

Insurance**As elder abuse claims rise, so does importance of institutional liability coverage**By **Dominic Clarke**

Dominic Clarke

(February 16, 2018, 9:00 AM EST) -- Individuals of prominence and power across all industries and institutions have recently been thrust into the spotlight by claimants claiming to have been sexually abused. While the public nature and sheer number of allegations being brought today against movie directors, actors, sports doctors and politicians is perhaps a new phenomenon, sexual abuse litigation has been a subject familiar to insurance carriers for decades.

Following the increase in civil litigation in the 1980s and 1990s against religious and education organizations concerning sexual abuse committed against those in their care, insurers responded by limiting coverage in many liability policies for abuse and intentional acts.

The Supreme Court of Canada in 2003 decided a trilogy of cases regarding the vicarious liability of institutions in the sexual abuse context. In *John Doe v. Bennett* 2004 SCC 17, the Supreme Court outlined several factors to assist in the determination of what constitutes a "sufficient connection" with respect to vicarious liability for intentional torts. These factors have since been applied with a variety of results in what has become a highly fact-specific inquiry. These factors include:

- the opportunity afforded to the employee to abuse their power;
- whether the act may have furthered the employer's aims;
- whether the act was related to friction, confrontation or intimacy inherent in the enterprise;
- the power conferred on the employee over the victim; and
- the vulnerability of potential victims to wrongful exercise of the employee's power.

With respect to acts of abuse, one factor afforded great weight in the public eye is the victim's vulnerability. While the bulk of institutional abuse jurisprudence concerns abuse committed against children, it is expected that, moving forward, claims are going to increase against another particularly vulnerable group: the elderly. Indeed, as Canada's Baby Boomer generation approaches retirement, institutional liability for elder abuse is expected to be at the forefront of both defence and coverage litigation.

Whereas traditional analysis of institutional abuse typically concerns abuse of a physical or sexual nature, elderly abuse claims will also be brought on the basis of financial, psychological and neglect-based abuse. Moreover, the institutions likely to be involved in such claims are not limited to those responsible for elder care, such as hospices and retirement homes.

Charitable organizations, religious institutions and medical and research centres may all face exposure if, for example, donations are inappropriately solicited from the geriatric community. Claims based on elder abuse may manifest in a number of forms, including on the basis of allegations that an institution or its professionals:

- physically, emotionally, psychologically or sexually abused a senior;
- failed or neglected to provide the requisite care,

- services or duties to a senior;
- failed to implement programs or policies to ensure the safety of the institution's patrons; and
- misused, misappropriated or stole a senior's assets or savings.

These less traditional forms of abuse are likely to require fresh judicial analysis divergent from the original trilogy. The contrast becomes evident with the application of the aforementioned factors to cases of financial elder abuse. By way of example, unlike with cases of sexual abuse, the act of soliciting donations by an employee of a charitable organization, whether untowardly or otherwise, may often be in furtherance of the employer's aims.

Insurance coverage will also be subject to different considerations: not all forms of non-traditional abuse will necessarily trigger coverage for bodily injury.

Insurers and policyholders are encouraged to review their coverages and explore whether or not elder abuse at the institutional level will be covered under existing policies. The two liability insurance coverages likely to be implicated in cases involving institutional elder abuse are the commercial general liability (CGL) and professional errors and omissions (E&O) policies. CGL policies are designed to protect against liability arising out of risks associated with operating a business and are designed to respond when a policyholder is sued by those who have suffered bodily injury as a result of incidents involving the policyholder.

Elder abuse claims in the institutional setting will also involve health care professionals such as doctors, nurses, therapists and other professionals who are more likely to be insured under separate professional liability E&O policies.

Regardless of which liability policy is triggered, most liability insurance policies now contain "abuse" or "sexual abuse" exclusions which are designed to preclude or limit coverage for these types of claims, which also acts to reduce insurers' reliance on the common intentional act exclusion. Moreover, the Ontario Court of Appeal has held that abuse exclusions also apply to claims for improper supervision at the institutional level.

Fortunately for policyholders, the market has responded to the increasing frequency of abuse claims. Some carriers are now placing "abuse" liability coverage in Canada. Typically, these abuse policies sit on top of a CGL or other policy and ultimately provide coverage for sexual, physical and mental abuse and harassment. The coverage is targeted at care centres, nursing homes and other clubs and organizations. The coverage remains in its infancy. Some insurers will still not write the coverage for certain institutions. Presently, where it is available, it can include coverage for legal and expert fees and expenses, internal investigations, as well as additional expenses including health services and medical expenses.

From an insurance litigation and coverage perspective, the Supreme Court of Canada has settled several important issues concerning sexual abuse claims. As Canada's population ages and a significant subset of our population enters retirement, elder abuse claims can be expected to rise. Both carriers and policyholders would be well advised to review their products and coverages now.

Dominic Clarke, a partner at Blaney McMurtry LLP in Toronto, practises primarily in the area of insurance litigation encompassing both coverage and defence matters. A special thank you to Zack Garcia and Harrison Nemirov for their contribution to this article.

Photo credit / TommL ISTOCKPHOTO.COM