willis**

In her 12 years in the industry, Rowanne has held client facing, management, placement broking and Broking Director roles.

Her current role focuses on insurer liaison for Willis UK. Rowanne is currently working towards the ACII qualification and has worked for Aon and Oval, before joining Willis in 2007.

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### **Keri Egan MSc FCII**



### **Keri is a Branch Manager at Circle Insurance Services**

Keri is an FCII qualified Chartered Insurance Broker who is now in her 10<sup>th</sup> year working at Circle Insurance Services. Keri completed her ACII in 2007 followed by her MSc in Insurance & Risk Management in 2009. Keri manages a team of account executives and account handlers and an internal claims advisor. Attaining her FCII in 2013 helped earn her the British Insurance Awards "Young Achiever of the Year" award in 2014.

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### **Caroline Fairclough ACII**



### **Caroline is a Property Account Executive at Pi-Property Insurance**

Caroline has over 11 years' experience within the insurance industry, and has previously worked at Jelf and Aon. She completed her ACII in 2012 and is registered as a Chartered Insurance Broker. She specialises in Property Owners Insurance, offering bespoke solutions to investment Property Owners, Chartered Surveyors and Managing Agents. Caroline is also a council member of the Stratford Insurance Institute.

## THE TEAM (CONT.)

### **Ian Lewis ACII**



### **Ian Lewis is an Account Executive at Lockton Companies LLP**

Ian has over 10 years' experience in the insurance industry and is registered as a Chartered Insurance Practitioner.

Ian works in Lockton's Real Estate and Construction team having worked previously for Aon and Bluefin on large corporate risks.

Ian is responsible for arranging and servicing insurance programmes for a number of UK and European property investment companies.

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### **Daniel Lim ACII**



### **Daniel is an Account Executive at Lark (Group) Limited**

Daniel is a business graduate from the University of London and has gained the ACII Chartered Insurance Practitioner status.

Daniel has been involved in the London market for a number of years now and has experience in general commercial insurance as well as specific Cover Holder expertise in Financial Lines.

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### **Alissa Ristic ACII**



### **Alissa is a Manager in Management Consulting at KPMG LLP**

Alissa has over 10 years' experience in the insurance industry with a primary focus in claims and customer growth for KPMG. She has her MSc in risk management and Insurance and became a Chartered Insurance Broker in 2009. Previously Alissa was Head of Claims for Simply Business where she was responsible for the claims strategy across all lines of business. She also previously worked for Marsh in the US before moving to London.

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### **Richard Whitehead ACII**



### **Richard is an Account Executive at D E Ford Insurance Brokers**

Richard is a Chartered Insurance Broker with over 10 years' experience in the insurance industry.

Richard purchases over £1m in insurance premiums for his client portfolio, is responsible for managing a team of account handlers, coordinating FCA compliance and developing risk management initiatives.

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### **Paul Wiggins ACII**



### **Paul Wiggins is a Director at bpw Insurance Services Ltd**

Paul joined bpw Insurance Services Ltd in 2004 and has been a Director since 2008. He is responsible for all aspects of managing the business, including HR, FCA compliance, as well as strategic and operational decision making.

Paul is also currently the 2014/15 president of the Insurance Institute of Cardiff's 'Young Professionals Group'.

## EXECUTIVE SUMMARY

With this research project focusing on liability insurance within the care home sector, specifically abuse coverage the group targeted the following stakeholders:

**Insurers**

**Insurance Brokers**

**Councils / Local  
Authorities**

**Solicitors**

**Care Service  
Providers**

**Risk Management  
Companies**

Before conducting the interviews it was necessary to gain a detailed understanding of how the development of insurance in this area had been shaped over the years. Case law has played the most important role in how incidents are handled. These cases, along with the risk appetite of insurers, who are not obliged to offer cover, have shaped the market.

In addition to case law there have been a number of high profile incidents covered by the media including cases of abuse at the Winterbourne Care Home as well as a number of successful prosecutions and legitimate allegations dealt with via operation Yew Tree; new allegations arise regularly.

Via a series of interviews with key individuals operating within this arena it was identified that there is not a consistent approach to the broking or underwriting of care home risks. We identified that this is a reflection of the wide variety of organisations and the level risk management associated with them.

The principal findings of each interview and our research are detailed within the body of the report, it should be noted that these are subject to change over time but were accurate at the timing of writing. Other than changes in underwriting stance reported in the media, the insurers approached did not feel that the recent high profile cases had sparked any major changes in claims. Unfortunately no specific claims details could be obtained due to the sensitive nature of the information.

Not all insurers offer the same basis of cover in respect of abuse, if indeed it is covered at all. Certain wordings would include a definition whereas others chose to exclude it. However, what is clear is that it is a difficult area to underwrite given the lack of any actual data and underwriters will often take an individual view on each case.

As identified in the interviews both the presentation of the risk and the level of risk management at the associated care home or organisation is key. There are a number of sources to assist with risk management detailed within this report.

At the beginning of the year (2014) it looked likely that there could be further shifts by insurers in respect of liability insurance in the care home sector. However, despite numerous high profile cases and documentaries insurance does still remain available via a number of markets.

At this time there is no need and no scope for argument for any other solutions outside the traditional insurance market such as the creation of a mutual or additional government involvement.

Given the long-tail nature of abuse claims, as well as the demand for more and more care homes, over time it is expected this area will remain a relevant topic for the foreseeable future.

Nonetheless we do anticipate that there will be further insurer developments in this insurance sector which will no doubt be influenced via new cases and updates to legislation.

## PROJECT OVERVIEW

As part of the CII Insurance New Generation Programme 2014, the Insurance Broking Faculty have conducted a project into the availability and limitations of Public liability Insurance for those industries who deal with vulnerable people, principally the extent of insurance coverage for "abuse" allegations and incidents. Despite being a sensitive subject, recent media coverage has highlighted the potential financial impact of such allegations and the importance of adequate insurance for charities and companies who face these risks. In addition to greater public awareness, the market for "abuse cover" has been affected by recent changes to underwriting approaches. This is particularly evident to the care industry, with known cover providers reviewing their stances on the extent or provision of cover.



The group scope of the project includes:

- Investigating whether there is a set definition for abuse in the insurance profession;
- Understanding the availability of cover from different providers across the market;
- Identifying the potential impact on the care sector in particular, should there be further contraction in the availability or withdrawal of the cover;
- Identifying the potential impact on service users and possible claimants;
- Discussing possible alternative solutions for this sector;
- Consider whose problem this is - Government, as one of social responsibility, or insurers?

As part of the project we have approached and interviewed (where possible) care providers, local authorities / government, solicitors, insurers and brokers to obtain a broad perspective of the issues at hand.

Our investigations have identified that there is still appetite and capacity in the market. However, restrictions on cover, potentially onerous terms and higher premiums are a current concern for those purchasing insurance in this area. It is also apparent that insurers are increasingly focusing on risk management before they are prepared to offer a quotation and it is in this area where the role of brokers will be of paramount importance going forward.

The intended outcomes of the project are as follows:

- To demonstrate proactively in the industry, i.e. to look at this problem before all cover has potentially been removed and in doing so, improve the reputation of the insurance industry;
- To encourage insurers to consider reasonable solutions rather than have knee-jerk reactions to individual events/books of business;
- To encourage clients, particularly those in the care sector, to improve risk management;
- Increase regulator/government and insurer interaction;
- To educate brokers on the issues and potential solutions.



