Introduction

A common question asked of me is: What is meant by care, custody, or control? I hope that the discussion that follows will shed some light on this issue although as we will see, it is not clear cut.

The reason for why question is asked in the first place is that there is a “Property in Custody or Control” exclusion in just about every commercial general liability (“CGL”) policy issued. Sometimes the words may be altered to “Care, Custody or Control” and other times “Property in Physical or Legal control”1. For the purpose of this paper we will consider the arguably the broader term of “Care, Custody or Control”.

While some form of exclusion in respect of “Property in Care, Custody or Control” is almost universally applied it nonetheless often proves onerous to the Insured due to the wide variety of third party property that an insured may be legally responsible for in the ordinary operation of their business.

Before we address the primary question of what is meant by care, custody, or control, I wish to touch on why do insurers universally exclude cover when it can take away vital cover to their customer?

The Reasons for a Policy Exclusion

In broad terms there are three reasons for any policy exclusion. They are:

1. The risk is uninsurable.

2. There is a policy in the market that is more appropriate to cover the risk; or

3. The Insurer wishes to obtain more underwriting information on the exposure for each particular client so that they can determine if they wish to accept the transfer of the risk to them and if so at what price2 and on what conditions.

Using these three, as I say broad categories, the reason for a reluctance of insurers to grant cover is that it falls within category 3 and insurers are looking for full information on the risks they are accepting before they grant cover. It goes further than this however.

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1 Policies are becoming more and more different and the reader should carefully read the wording of the relevant policy wording.

2 The premium.
In “Public Liability Wordings and Cover” Peter Madge set down five reasons why liability underwriters are so reluctant to cover property in the insured’s physical or legal control. The reasons listed by Mr Madge are the insurer would be:

1. covering liability as a bailee as, for example, damage to a car left at a mechanic’s workshop for repair,

2. covering what in many respects could be regarded as a trade risk as, for example, damage to property whilst being cleaned at a laundry,

3. offering cover in circumstances where more adequate arrangements exist to cover the loss as, for example, an item could be added to the insured’s fire or burglary policy to cover losses from these perils.

4. Virtually giving all risks cover under the guise of a liability policy since, in many cases, insurers would find it difficult to avoid liability for loss or damage. Once the loss or damage was proven they would be expected to pay.

5. Covering, in many cases, a heavy risk as, for example, parts may be sent to assemblers to be made up into a finished article. If the assembler damages these parts whilst handling them he would expect indemnity under the policy.

However liability insurers recognise that property insurance alone by a bailee does not offer a complete solution, since it does not provide for the property owner’s consequential losses nor for their insured’s legal defence costs. Therefore some exemptions from the exclusion are usually provided as a matter of course:

1. Premises Leased or Rented by the Insured: in this exclusion wording is based on the Insurance Council of Australia’s 1980 advisory CGL policy wording which, although long outmoded, is still used as the basis of cover by some insurers. Special care however is required as the write back can be overridden by the Contractual Liability exclusion, e.g., if the insured was under a leasehold obligation to insure the property but failed to do so.

2. Premises (and their contents) where the premises are temporarily occupied by an insured person to carry out work: This write back address the situation which commonly arises where the insured does who work away from the premises.

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4 Again the reader is warned that policies differ markedly and that they should read the policy and the exclusions carefully to ensure that they fully understand what is and what is not covered by the particular policy.
3. **Car parks:** this is a common write back as the provision of a car park is so frequently provided by an Insured business.

4. **Personal effects of your directors, employees and visitors:** While this is commonly provided, it is questionable whether any legal liability would necessarily apply at common law. However employers do have a liability for loss of or damage to employees' tools under some industrial awards.

5. **Property, other than an aircraft, watercraft that is not on dry land or hovercraft, not owned by you, but in your physical or legal control subject to a maximum of $100,000 for any one occurrence and in the aggregate during any one period of insurance:** While I have used the base Sub-Limit shown in the Zurich Business Pack\(^5\) for this discussion, it is necessary to remember that policies do differ in the write backs and Sub-Limits provided. In some cases a separate policy excess may also apply.

**Property Damage Exclusion**

As an industry we sometimes forget how easy it is to assume everyone knows our insurance lingo. I was reminded of this only yesterday when an Insured stated “its not personal property—the business owns it.” So it is worth pointing out that, in the context of the care custody or control exclusion, the reference is not to ownership (business or personal), but rather the type of property. In other words, the exclusion does not apply to property that is considered real property\(^6\), such as a building\(^7\).

