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TO INDEMNIFY OR NOT: Professional indemnity arrangements

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Based on questions posed during presentations at the annual Orthopaedic & Trauma Alliance UK conferences, professional indemnity arrangements and insurance is something that can cause confusion and consternation amongst health care practitioners who are sometimes unsure if they need it or indeed if they already have it. This article will outline what professional indemnity insurance is, when it is needed, how most health care practitioners have it and, when you need additional indemnity arrangements.

Keywords: professional indemnity; insurance; negligence; fitness to practise cases

Introduction

This article is concerned with professional indemnity arrangements for health care practitioners, why it is needed and how it can be obtained. One of the main reasons why a professional indemnity arrangement is needed is that it is compulsory for those who register or reregister/revalidate with one of the health care regulators such as the General Medical Council, the Health & Care Professions Council or the Nursing & Midwifery Council. As the Health & Care Professions Council state:

‘You are required to have a professional indemnity arrangement in place as a condition of your registration with HCPC.

When registering, you will be asked to make a professional declaration to confirm that you have (or will have) one in place and that it provides the appropriate level of cover (Health & Care Professions Council 2018).

What is indemnity?

To indemnify is ‘to compensate for loss suffered, expenses incurred’ according to The Oxford Shorter English Dictionary, whilst it defines indemnity as ‘security or protection against contingent hurt, damage or loss’ (Onions 1984).

It follows from this that a professional indemnity arrangement is one that will indemnify the person who holds it from expenses incurred or suffering a loss. A professional indemnity

arrangement is a form of indemnity insurance. As with any insurance this is a service that you hope you will never use and for which you pay a fee for someone else (usually an organisation) to recompense you should you suffer any loss or incur expenses for a given situation, such as a burst water pipe with a home insurance policy, or crashing into another car and causing damage with motor insurance, or for negligence costs incurred during your clinical practice with a professional indemnity arrangement.

Types of professional indemnity

Within the health care setting there are two types of indemnity insurance. The first is that which is a compulsory requirement of the health care regulators for registration with them. This is indemnity insurance that pays out in the event that you are sued for negligence during the course of your professional/clinical practice. The requirement of the health care regulators is a basic one that you have an indemnity arrangement in place that will pay the claimant, the person bring the claim against you, the compensation (money) that they are awarded if they win their case, along with their legal costs in bringing the claim against you. This form of indemnity insurance will also pay your legal defence costs, that is any costs associated with defending you against the negligence claim made against you including the fees of solicitors and barristers who are employed to represent you.

The second type of indemnity insurance is concerned with indemnifying a health care practitioner against the costs and expenses associated with defending and being represented at regulatory bodies fitness to practise hearings or in other legal situations such as employer disciplinary hearings, inquests, or criminal cases brought against the health care practitioner.

Because different organisations use different terms for indemnity arrangements, such as indemnity insurance, indemnity arrangement, negligence insurance, practice insurance etc., there can be confusion about what is being referred to. Whether it refers simply to indemnity against a negligence claim or if it refers to the wider form of indemnity covering not just negligence but also the other areas mentioned above such as representation at regulatory body fitness to practise hearings.

As an example, the Nursing & Midwifery Council may be said to contribute to this confusion when they state that

‘you must have in place an indemnity arrangement which provides appropriate cover for any practice you take on as a nurse, midwife or nursing associate in the United Kingdom’ (Nursing & Midwifery Council 2018).

without actually stating what they mean by appropriate cover.

This article will use the term 'professional indemnity arrangement' to mean indemnity against clinical negligence claims AND indemnity for other legal situations such as employer disciplinary hearings and regulatory bodies fitness to practise hearings.

Why do I need a professional indemnity arrangement?

As stated earlier, one of the main reasons why a health care practitioner needs a professional indemnity arrangement in place is because it is a requirement of the health care regulators. If you cannot demonstrate that you have a professional indemnity arrangement you will either not be allowed to register with the appropriate health care regulator or can have your registration suspended or revoked via a fitness to practise hearing.

It is not always been the case that health care practitioners have needed professional indemnity arrangements in order to register with their health care regulator. Indeed, in the late 1990s and early 2000s there were many calls for indemnity arrangements to be made compulsory. For instance with regard to doctors, the Department of Health issued a press release on the 4th November 1998 with the title 'All doctors and dentists to be required to have full insurance', this was followed in November 2005 with a consultation by the Department of Health regarding the amendment of the Medical Act 1983 to legislate for compulsory indemnity arrangements. This, in turn, resulted in The Medical Act 1983 (Amendment) and Miscellaneous Amendments Order 2006 being laid before Parliament in June 2006 and receiving Royal Assent on 17th July 2006. Whilst in 2002 Mulholland and Dowd reported that the NMC had been considering compulsory indemnity cover for all nurses and midwives.