## PEST ANALYSIS AND RISK IDENTIFYING

The project's initial focus was to consider the availability and appetite for insurance for care homes, and what it might mean if insurers were to cease coverage for this trade.

In order to identify the risk and insurance factors relating to the sector, the group conducted Political, Economic, Socio Cultural, Technological (PEST) analysis to assess the external factors in relation to the care home environment. This analysis allows insurers to determine market growth, business positioning, and potential direction of their operation in the future.

### **P**olitical

- Legislation concerning recruitment
- Working hours legislation
- Regulatory bodies and processes
- Government term and change
- Funding, grants and initiatives
- Pressure groups

### **E**conomical

- General taxation issues
- Pension money
- Personal income
- Taxation specific to care services
- Availability of insurance
- Customer/end-user drivers
- Competition

### **S**ocio Cultural

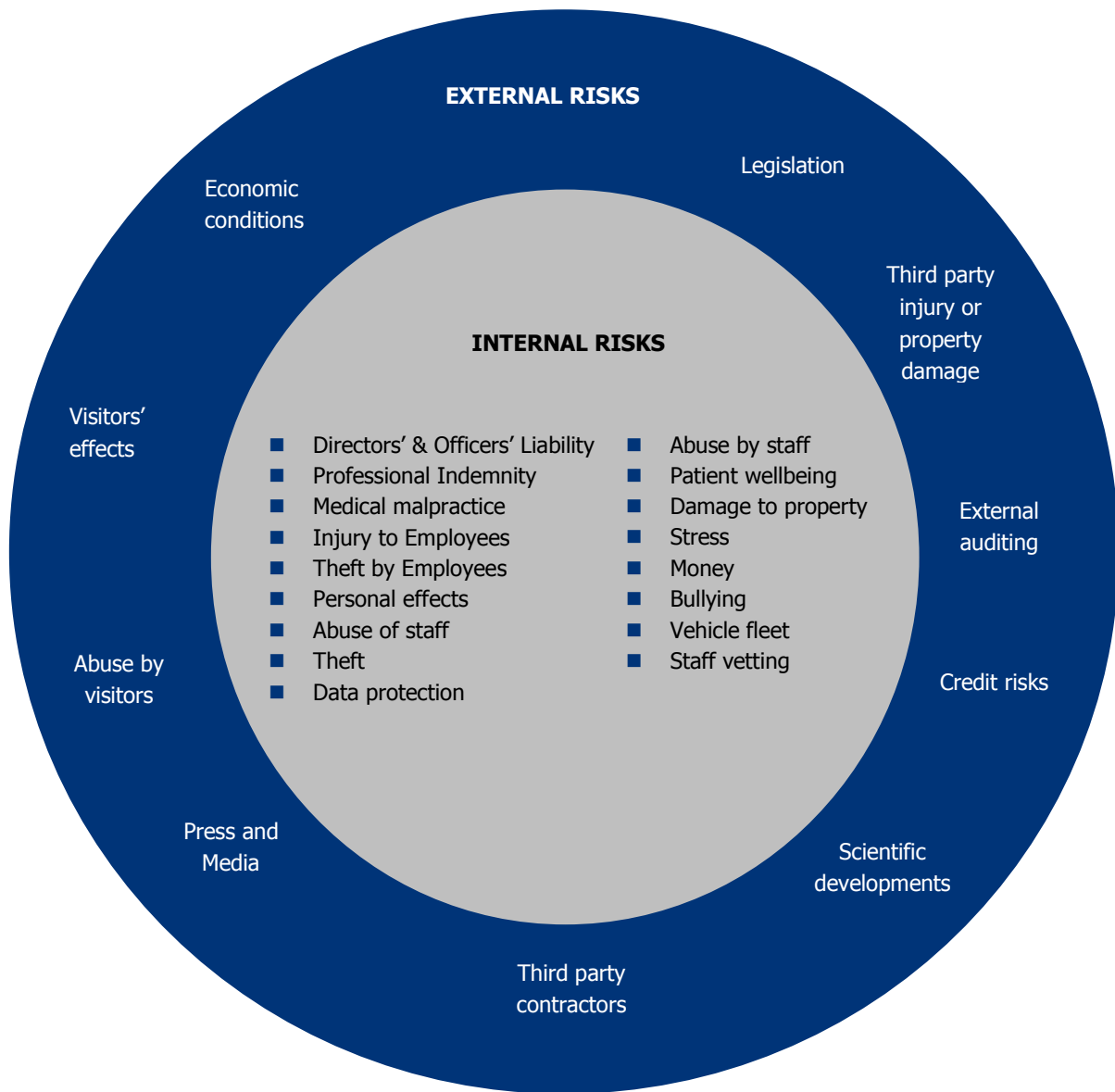
- Demographics – ageing population
- Media views & press coverage
- Company Brand, company
- Major events and influences
- Ethnic/religious factors
- Advertising and publicity
- Ethical issues

### **T**echnological

- Research funding
- Technology/solutions
- Information and communications
- Technology legislation
- Technology access, licencing, patents
- Intellectual property issues
- Internal & external communications

**Following the PEST analysis, an insurance risk matrix was produced to highlight the areas of exposure which the sector faces.**

# CARE SECTOR RISK MATRIX



After initial discussions around the risks above, although there were additional areas of interest such as stress and how accusations of abuse could affect a business, the availability of liability coverage in the care sector and similar services involving vulnerable people and the main insurance market developments seemed to concern abuse coverage.



## METHODOLOGY

In order to complete the project aim of investigating the factors affecting the abuse insurance market, our strategy was to:

- Ascertain the perceived current insurance market conditions by relevant stakeholders;
- Evaluate the reasons why the market has arrived at this current position;
- Identify the market's short term strategy towards abuse insurance;
- Canvass opinion on what changes could, or indeed should, happen within the care sector to better the future position on abuse insurance.

It was important as part of this project to canvass opinion from the main bodies of stakeholders involved in this sector. To ensure a consistent approach, we allocated teams to specific industry areas with a common question set. This report summarises the outcome of our market research.

We identified the following parties as the key stakeholders involved in this sector



- Insurers – we have approached some of the leading markets involved in the care sector; namely



- Risk management companies & the Care Quality Commission (CQC);
- Care service providers – who have requested to remain anonymous for the purpose of this report;
- Councils/Local Authorities;
- Solicitors;
- Insurance brokers

In addition, we have also sought information from relevant trade press as well as local and national media.

**Of the above stakeholders approached we were unfortunately unable to obtain responses from The Care Quality commission and the Local Authorities. As a result of this the findings discussed below exclude any input from them.**

# INSURANCE LANDSCAPE

## The Changing Legal & Insurance Landscape

To understand the changing approach of insurers' underwriting strategy with regard to "abuse claims" exposure, it is necessary to consider the legal background that has increased the responsibility of employers, and therefore the cost to insurers. The doctrine at the centre of this is that of vicarious liability; a strict liability that places legal responsibility on an employer for the actions of their employees, even where they may not be directly at fault for injury or damage. They are deemed legally responsible as they may have allowed the wrongdoing; the obvious advantage being that the injured person is able to seek compensation from the employer rather than the employee and is thus more likely to have access to compensation via insurance.