Back to our question: As the exclusion applies only to property in an insured's care, custody, or control, what constitutes “care, custody, or control”?

**Each Case Considered on its Merits.**

As stated above, my research\(^8\) shows that some form of “care custody or control” exclusion is almost universally used, but its construction is, to a large extent, dependent upon circumstances of each case and as was stated in

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\(^6\) At common law, real property (or realty) refers to one of the three main classes of property, the other two classes being personal property and intellectual property. Real property generally encompasses land, land improvements resulting from human effort including buildings and machinery sited on land, and various property rights over the preceding. An easy way to remember this is to think of real estate.

\(^7\) In the case in question the policy exclusion only applied to “personal property”. Most Australian policies do not distinguish between real and personal property when it comes to the “care custody or control” exclusion.

\(^8\) Using www.PolicyComparison.com
a US case: the phrase should be applied with common sense and practicality. This means that there is no "one-size-fits-all" answer to this question.

Of course, this provides only limited guidance on the issue. After all, if common sense and practicality were the order of the day, we might not need the courts at all. But there are at least some general rules to keep in mind as to the meaning of: "care, custody, or control"?

In a general way the word "care" has reference to temporary charge; "custody" implies care, keeping or guarding and a necessity for an accounting; and "control" refers to power or authority to manage, superintend, direct or oversee.

As is often the case, definitions are not universally accepted. For example, in one United States case, a "two-pronged test" was imposed: (1) the property was "within the possessory control of the insured at the time of the loss"; and (2) the property was "a necessary element of the work performed [by the insured]." [Emphasis supplied.]

By "possessory control," the court meant the property is in control only if it is in the insured's possession—whereas the Oxford Dictionary definition of "control" is a broader concept and applies when the insured has the authority or power to control the property—not necessarily possession.

Case Studies

Probably the best approach to gaining an overall perspective on meaning of "care, custody, or control" is by case studies. Here are a few, but before I start, I would explain that like many such cases the issues being decided do not centre on just on the one issue of care custody or control. I have kept the other issues including other policy exclusions out of the discussion so as to focus on the topic at hand, i.e. "care, custody or control".

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9 *Hardware Mutual Casualty Co. v. Crafton*, 350 S.W.2d 506
11 The definition also includes the word care which is likely why Zurich Insurance Australia Limited and several other insurers have done away with the word "care" in their exclusion.
13 *Ibid*.
A transport company brought a prime mover with a tank trailer of milk to a dairy processing plant. The procedure was that the driver of the truck would park the prime mover and tank trailer, and the employees of the processing plant would unload the milk after the agree quality assurance tests had been conducted to determined the milk was acceptable. Unloading was by electric pump, with a hose attached to the tank trailer. While only the dairy processing plant employees could unload the tank trailer, only the driver could move the truck.

If the truck needed to be repositioned, the processing plant employees had the authority to direct the driver to move the truck, but were prohibited from actually moving the truck themselves. In this case, a vacuum resulted from the pumping, causing the tank trailer to collapse. The truck owner made claim against the dairy processing company for damage to the tank trailer, resulting in a finding of negligence by the dairy in causing the damage to the tank trailer.

No Cover: The liability insurer for the dairy processing plant denied coverage, contending the tank trailer was in the care, custody, or control of the dairy processing plant and thus excluded from coverage afforded by the policy they had issued. The dairy processing plant contended that since the driver was the only person authorised to move the tank trailer, it was under the control of the driver and not the dairy. The court disagreed—although the driver was the only person authorised to actually move the truck, the court concluded the dairy had sole authority to direct that the truck be moved.

The court ruled that the authority to direct movement of the truck meant the truck was under the supervision of the dairy at the time of the collapse—and concluded this meant the truck was under the care, custody, or control of the processing plant. Therefore, the exclusion applied.

In the above example, control by the dairy was found to apply because the dairy had the authority to direct movement of the truck, which was deemed to be supervision, despite the fact that the dairy was prohibited from actually moving the truck by driving it.
A truck driver parked his employer's prime mover and trailer at the site of a wood products company. The wood products company was to load the trailer with sawdust. The driver left the cab of the prime mover (leaving the keys in the ignition), and an employee of the wood products company inserted a suction pipe into the rear of the trailer to blow in the sawdust, after which the employee left the area while the filling operation took place.

