

POLICY DECISIONS

Del Sharman is Underwriting Manager at Pound Gates Insurance Brokers. He will conclude his look at early years insurance issues in the next issue.

Del Sharman of brokers Pound Gates looks at the insurance implications of claims of physical and sexual abuse against early years settings...

Nursery owners and managers will be acutely aware of the responsibility and duty of care owed towards the parents of children in their care. This duty of care also extends to make them liable for the acts of their employees – an issue about which there have been heightened concerns following recent high level media coverage of alleged child abuse incidents in early years settings.

There is no legal definition of abuse.

However, in the context of legal liability and insurance, it may be encapsulated as:

- a situation where there is a duty of care owed to a vulnerable (due to age and/or disability) person; and
- there is a breach of that duty by a) the sexualisation of the victim and/or use of the victim for non consensual sexual gratification; or b) an excessively harsh regime or systematic maltreatment, neglect or assault.

In 2002, the House of Lords made the landmark decision in *Lister v Hesley Hall Ltd* that an employer was vicariously liable for the abusive acts of an employee. In this case it was held that there was sufficient connection between the employee's work and the abuse for it to have been committed in the course of employment.

Public Liability insurance

Liability for abuse is often 'strict' – i.e., there is no requirement for somebody to prove that you

as an employer were negligent, particularly where the individual responsible has been convicted under criminal law. It is therefore vital to know whether your Public Liability insurance protects you against acts of abuse committed by your employees.

Where the policy is written on the traditional basis of 'legal liability for accidental bodily injury' there is no need to refer specifically to injury arising from abuse. Insurers will be covering the act of abuse within the definition of bodily injury and up to your full public liability limit of indemnity.

Furthermore, this cover would normally be written on a 'claims occurring' basis. This means that if an incident that occurred 30 years ago comes to light now, the policy that was in force in 1981 would respond to and deal with the claim.

If a parent brings an action for abuse-related injury (physical or psychiatric) an insurance cover written on the above basis should provide an indemnity if:

- there is a legal liability;
- the event is accidental and not a deliberate act by the Insured in person (even though it may be a deliberate act by an employee or volunteer for which the Insured is vicariously liable).

In recent years, however, some insurers have taken the decision to exclude abuse from their Public Liability insurance cover. Customers

may be offered the option to 'buy back' abuse cover at additional cost; but such cover often comes with a much lower policy limit (typically £250,000 or £500,000) and on the more restrictive 'claims made' basis – meaning that the incident must have occurred and be reported to insurers during the policy period, otherwise the policy will not provide indemnity.

Often insurers that write cover on this basis will provide a 'retroactive date', typically the original inception date of your policy. In other words, if you had been with that insurer for five years you would be protected against claims for abuse incidents provided the incident occurred on or after the retroactive date. Unfortunately, often abuse claims are not made for 20 or even 30 years and therefore cannot be reported to insurers within the retroactive date – unless you had been with the same insurer for the last 30 years.

If your insurer has a public liability wording that contains an exclusion for acts of abuse then you should:

- ensure that you have purchased the abuse cover extension (if it is available from your insurer) and make sure you understand the basis of claims settlement (claims occurring or claims made);
- consider switching to an insurer that offers cover on a traditional (claims occurring) basis with no abuse exclusion.

Public Liability insurance can be a very technical area of cover, so I would strongly advise that you contact your insurance broker or adviser for further guidance.