There is no statutory definition of this tort and as such the scope has evolved with the changing trends and needs of society. Historically, employers were understood to be vicariously liable for only the negligent acts of employees. Deliberate actions were regarded as too far removed from the course of employment and thus fell outside the employer's responsibility. The reasoning here followed the citation of Sir John Salmond in the first edition of his Law of Torts (1907), who outlined a wrongful act as deemed to be done by a servant in the course of employment if it is *"either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master"*.

This was evidenced in the 1998 case of Trotman v North Yorkshire County Council (1998) whereby the council were found not liable for the sexual abuse of a disabled child by a deputy head master. At that time, the court held that the abuse was not sufficiently connected to the employer of the wrongdoer so vicarious liability did not exist.

**Butler Sloss LJ stated** "in the field of serious sexual misconduct I find it difficult to visualise circumstances in which an act of a teacher can be an unauthorised mode of carrying out an authorised act"

Later case law overruled this, allowing cases to succeed where there had been criminal actions. The transitional case here is that of Lister v Hesley Hall Ltd (2002). The circumstance of this case was the abuse of children by a warden of a boarding house attached to a school. Initially, the Court of Appeal found itself bound by the decision in Trotman, but in the appeal the House of Lords declared Trotman as wrongly decided, with Lord Steyn stating:

"The evidence shows that the employer entrusted the care of the children in Axenholme House to the warden. The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case I would say the answer is, yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties. Matters of degree arise. But the present cases clearly fall on the side of vicarious liability"

It was deemed that the position of the warden and the close contact with boys, which the work involved, created a sufficient connection between the acts of abuse and the work which he had been employed to do. With reference to Salmonds considerations, it was thus an unauthorised act, but so entwined with authorised duties, it was just to find vicarious liability.

**Lord Millet added** "Vicarious Liability is a species of strict liabilities. It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of his employee. It is best understood as a loss distribution device".

## INSURANCE LANDSCAPE (CONT.)

The scope of an employer's vicarious liability was thus widened. For insurers this meant that without any policy restrictions, they found themselves legally bound to meet compensation claims for abuse under the public liability section, up to the limit of indemnity at the time of the incident. As Public Liability is traditionally underwritten on a claims-occurring basis in its entirety, this presented unforeseen historical liabilities and forced insurers to review their future exposure to "abuse claims". Consequently, at the start of the 21st Century there materialised three notable approaches:

- Full exclusion of abuse;
- Abuse claims insured on a 'claims-made' basis, thereby ceasing insurer's liability upon policy termination, and allowing them to "walk away" from emerging trends;
- For those insurers who remained 'silent'; the standard Public Liability wording continued to include abuse exposure by virtue that it was not excluded.

Successive cases followed in favour of the Lister judgement, with many insurers affected by historic claims. A further notable example includes that of *Maga v Trustees of Birmingham Archdiocese of the Roman Catholic Church* (2010).

### **Maga v Trustees of Birmingham Archdiocese of the Roman Catholic Church (2010).**

A priest's sexual abuse of the claimant had been considered so closely connected with his employment as a priest that it would be fair and just to hold the archdiocese which had employed him vicariously liable for that abuse.

Insurers have additionally been affected by the Court's interpretation of The Statute of Limitations, with respect to assault and abuse cases. Two notable cases challenged the notion that such a claim was statute barred if not lodged within 3 years of the date of knowledge of injury.

**In Patrick Raggett -v- The Society of Jesus Trust 1929**, Mr. Ragget, who had been abused between 1969 and 1976 by a Jesuit priest, brought a claim in 2005 having had a breakdown connected to the abuse. The defence said that the allegations should be time barred but the Judge considered the breakdown as realisation of the assault, to be the point at which the clock commenced ticking.

**A v Loworth Hoare 2008** (also referred to as The "Lotto Rapist") involved a victim, who was raped in 1988, claiming damages from her assailant only when he won significant lottery funds in 2004. The defendant contested the claim on the grounds of it being statute barred but it was eventually allowed by The House of Lords, setting the precedent that a judge has discretion in allowing serious assault cases to be heard.

The impact to the insurance industry was made difficult in further predicting and controlling when exposures to such claims would cease. A claim being allowable decades after the wrongdoing is near impossible for insurers to quantify and reserve for. To negate this, those insurers still prepared to pick up abuse exposures, largely did so by adopting the claims-made approach. By ensuring that future claims could only hit insurers when a claim is realised enables insurers the option of reacting to any painful trends on a particular account by declining renewal, or imposing additional terms and conditions to mitigate future losses.

## INSURANCE LANDSCAPE (CONT.)

Vicarious liability has also evolved with regards to the employer/employee relationship, going beyond the confines of an explicit contract of service. The traditional situations where a principal might be held liable for the actions of an employee or third party are:

- There is a 'master-servant' relationship – the employer is considered liable for the actions of his employee when the employee has behaved negligently or damagingly while performing tasks on the employer's behalf;
- The principal and the negligent party are business partners;
- Where the negligent person is an agent of the employer, the employer will generally be held liable for their actions.

In the case of *JGE v The Trustees of Portsmouth Diocesan Trust (2012)* the claimant alleged that she was beaten whilst in a children's home run by the nuns of a convent, which was subject to the direction and control of the English Province of Our Lady of Charity, the first defendant. She also alleged sexual assault and rape by Father Baldwin, a local parish priest, and named the Appellant Diocesan Trust also vicariously liable for such acts and as 2nd defendant.

The issue on appeal was whether the law could in fact be extended to relationships akin to employment. The test was whether the relationship of the Bishop and the Priest was so close in character to one of employer and employee that it was just and fair to hold the Appellant employer vicariously liable.

The priest was not subject to direct control in the sense of the checking what he did every day. However, residual control remains, against a background of a priest being bound to show reverence and obedience to their ordinary.

Davis LJ stated "a priest is appointed to further the bishop's aims and purposes. As with a health trust's control over a surgeon – a priest is not told how to do the job but can be told how not to do it".

Abuse of a child was a gross breach of ecclesiastical law and if it came to the bishop's knowledge, he would be bound to dismiss the priest from his office. Whilst recognising the difficulty in identifying the employer's business, the court considered the structure; the Pope resided in the head office, under which were "regional offices" with appointed bishops and "local branches" of parishes with their appointed priests. They held that the Roman Catholic Church looked and operated as a business for the purpose of vicarious liability.

The overall conclusion was that, whilst the priest did not meet every facet of an employee, the relationship was sufficiently akin to that of employer and employee to make it just and fair to impose vicarious liability.

This verdict was extremely significant in an age when bodies utilise the services of a range of individuals who are not always classified as employees.



## INSURANCE LANDSCAPE (CONT.)

**In Various Claimants and the Catholic Child Welfare Society & Ors v Institute Of The Brothers Of The Christian Schools & Ors (2010)**, a large number of claimants alleged abuse by staff at a school. At the times of the alleged abuse the school was constituted either as an approved school or an assisted community home, in each of those constitutions having a board of managers. The headmaster and some of the teachers were supplied by the Institute of the Brothers of the Christian Schools. Initially the judge found that The Institute would not be vicariously liable for alleged abuse perpetrated by the brothers on the teaching staff of a particular school as they had not been responsible for running the school, nor did they exercise effective control over a Brother's doing of his teaching job.