While the sawdust was being blown into the unattended trailer, a fire broke out, damaging the truck. The owner of the truck made claim against the wood products company, seeking payment of damages to the trailer caused by the fire. The wood company sent the claim to its liability insurer, who subsequently denied coverage for damage to the trailer, citing the care, custody, or control exclusion.

The insurer argued that the truck owner had surrendered care of the trailer, including its custody and control, to the wood products company. Here, again, technically the wood products company did not have the right to move the truck. If it needed to be moved, the wood products company was required to find the driver to move the truck and ask him to move it. The court pointed out that the wood products company did not "exercise dominion or control" over the truck and trailer as they were required to notify the truck owner to send a driver to move the truck.

**Cover Applies:** As the wood products company did not have authority to do anything with the truck, except fill it, and there was no agreement that the wood products company was obligated to guard the truck, the court ruled against the insurer and found the trailer was not in the care, custody, or control of the wood products company at the time of the fire. Thus, coverage applied.

The distinction between this and the damaged milk tank trailer is that the wood products company was found not to have supervision over the truck. In the sawdust case, the unattended truck was merely left at the wood products premises to be filled. No right to direct the truck or trailer's movement was conferred on the wood products company. The court pointed out that the driver could have remained with the truck during the filling process, but chose not to do so.
With Friends Like These!

Friends agreed to store a vehicle for its owner in the garage of their home for no charge. A fire in the friends' home (and garage) destroyed the home, including the vehicle. The cause of the fire was due to the negligence of the home owner. There was no suggestion that the fire was deliberately lit. The owner of the vehicle brought a claim against his friends for destruction of his vehicle. The friends sent the claim to their insurer, who denied coverage, citing the care, custody, or control exclusion found in the friends' homeowners policy.

In the litigation that followed, the friends testified that they felt the same responsibility for the vehicle as for their own property; they locked the garage (the owner of the vehicle had a key), and further testified they would not allow access to the vehicle to anyone but the owner.

No Cover: The court concluded that both parties agreed the friends were to keep the vehicle safe. Thus, the care, custody, and control exclusion applied as the friends had "affirmative duties with respect to the vehicle, bringing it within their care, custody, or control and within the exclusionary clause."

The safekeeping or "care" was the key issue in this case; the court determined the circumstances were such that the friends had "care" of the vehicle. Worth noting is the fate of argument that the “care, custody, or control” exclusion applied only to commercial transactions, which the court rejected by simply stating, "The insurance policy does not so limit the provision." This can be instructive as oftentimes it is presumed that lack of consideration - i.e., no payment for storage, garaging, etc. - eliminates the effect of the care, custody, or control exclusion. This is clearly not the case.

May I Park Here?

Apparently with permission, a person parked his semi trailer on the premises of the owner. The owner of the trailer brought the trailer to the premises with his own prime mover, unhooked and parked the trailer, and drove away. Subsequently, the trailer caught fire and was damaged. The owner of the trailer brought suit against the property owner, contending the property owner was liable for the damage to his trailer as the trailer was lawfully parked on the premises of the owner. The property owner reported the matter to their insurer and allowed the insurer to defend the suit. The property owner's liability insurer refused to defend based on the care, custody, or control exclusion.
Cover Applies: The court noted that the fire happened some 9 hours after the owner had parked the trailer. Further, the court pointed out the property owner neither moved nor loaded the trailer and that there was no proof that the property owner undertook to maintain the safety of the trailer. Thus, the court concluded that the trailer was not in the care, custody, or control of the property owner, and the property owner's liability insurer should subject to any other exclusions under the policy, defend the claim on behalf of the Insured.

Unlike the vehicle case, the court found no obligation on the part of the property owner to safeguard the trailer. Thus, the trailer was not in the "care" of the property owner.

Pack and Ship

The insured owned and operated a warehouse. For one of their customers, the insured had an agreement to not only store merchandise, but also to "store, package, and ship" the merchandise of the customer.

A fire at the insured's warehouse damaged their customer's merchandise. The customer's property insurer paid the customer, but relying on their rights of subrogation of the customer, the customer's property insurer sought to recover from the warehouse operator the costs of damage to the customer's merchandise damaged by the warehouse fire.