The General Medical Council made compulsory indemnity arrangements a requirement for doctors on 1st August 2015, and they were finally made compulsory for nurses and midwives in April 2016, whilst the Health & Care Professions Council had made compulsory indemnity arrangements a requirement for registration in April 2014.

Although not compulsory, professional indemnity arrangements have been around for quite a long time. In fact, some of the organisations that provide professional indemnity arrangements are older than many of our national institutions such as the National Health Service, which is 72 this year, and even the National Trust which is celebrating its 125th birthday this year.

As to the reasons why these organisations have been in existence for so long, and why a health care practitioner may need a professional indemnity arrangement, aside from the fact that it is a requirement of their registration with their health care regulator, it is probably best left said by one of the organisations providing professional indemnity arrangements:

‘Our in-house experts can assist members with the wide range of legal and ethical problems that can arise from their professional practice. This can include assistance with clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

Our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place. We do this by promoting risk management through our workshops, e-learning, clinical risk assessments, publications, conferences, lectures and presentations’ (Medical Protection Society 2020).

As can be seen, a professional indemnity arrangement can provide legal assistance when it is needed in the course of clinical practice, as well as also providing advice and education on legal and ethical matters. There is a difference between the compulsory indemnity needed to satisfy the registration requirements of the health care regulators and having a professional indemnity arrangement that will provide assistance and/or advice in situations other than being sued for negligence, such as a dispute with an employer or even a fitness to practise investigation by the health care regulator themselves.

Do I have a professional indemnity arrangement, or do I need to get one?

As a consequence of the old master servant law, where a master was responsible for the actions of the servant who had to follow the orders given to them by the master and not think for themselves, the master in effect indemnified the servant for those actions, employers are generally responsible for the actions of their employees acting during the course of employment through the legal concept of vicarious liability.

Health care practitioners who work for the National Health Service receive their professional indemnity arrangement through their employer. The employer pays a fee to NHS Resolution, which is the name of the former NHS Litigation Authority.

NHS Resolution is an executive arm’s length body of the Department of Health and Social Care. Its remit is to enhance patient care by providing expertise in relation to resolving negligence claims and by providing advice and guidance on ways to improve patient services and safety standards and through shared learning throughout the NHS on these matters.

It is NHS Resolution which manages the indemnity schemes, there are currently 7 schemes, that provide indemnity for National Health Service employees, including those working in general practice.

As a National Health Service employee, you will have the basic indemnity arrangement that provides indemnity cover in respect of clinical negligence claims required by your professional regulatory body. In respect of clinical negligence you do not need to take out any additional private indemnity arrangement for your National Health Service work.

That said, the indemnity arrangement provided through your employment with the National Health Service only cover you for clinical negligence claims made during the course of your employment as an employee. Therefore, if you undertake other paid health care work, work outside the National Health Service, or even volunteer in a health care capacity you may wish to consider having a professional indemnity arrangement for that work as well.

It is also worth noting that the indemnity arrangement you have through your employment in the National Health Service does not provide cover for the additional non-clinical negligence aspects of professional indemnity arrangement, such as representation at employer disciplinary and regulatory fitness to practise hearings, and this is something you may consider worthwhile having.

Some unions and professional organisations provide professional indemnity arrangements as part of their membership subscription, or as an additional service. If you are a member of such an organisation it may be worth checking what arrangements are in place for you.

If you work in health care practice outside of the National Health Service your employer will still have vicarious liability for your actions during your employment. However, it is worth checking what the indemnity arrangement in place actually indemnifies you against, as you may want to consider having additional cover particularly if you undertake voluntary or other paid work. If you are self-employed you will need to organise and pay for your own professional indemnity arrangement.

Summary

Most National Health Service employees will have their professional indemnity arrangement need provided for them and did not need to make any arrangement. Those in paid employment outside of the National Health Service will also most likely have the professional indemnity arrangement provided for them through that employment.

It is only the self-employed and those undertake any other health care practice outside of their employment who need to make their own professional indemnity arrangement. However, it is worth all health care practitioners checking what professional indemnity arrangement they have in place either through their employment or their trade union or

professional organisation membership and determining whether this meets their needs or if they need to make additional arrangements.

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