In 2013 The Supreme Court unanimously allowed the appeal for The Christian Brothers and held that it was fair, just and reasonable for the Institute to share, with the board of managers, vicarious liability for sexual abuse committed by brothers. The fact that the brothers had not entered into an employment contract with the Institute directly or that they gave their earnings to the Institute was not important.

Lord Phillips said the precise criteria for imposing vicariously liability for sexual abuse was "still in the course of refinement by judicial decision" but the courts had "succeeded in developing the law of vicarious liability so as to ensure that a remedy for the harm caused by abuse is provided by those that should fairly bear that liability"

Following on from this, it is now legally possible for two or more different defendants each to be vicariously liable for a single wrongful act. Whilst this case presents defendants and insurers with the opportunity to reduce their exposure, where there is dual or shared control of employees by more than one body, it can conversely mean that they have potentially increased exposure where one of the parties deemed to have shared control is either defunct or uninsured.

This decision also meant that it is possible for an unincorporated association to be vicariously liable for the wrongful acts of its members, and such associations and clubs previously may not have considered themselves to have any exposure. This is an important Supreme Court decision that may have repercussions for bodies such as voluntary groups (particularly those where children are supervised by adults) as well as educational establishments. Naturally, this translates into concern for insurers where they have books of business which these changes may affect.

All the cases summarised above signify that vicarious liability is an expanding concept, making it difficult to underwrite. The law in this area struggles to balance compensating innocent victims with the innocence of an employer who would never have sanctioned the actions of their employee.

The importance to the claimant of establishing vicarious liability is that once established it will become a case of strict liability. The claimant need not prove systemic failings on the part of the employer, lack of training or any other of the usual common law and statutory tests applied to establish culpability on the part of an employer. All liability will be imposed on the employer for the actions of the employee irrespective of the employer having knowledge about the wrongdoing. Vicariously liability does of course go far beyond just abuse claims but it is apparent that with abuse cases being so emotive, the court tends to err on the application of vicarious liability. The issue for insurance is that once one claim succeeds, and strict liability applied, it becomes far easier for other claimants to succeed.



## INSURANCE LANDSCAPE (CONT.)

It is not surprising that the changing legal picture is reflected in insurers' changing approach to underwriting "abuse cover". Insurers are rightly protecting their own businesses but the changes, which they are seeing as necessary for their "vulnerable persons" accounts, leave a real possibility of future abuse victims being victims twice when no or insufficient compensation is available. Insurers will argue they have stayed in the market, but when names like Zurich, Aviva and others simply do not quote this is clearly not the case. Others, like RSA, Lloyds, Travelers and Axa are utilising 'claims-made' solutions which mean they can cut and run if the trends get too painful. Ecclesiastical, a renowned market leader known to provide a silent approach, has now withdrawn from writing private care business, and imposed an aggregate limit for abuse.

The result is that insurance programmes for charity, not-for-profit and commercial businesses who work with vulnerable people are experiencing a decline in viable and affordable insurance protection in this area, and with abuse scandals ongoing, it is probable that claims will hit their own balance sheets with potentially disastrous consequences.





# DEVELOPMENTS IN THE CARE SECTOR

## Introduction

As abuse cases have received greater media attention more and more people have come forward with allegations of abuse. In the past decade there have been several high-profile instances of abuse of vulnerable people in care, cases of abuse that has taken place both in the present and recent past and historic abuse spanning several decades.

Incidents have taken place in a wide range of environments including schools, hospitals, and residential care homes.

## Winterbourne View

Abuse specific to the care environment was dramatically highlighted in 2011 when the BBC's Panorama programme, utilising undercover crew, exposed shocking abuse of patients by staff within Winterbourne View: a private hospital treating those with autism and learning difficulties at Hambrook, South Gloucestershire.

Winterbourne View was closed one month after the programme was aired; Castlebeck, which owned and operated the hospital, went into administration in March 2013.



Eleven ex-employees from the hospital pleaded guilty to criminal offences of neglect or abuse, six of whom were ultimately jailed (Gloucestershire News, 2012).

The patients in Winterbourne View had been sent there by NHS officials. Consequently, with Castlebeck in administration, liability for the abuse fell on the NHS.

Ultimately, the Department of Health made undisclosed pay-outs to nineteen vulnerable patients who were abused at Winterbourne View, however the NHS did not admit liability (BBC, 2013).

## Savile

Perhaps the most high-profile of current abuse scandals, and the one that has brought scrutiny on the issue of abuse in all levels of society and institutions, is that of Jimmy Savile.

Following his death in 2011, a BBC Newsnight program was scheduled to be broadcast in December 2011 raising the question of his conduct around vulnerable people. The BBC, however, declined to broadcast it, opting instead to continue with the scheduled tributes to Jimmy Savile.

With other allegations against Savile beginning to surface, on the 3rd October 2012, almost a year after his death, a documentary titled 'Exposure: The Other Side of Jimmy Savile' was broadcast bringing the problem of abuse to a wider public audience.

## DEVELOPMENTS IN THE CARE SECTOR (CONT.)

Quickly following this, the Metropolitan Police launched Operation Yew Tree on the 9th October 2012 to further investigate the allegations against Savile. It is alleged that Savile had abused hundreds of individuals over five decades, which included substantial allegations for those in care. Operation Yew Tree also triggered allegations against other celebrities with several receiving custodial sentences as a result.

Two years after the scandal first broke, newspaper adverts advised those who alleged to have been abused by Savile on making claims for compensation against his estate, the BBC, and the NHS. Compensation payments were capped at £60,000 per person (BBC, 2014).

### Post-Savile

Abuse of vulnerable people in care continues its prominence in the media. In another, more recent, Panorama programme 'Behind Closed Doors: Elderly Care Exposed' (aired on the 30 April 2014), undercover reporters discovered abuse of elderly and vulnerable people by care workers at a care home in Essex. The programme also highlighted that CQC figures showed that a third of homes that received warning in 2011 were still not meeting basic standards.

BBC health correspondent Nick Trigger reported;

*"Let me explain. The problem with care homes - and Care Quality Commission inspectors are fairly open about this - is that it is much easier to hide abuse than it is in, say, hospitals. Hospitals are essentially open environments. Public and staff come and go. By comparison, care homes are private places where the main care being provided is personal, often intimate."*

This demonstrates how vulnerable those in care can be and how crucial it is that all such establishments include robust whistleblowing procedures as part of their safeguarding policies, policies which protect those who raise concerns.

### Insurance Related Abuse Timeline

The media spotlight on abuse of vulnerable people has coincided with dramatic changes within the care insurance sector.

In December 2013 Ecclesiastical, a major player in the care home insurance sector with over 30% of the market, announced that it was withdrawing cover for all care homes not run by registered charities (Insurance Times, 2013). In addition, they are actively reducing their exposure by imposing inner, or aggregate limits on claims in connection with abuse.

More recently, Hiscox has also announced that it was moving away from the care home sector, only stating that the decision was made in order to *"focus on other business lines"* (Barton, S, 2014).

These decisions are likely to cause other insurers in the market to review their rates, limit their cover, or pull out completely.