The liability insurer for the warehouse denied coverage for the claim, citing the "care, custody, or control" exclusion in the warehouse operator's CGL policy and also sought a ruling from the courts that the insurer owed no duty to the warehouse owner/insured.

The warehouse owner did not dispute that the customer's merchandise was property on which the warehouse performed work: that is, packing and shipping. However, the warehouse argued that the warehouse did not have "possessory control" of the customer's merchandise because the customer had access to the merchandise, and the fire occurred at night when no employee of the Insured was at the premises. At the root of the Insured's argument was that possessory control cannot exist if they, the Insured, had only "temporary or incidental access to the property" or "limited possession."

No Cover: Here the courts found possessory control by observing, "While control exercised must be exclusive, it need not be continuous." Exclusivity of possession may exist even if the possession is of a short duration, the

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The person storing the vehicle is said to be a gratuitous bailee whereas a person receiving payment for storage is known as a bailee for reward. While under Australian law there once was a different level of duty of care for these two categories, the higher duty applying to the bailee for reward, the difference in the level of duties has all but disappeared.
court opined, and the fact that the customer had access to the merchandise did not preclude possessory control. Exclusive possession centres on factors such as who supervised the operation in which the property was damaged. The court's conclusion was that because the warehouse stored, packed, and shipped the customer's merchandise, the warehouse had taken exclusive possession of property, and the merchandise was a necessary element of the work the warehouse performed. As such, the “care, custody, or control” exclusion applied, and the warehouse operator's liability insurer had no further duty to their insured for this incident.

In rendering this decision, the court reviewed another case where care, custody, or control was not found. That case involved musicians who left their musical instruments in an establishment that caught fire, damaging the musical instruments. The distinction was the establishment did not exercise possessory control solely because the musical instruments were left on the premises between shows.

_A Needed Lift_

The insured was a contractor using a crane supplied by its owner under an oral agreement (the invoice to the contractor was stamped "crane rental"). The owner of the crane supplied not only the driver of the crane, but also an operator to make lifts, and these two employees of the crane owner retained full control over the crane. During the course of the construction work performed by the contractor, the crane was damaged, and the contractor was sued by the crane owner for the cost of the damage to the crane.

The liability insurer for the contractor denied coverage, citing the care, custody, or control exclusion of the contractor's liability policy. The court acknowledged that businesses, for various financial reasons, rent equipment which, for all intents and purposes, they operate and control—such as a leased fleet of trucks. In taking exception to the insurer's position that the word "rental" was conclusive as to the parties' intention, the court stated, "We think this ignores the on-the-ground facts."

_Cover Applies:_ Instead, the court found use of the crane to be a service agreement, not a rental agreement. This was based on several factors, including the facts that the crane owner's employees drove, operated, fuelled, maintained, and repaired the crane. Further, the court pointed out the crane owner could move the crane to another job site and substitute equipment capable of the same work. While the contractor could direct where and when the crane should make lifts, the court deemed that to be the typical function of a general contractor. The court concluded that the same factors that make the agreement a service agreement also determine the crane was not in the custody of the contractor. And, without possession or control, the exclusion did not apply and the insurer was required to defend.
Here, the degree of supervision—that typical of a general contractor over a subcontractor—was not, in the view of the court, enough to constitute custody or control.

**Conclusion**

While some general guidance can be found on the meaning of “care, custody, or control” and thus the scope of the CGL exclusion for property in the care, custody, or control of the insured, what becomes evident is that each claim is fact specific. Seemingly small changes in the circumstances—such as the degree of access the owner has to the property that has been damaged—can result in a totally different outcome as to whether property is in the care, custody, or control of the insured.

Additionally, as can be seen, some courts may emphasise some factors, while other courts weigh more heavily other factors. If there is a serious question about care, custody, or control, it is clearly best to remove the doubt by either insuring the property under the material damage section of the policy thereby moving it from a third party cover to a first party cover which is always best to protect the brand reputation of the Insured or by ensuring that the Sub-Limit is sufficient to cover the exposure. Finally, other exclusions such as “registered vehicles” also need to be considered.

**Disclaimer:** This discussion paper is intended as a starting point to highlight a common issue. It should not be relied on as a substitute for professional advice. Specialist insurance and or legal advice should always be sought in relation to any particular circumstances and no liability will be accepted for any losses incurred by those relying solely on this paper.

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