David Waters, managing director of Care Home Insurance Services, an independent insurance broker, said:

*"Ecclesiastical currently insures around 30 per cent of all care homes in the UK, more than any other insurer. Its withdrawal from the care market will come as another 'body blow' to the care industry.*

*The market is likely to harden in the coming months, with other insurers likely to reconsider their own position and almost certainly looking to increase their premiums and quite possibly limit their exposures. We are hearing that abuse cover is likely to be restricted by many insurers from 1 January."*

## DEVELOPMENTS IN THE CARE SECTOR (CONT.)

Mr Waters added:

"The failings of certain care home operators have been well-documented in the media and the increase both in the frequency of litigious claims and the rise in the costs of litigation have coincided with a significant number of care homes coming under financial pressure."

"While it is saddening to hear of Ecclesiastical's withdrawal, this latest development could just be the shot in the arm that prompts care home operators to overhaul their risk management and safety awareness."

\*<http://www.carehome-magazine.co.uk>

A report by the health care market intelligence company LaingBuisson suggests that the market for care home insurance will get worse before it gets better, with reports that rates are set to rise by as much as 65% over the next three years (LaingBuisson, 2014).

## PRINCIPAL FINDINGS / NATURE AND EXTENT OF THE PROBLEMS

This section contains a synopsis of all the findings from the interviews and research described in the methodology section.

### The extent of the problem

- Level of incidents are nowhere near the level of Flood claims or Public Liability / Employers Liability incidents.
- Selected insurers are still offering the cover. It is not an industry-wide decision to restrict/withdraw cover.

**No major increase in claims following media coverage**

### What can Brokers do?

- Present risks correctly and thoroughly
- Understand the subject
- Ask the right questions
- Encourage clients to improve risk management

**Communication to their clients is key**

### What can insurers do?

- Insurers need to look thoroughly at stats to assess their own risk. Is there realistically as much of a risk as they think there is?
- When compared to number/frequency/size of Employers' Liability / Public Liability claims, insurers need to understand that the cost is not significant to the industry as a whole
- Is there a way insurers can communicate and share their knowledge of the risk involved with each other?
- Write the policy with a risk management Condition into the wording to manage it more effectively
- Offer reduced insurance premiums for increased risk management

**Still healthy competition in the market**

## PRINCIPAL FINDINGS / NATURE AND EXTENT OF THE PROBLEMS (CONT.)

### What can the Care Sector do?

- Better presented risks equal better terms
- Improved risk management reduced claims incidents in the first place
- Stress importance to keep procedures in place and updated
- Stress legal obligations

### Risk Management and Safeguarding

### What can the Government do?

- Increase level of payout under the Criminal Compensation scheme
- Introduce minimum qualifications for carers
- Introduce measures in place with Local Authorities to ensure that all care providers have adequate insurance
- Offer a bare bones policy giving minimum death benefit as a result of negligence/abuse

### Not enough claims for government to get involved



# PRINCIPAL FINDINGS / NATURE AND EXTENT OF THE PROBLEMS (CONT.)

## A Summary of the Interview Findings

### Meeting with Regional Manager of Insurer A on 09/05/14

- Sees Employers' Liability as a bigger problem – some insurers are "overreacting";
- No detailed definition of "abuse" and have no restrictions/exclusions;
- Insurers with an appetite for risk will not restrict cover;
- Stressed importance of risk management;
- Need improved communication between broker and insurer;
- Onus on brokers to "ask the risk questions" and understand the risk;
- Importance to understand the difference between claims-made and claims-occurring and the potential pitfalls;
- Prefers claims-made basis – good risk management could change their view on this;
- Can see legal costs increasing significantly in the future.

### Meeting with Claims Director, Underwriting Director & Casualty Underwriting Manager at Insurer B

- Decision to remove themselves from care sector just down to profitability and not as a result of exposure to risk;
- No set definition of "abuse". Believes all insurers are adopting a similar stance;
- Seeing historical claims arising back to 50 years – records can be difficult to trace;
- Seen a rise in claims being reported due to media coverage over last 5-10 years;
- Robust stance on fighting claims where they are not liable;
- Seen solicitors "trawling" for similar claims relating to one incident;
- Accurately track/predict claims to enable them to set pricing right and reassure shareholders/directors
- When compared to Employers' Liability/Public Liability claims, cost of abuse claims is not significant to the industry as a whole;
- Little or no market information available as insurers don't "compare notes". Increased awareness may change the position of certain insurers who are restricting cover more than others;
- Insurers can no longer use limitations as a defence – increased exposure;
- Sometimes insurers will pay claims rather than fight them
- As with Insurer A, stressed importance of broker education and understanding of risk and policy exclusions/restrictions;
- Due to competition rules, government won't get involved and there are not enough claims;
- Legal costs will inflate in the future.

### Meeting with Head of Casualty at Insurer C

- Insurer C look at risks on a case-by-case basis;
- Tend to write new business on a claims-made basis but may consider claims-occurring basis where risk management is strong;
- Do not feel that abuse claims have increased in light of recent media coverage;
- Risk management is key, some customers requiring more guidance than others. This may not be as much of a priority for smaller customers due to time/money constraints and often needed to raise the issue with them and offer appropriate guidance;
- Government pool is a possibility. The Government have a statutory duty to ensure that people are cared for; Insurers could look at including risk management requirements in policy wordings for cover to be given.



## PRINCIPAL FINDINGS / NATURE AND EXTENT OF THE PROBLEMS (CONT.)

### Meeting with Insurer D

- Care is not particularly in their appetite at the moment but they are gradually taking on cases;
- Have not felt that rates have increased following other insurers withdrawal from the market;
- Do not have a specific wording for these cases as not seen to be a profitable area for them. Small cases specifically are not profitable for them to cover, given the level of exposure to risk;
- Initially they wrote on a claims-occurring basis but have since changed to claims-made with an aggregated inner limit in respect of abuse. Claims-made basis is easier to manage as insurers know their exposures quicker;
- Does not feel that the level of reported abuse claims is increased due to the recent media coverage however there is a general trend towards litigation with more people being prepared to claim. Feels that the stats do not reflect the level of negative media coverage about the care industry at the moment;
- Unlikely that the Government will respond with a 'pool' as this is a growing market that many insurers are still interested in providing cover for. Government may respond if level of bad publicity increases, for example, if regulatory bodies fail badly although concerns are raised over how this could be funded;
- Broker needs to be responsibly in providing good professional advice to ensure that the cover is placed correctly, protecting both themselves and insurers.

### Meeting with Insurer E - Head of Liability for Corporate and Speciality Risks 21/08/14

- They have evolved and developed their appetite in the Care Sector, responding in particular to Insurer A's withdrawal from the market;
- Does not feel that the situation is anywhere near a "crisis" point. Cover is still available;
- Do not define "abuse" – choose to stay silent on the issue and follow common law definition;
- Write on a claims-occurring basis. Feel this gives client the best cover. A claims-made basis may be easier for insurers to manage their exposure but not necessary the right thing to do socially in the care sector
- Believes some insurers are declining to write business due to the perceived risk of abuse;
- In writing risks, they may ask for a questionnaire to be completed and/or condition precedent to liability I respect of background checks/procedures Insured has in place. Much keener to write business for well-managed risks and this along with deductibles can help insurers manage their exposure;
- They offer risk management solutions to clients, online for smaller clients and review/consultancy services for larger clients;
- Biggest risk is mix of triggers which are being applied, leaving potential for gaps in cover – a risk for the company and the client!
- Suggested development of something like ELTO to record where cover has been placed previously and enable previous insurers to be located;
- Long-tail issues of Public Liability exposures are not catered for as well as PL is not a statutory cover
- Would expect public to be more conscious about insurance and ensure that adequate cover is in place before using care services;
- Does not think a government pool is likely to happen, questions how it could be funded;
- Brokers need to keep a clear record of insurance history and to present risks to insurers clearly with explanations of the quality of risk management in place. Details of how a company has responded to complaints can be powerful;
- Feels the CQC has not been penetrating enough in their inspections although this is an improving picture.

## PRINCIPAL FINDINGS / NATURE AND EXTENT OF THE PROBLEMS (CONT.)

### Meeting with Insurer F - 29/07/14

- Abuse is clearly defined in their policy wording;
- Does not feel as though claims have increased in light of recent media coverage;
- Their stance is to exclude "abuse" cover and write back in on a case-by-case basis if appropriate;
- Prefer to write on a claims-made basis. Claims-occurring basis increases their exposure and would make their book unprofitable. Claims-made ensure that they remain competitive in the market. Observes that the market seems to be moving towards claims-made;
- If a claim did occur, they would probably come off cover unless it was clearly a "one-off" incident;
- Risk management is key for all risks and procedures need to be in place before they will consider a risk;
- Does not think compulsory cover or a government pool is likely unless the industry stopped writing cover altogether;
- Brokers need to appreciate changing from claims-made to claims-occurring and potential for gaps in cover;
- Insurers should be very aware of potential of bad press around the subject. They do not want to be seen to be defending abuse. Insurer F specifically requires comprehensive information when underwriting as they are aware of the potential spin the press could put on the situation.

### Meeting with Insurer G – 09/06/14

#### Underwriting Considerations

- Have an inherited exposure from the acquisition of a previous company that covered numerous religious organisations, largely religious schools, charities, establishments and boarding institutions in the 1970's – 1990's on an occurrence basis;
- Risks with vulnerable person exposure are not currently a target sector, although it is not a complete decline;
- Care in particular if of concern because of the intimate environment / no CCTV in residential units and the innate risks of domiciliary care;
- Also, they have concerns over turnover of staff (akin to construction sector) and the reliance on less skilled/ overseas applicants;
- The cover is "notoriously difficult to underwrite", which makes it difficult to generate a profit from this class of business;
- Insurer G considers the claims made basis to be the best way to prudently underwrite and this insurer has written these types of cover on a claims made wording for more than 5 years. Claims made allows a full review at renewal and the ability to remove the insurer from further exposure;
- Claims occurrence wordings can be considered but subject to head office referral and with likely additional terms such as a £1,000,000 limit;
- The claims they have received have been psychosomatic, rather than on going care, so tend to be 6 figure sums, not those in the millions;
- They do not have a definition of abuse in the policy wording;
- Any risks they underwrite must be backed with as much information in terms of managing exposure and prospects and clients must have active policies against addressing this risk;
- They recognise the need for a safeguarding questionnaire but they are not active enough in this field so it is not prerequisite;

## PRINCIPAL FINDINGS / NATURE AND EXTENT OF THE PROBLEMS (CONT.)

### Meeting with Insurer G - 29/07/14 cont.

- Insurers G is reviewing their children's nurseries schemes although this class is a referral rather than decline;
- Insurer G does believe that there will be increased demand for care and insurance opportunities. They anticipate a price increase as players in the market reduces.

### Claims Considerations

- Insurer G believes publicity does add exposure to claims, as similarly seen with deafness claims;
- The claims often have a frequency potential, they have certain establishments that have 20/30 claims over 5 years;
- Claims currently affecting them are subject to the historically lower limits (£100,000/£500,000 Public liability limit);
- As the abuse may have spanned multiple policy years the occurrence limit will be available every year per occurrence (no aggregate protection);
- Insurer G observes that the trigger date is very difficult to determine, as it can be hard to assess when psychological injury first sustained;
- Due to sensitivity a quick decision is made on liability. In some cases there a connected criminal cases that and once there is a conviction, civil claims will be settled swiftly;
- Multiple claims are often seen from one perpetrator;
- Insurers G centralises claims of this nature due to experience of handlers.

### Meeting with Solicitors 28/05/14

- Definition of "abuse" needs specifying. Does it include both deliberate and negligent abuse? As negligent abuse is not always deliberate;
- Suggested local authorities ensure that care homes/service providers have adequate insurance in place;
- Solicitors now more selective about the cases they take on and only on the ones where they see a decent chance of success;
- Unlike the opinion of certain insurers, they do not "trawl" for cases, cases come to them;
- Stressed necessity for improved risk management in care homes and adequate numbers of qualified staff – look at preventative measures rather than insurance as the solution – training is never a waste of money;
- Suggested government offer a "bare bones" policy covering at least death benefits, if nothing else responds;
- There are compulsory insurance requirements in place for riding establishments but not care homes.

## PRINCIPAL FINDINGS / NATURE AND EXTENT OF THE PROBLEMS (CONT.)

### Meeting with Finance Director at Care Home

- Has seen a rise in abuse claims over the last few years – possibly a rising claims culture in certain homes and has seen his insurance premiums affected as a result, even for allegations only;
- Believes insurers should insist on risk management systems – although he pays £50k per year for thorough systems in place himself. Insurers could offer the same at discounted/bulk-buying prices;
- Believes “rogue” employees going against training is a problem;
- A possible solution - arranging mutual insurance for individual employees, or individual cover like dentists/doctors have currently;
- 60-70% of management time spent on HR/litigation issues – avoiding being sued;
- Market strategy for them personally is to be out of the care sector in 3 years – too litigious;
- More robust notifications/internal management procedures are needed on a nationwide basis. Individual cases of malpractice are often not recorded as employees in question are terminated for other reasons.

### Meeting with Charity

- Charity A who works with vulnerable people are aware that there is risk involving their work with this demographic.
- Before becoming coaches, a Disclosure & Barring Service, Online Training and CRB checks are required with bi-annual reviews – this is how care homes/providers should be doing things.
- They were keen to obtain additional information regarding their risk and to gain a better understanding of how their risk is managed and what insurances are available



## POTENTIAL SOLUTIONS & BROKER GUIDE

Insurers are becoming more selective in the risks they chose to underwrite and more insistent on detailed risk information. The fact that some insurers, such as Ecclesiastical, have withdrawn from the market makes it even more important that insurance brokers work with clients to demonstrate and implement comprehensive risk management systems and controls.

*The points below examine some considerations for ensuring that appropriate and adequate insurance coverage is granted for abuse allegations within the care sector.*

**Ensure the Commercial insurance policy(ies) include adequate cover for abuse**

**Ensure effective risk management**

**Further risk management guidance - Follow the guidelines from sources such as the government organisations and other professional bodies**

**Assess the viability of Alternative Risk Transfer methods**

**Assess coverage of alternative polices such as Directors and Officers Liability insurance**

### **1. Ensure the Commercial insurance policy(ies) include adequate cover for abuse**

Historically, most abuse (i.e. legal liability for abuse) claims fell within the basic Public Liability coverage. Certainly losses involving physical abuse would have been covered and depending on the definition of 'Damage', some policies gave wider cover.

Approximately 10 years ago insurers began to change their approach, following an increase in allegations, for example RSA chose to exclude abuse and then sold the cover back as a separate section - but this was with lower limits and on a 'claims made' basis.

**Essentially there are three options for Insurers:**

- 1.** Many insurers have taken the stance of being 'silent'. Therefore, since they do not exclude liability for abuse, it is covered provided under the public liability that the definition of Damage is wide enough
- 2.** Some insurers exclude abuse and molestation cover but add it in as a separate section as above
- 3.** Some insurers exclude it and do not endorse it back in - so the Insured has no cover

## POTENTIAL SOLUTIONS & BROKER GUIDE (CONT.)

Although abuse is intentional on the part of the abuser and therefore not covered by a legal liability policy, it is not usually intentional on the part of his/her employers. However, the Employer can still be negligent, for example not obtaining proper checks and this is why Public Liability cover is important for Care Homes, Schools and Churches, etc.

It is imperative that all businesses which have an exposure to abuse allegations, including any firm that undertakes work with children and/or other vulnerable people obtain adequate insurance coverage through a qualified insurance broker. The policy must be checked to ensure that abuse is covered to an adequate limit of indemnity.

It is also crucial that brokers dealing with this area are fully conversant with the claims made and claims occurring wordings available. There are benefits and pitfalls of each and clients will need to be properly advised of the best option for them. Even more importantly, the potential consequences of switching between the two must be conveyed to clients and prospects.

In brief, a claims made wording is often the choice of a cautious underwriter as it is the only way to give complete certainty to their exposure, and ring fence where necessary. The potential downside to a client is that a bad year claims wise may see refusal to renew cover and any incidents not reported will cease to have any cover in operation. An occurrence wording, whilst flawed by the effects of inflation and possible inadequacy of the limit of indemnity in the future, at least provides the insured with protection that the policy will operate for past events even if cover is unobtainable or unaffordable in the future.

With regards to moving providers, and/or the basis of cover, a broker must understand and explain that an organisation currently on an occurring wording may switch to a claims made basis with relative ease. However, a move in the other direction leaves the client exposed, as shown below:

Example	Year X	Year Y	Year Z
1			
2			

	Claims Occurring Basis
	Claims Made Basis

In the first example the client does not have a gap in cover as the occurring wording will continue to pick up incidents from years X and Y yet to be notified and the claims made will indemnify incidents in year Z for the life of the policy. In example 2, the client will need to consider that once they have arranged cover on an occurring basis in year Z, they will cease to have any cover for an incident arising during years X & Y, as the policy active for that period will have expired. This will also apply if they cannot obtain any cover in year Z.

A broker must protect their own errors and omissions exposure by ensuring this is properly communicated, and if necessary, by seeking retroactive cover via endorsement for that period.

The Broker Guide which follows can be used by professional advisers when analysing a client's exposure and providing advice.



## POTENTIAL SOLUTIONS & BROKER GUIDE (CONT.)

### 2. Ensure effective risk management – Broker Guide

The following document can be used by insurance brokers in assessing a client's insurance needs in relation to protecting against abuse allegations. This has been adapted from the Ecclesiastical questionnaire 'Safeguarding Children and Vulnerable Adults against Abuse'

#### Client Detail

- Name of Applicant/Insured
- Address(es)

#### Previous Insurances

- Do you purchase insurance that covers abuse? What levels of cover are purchased, if any?
- If you are unsure please provide copies of your insurance documentation, including the Commercial Combined and Directors and Officers Liability policies.

#### Previous Circumstances

- Please provide full details of all incidents of abuse including allegations

#### Health and Safety and Safeguarding Policy

- Who is responsible for Health & Safety and Safeguarding issues?
- Please provide a copy of your Health & Safety and Safeguarding policies
- When was the policy first implemented, how often is this reviewed and when will the next one take place?
- Is the policy accessible to all employees (including part time staff, volunteers, etc) and how are people made aware of this?
- Do you undertake work away from your premises? If 'Yes' do you have written guidelines

#### Risk Assessments

- Please provide copies of your Risk Assessments
- Do you have persons in your care with learning disabilities, mental disorders, 'anti-social' behaviour or behavioural difficulties? Do the Risk Assessments include this aspect?

#### Legislation & Guidelines

- Are you aware of the statutory provisions relating to pre-trading registration, employment screening and notification requirements concerning individuals who are unsuitable to work with children, young people and vulnerable adults?
- If No, this must be addressed including reference to The Children Act 1989, National Minimum Standards of the Care Standards Act 2000, The Human Rights Act 1998 &/or similar legislation
- Are you aware of and do you carry out the relevant checks in relation to the Disclosure and Barring Service?

## POTENTIAL SOLUTIONS & BROKER GUIDE (CONT.)

### Training

- What formal training and refresher courses are held? What provision is made for any changes in legislation?
- Formal training must be carried out by qualified personnel.
- What is the frequency of training sessions?
- Does a formal induction procedure take place for new employees and what level of supervision is given for the probationary period?

### Recording of Information & Record Keeping

- All personnel employment and training records, inspection reports, liability insurance policies and all other relevant documentation should be retained for no less than 50 years. In relation to documents containing personal data, the requirements of the Data Protection Act must be adhered to at all times.
- How are incidents of abuse recorded?
- How do you communicate your stance in relation to adhering to care standards e.g. Mission Statement?
- Do you publish a 'Statement of Purpose' if you are subject to the Care Standard Act Regulations?

Do you securely keep for a minimum of 50 years:

- Employment forms including identity verification
- Full records of the Disclosure and Barring Service
- A copy of the Safeguarding policy, changes, and the training delivered to your personnel
- A record of all abuse allegations and notification to the relevant authorities
- The historical Public Liability and any other relevant insurance policies

**Name**

**Position**

**Signature & Date**

## POTENTIAL SOLUTIONS & BROKER GUIDE (CONT.)

### 3. Further risk management guidance - Follows the guidelines from sources such as the government organisations and other professional bodies such as the Quality Care Commission

There are many sources of advice that can be used when organisations require risk management guidance. Since Safeguarding\* is covered by legislation, insurers tend not to produce extensive literature and can rely on making their policies subject to the Insured abiding by the legislation.

The following sources can be useful when seeking risk management guidance:

- [http://www.safenetwork.org.uk/getting\\_started/Pages/Why\\_does\\_safeguarding\\_matter.aspx](http://www.safenetwork.org.uk/getting_started/Pages/Why_does_safeguarding_matter.aspx)  
This site has numerous links to other sites covering DBS and safeguarding issues. It relates to children but the same applies to vulnerable adults.
- <https://www.gov.uk/government/publications/dbs-check-eligible-positions-guidance>  
This official government source provides advice on helping employers to make safer recruiting decisions and supervision guidance for those working with children and adults. The website also has links to other sources of information, such as the Department of Health.
- [http://www.nspcc.org.uk/Inform/informhub\\_wda49931.html](http://www.nspcc.org.uk/Inform/informhub_wda49931.html)  
The NSPCC link provides child protection information, advice and support.

\* Safeguarding legislation and government guidance says that safeguarding means:

- protecting children from maltreatment
- preventing impairment of children's health or development
- ensuring that children are growing up in circumstances consistent with the provision of safe and effective care.

### 4. Assess the viability of Alternative Risk Transfer methods

In theory there are a number of fundamental risk transfers options that are available to provide financial protection against abuse allegations.

Alternative Risk Transfer is the use of techniques, other than traditional insurance and reinsurance, to protect or cover risk bearing entities.

One of the options is to create a pooled insurance fund similar to Pool Re whereby Terrorism is currently transferred into a pool to reinsure losses. The Pool Re scheme was set up by the insurance industry with the UK government so that insurers can continue to insure losses and damage caused by acts of terrorism to commercial property in Great Britain. This means that a large fund is available in the event of losses that exceed each individual Insurer's threshold. In terms of covering abuse claims, this may not be feasible due to the smaller size of the potential pool.

Similarly, a captive insurance company could be formed by a firm and re-insurers with a large enough exposure so that premiums are received and invested as a "funded" layer of insurance.

Another option is for companies to set up a mutual insurance company. The principle of a mutual insurance company can be explained by using P&I Clubs as an example. The ship owners clubbed together and agreed to settle claims out of their own money, as opposed to through an insurance company. The difference between an insurance company and a mutual is that the policyholders are also the members/shareholders of the company. In general, the purpose of a mutual is not to cover attritional claims but to fund the bigger claims.

## POTENTIAL SOLUTIONS & BROKER GUIDE (CONT.)

Frits Van Kempen, a Director of the mutual Thomas Miller, expressed his thoughts on the viability of setting up a mutual insurance company to cover abuse insurance. He explained that the greatest hurdles in setting up a mutual company are Capital and Regulation. New applicants must apply to the PRA/FCA and will undergo extensive due diligence and comply with Solvency II, which places stringent rules on any insurance company, including mutual companies.

Since the 1970s with increased regulation and more recently FSA and European directives the licence requirements are very stringent and minimum capital required is €3m in addition to the required documentation. However, this can easily reach €30m when costs are accounted for. Mr Van Kempen stresses that for a mutual insurance company to succeed it must contain like-minded people and contain enough participants. Mr Van Kempen concluded that a mutual insurance company could be set up for the care industry, but it is unlikely due to the fact that there must be enough care homes with the same cohesive approach and the minimum capital requirements.

The Alternative Risk Transfer options described above are feasible in principle, but the size of the participants may make some of these options prohibitive. Risk management is critical in protecting organisations. Furthermore, it is unlikely that the Government would intervene to provide cover, or run a state scheme for private companies. Otherwise, it would make sense for the Government to argue that care homes should be a public service.

### 5. Coverage via additional policies

#### **Directors & Officers Liability**

There are a range of stakeholders who potentially could claim against the negligence of the key management and Directors of the care home. If an employee, vulnerable person, their family or a shareholder or any other third party thinks a Director or Officer has failed to exercise "due care" in the running of the care home, a claim can now be made against them personally. Director's liability is therefore advisable and this type of Liability Insurance provides essential financial protection for not only the directors and officers of the firm, but extends to include managers and key employees.

It should be noted that the policy will cover any civil & criminal offences, including any legal defence costs and awards. Without this, the Director could be held personally liable for the financial costs associated with paying for a claim. It is not scaremongering to point out that a director's personal liability is unlimited and for the period they are employed by a care home, directors are potentially exposing themselves personally to actions, legal claims, investigations, criminal prosecutions and director disqualification.

In advising clients, you will usually be speaking to the principal or a Director of the firm – and making them aware of the legal ramifications of their actions, or indeed failure to act as well as the potential pitfalls are key. This is why having such cover is advisable.

### **Third Party Insurances**

One final note is that those who work in care homes may also expose themselves to potential claims and therefore, where outsourcing services to third parties, copies of their Public & Employers' liability and Professional Indemnity insurances should be obtained.

It rests on the management to ensure that they hold these policies and that it is sufficient and adequate to cover potential claims arising from their work in the care sector.

### **Excess Layer Insurances**

It should be noted that additional liability coverage is available in the market over and above any primary limits already purchased in the form of excess layer policies.

Brokers will need to consider if abuse and molestation cover is necessary under the excess layer cover too, and the basis upon which it is being covered.

## CONCLUSIONS

At the start of this process, we were all very aware of the media coverage in respect of the care sector and how victims had been failed by the system. Even before we started the project we saw some major insurers in this sector announcing their withdrawal of cover for all care homes not run by registered charities, with some stating that the decision was made in order to “*focus on other business lines*”. The apparent response from the insurance industry prompted us to investigate the topic in more detail and to further understand the reasoning and impact this may have on the industry in the future.

We entered into this topic with caution appreciating that this was a sensitive issue but one we felt needed to be addressed.

We found that legislation played the key role with the landmark case of *Lister v Hesley Hall Ltd* (2002) which overruled a previous decision made in the case of *Trotman v North Yorkshire County Council* (1998). With case law now setting a precedent, employers were now more widely exposed and held vicariously liable for the actions of their employees when it came to acts of neglect or abuse or other such criminal acts. This impacted the insurance industry and as a result insurers started reviewing their exposures to abuse claims in terms of cover being offered, restrictions imposed, whether they will offer cover on a claims made or claims occurring basis or generally their commercial appetite for these types of risks.

Initially there was concern that if all insurers started to follow suit, there could be a future exposure for the victims where compensation would fall short. Companies could also be widely exposed financially through lack of insurance or through increased litigation costs. Companies could find themselves at risk or choosing not to transfer their own risk due to the restrictions or lack of support from the insurance industry. As insurers certainly would want to protect their book and limit their exposures.

After discussing the topic at length with various insurers, solicitors and care homes we found that the industry is not at crisis point yet. In comparison to the flood claims or Public Liability/Employers Liability claims in recent years, the number of abuse claims actually remains comparatively low. There is still capacity from a number of insurers who are willing to write the business on standard terms without restrictions.

However, what we did find was the need from insurers for the risks to be presented more appropriately from the broker and for a better understanding of the risks to be communicated. There is a responsibility on all parties to work together more effectively and for detailed risk information to be presented. In all our interviews risk management was key. The service provider needs to better understand their own exposures and implement risk management practices in line with broker/underwriter requirements in order for adequate cover to be sourced more effectively.

Where insurers excluded the cover, some were willing to write the cover back in depending on how the risk was presented back to them. Insurers need to better communicate exactly what they require and brokers need to understand the questions they are asking of the service provider. Service providers need to be able to look to a professional broker for appropriate advice in terms of cover how their risks are presented and understood and how this can be improved through effective questioning on risk assessment and management, training, record keeping and health & safety.

The industry as a whole may further need to investigate what the future holds for the care sector. From our investigation, the number of claims being reported has not yet peaked. Claimants are coming forward more readily than before, understanding that they will be listened to and consequently, insurers need to prepare for the future. If insurers are going to change from claims occurring to claims made, will this be communicated adequately to the brokers and do the brokers fully understand what this means. Effective risk management and safeguarding will be key to the availability and scope of the cover provided in the future.



