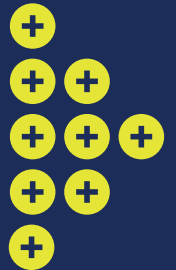


*Caring
for those
that care
the most*



***Primary Care Home Indemnity:
Understanding the Considerations***

As part of an innovative and co-ordinated approach to the delivery of primary care, there is a lot to consider as a Primary Care Home. Most of your strategy will be uncharted territory and throughout the journey of becoming a fully-fledged Primary Care Home, you will be presented with a number of new and potentially pivotal business decisions.

In this increasingly litigious society, no decision could be considered more significant than making sure you and your organisation are appropriately covered against the rising number and value of both speculative and legitimate negligence and malpractice claims. After all, the cost of inadequate indemnity cover can be millions of pounds for the affected business, so it is important that you give insurance the time and consideration it needs.

For many newly emerging organisations, there is a temptation to “stick with what you know”. This may mean that as long as you feel the GPs and nurses are adequately covered through one of the ‘big three’ Medical Defence Organisations (MDOs), that there is no need to do any more than check the indemnity is in place as part of your expanding business’ due diligence. At a practice level, you have come to trust your defence organisations and have always used them, so why would such an approach be incorrect or unjustified?

To answer this question, we need to briefly explore two issues: discretion and the Discount Rate.

Discretion

In the context of defence organisation indemnity, discretion is something that is rarely understood by many of their members, but can be a very significant clause when making a claim. MDOs are not insurance providers. As a member, you join the MDO by subscribing to an Articles of Association. This is an agreement between you and the organisation that should negligence be alleged against you, at their discretion they will support you and assist you legally. While the MDOs have been historically very good at supporting their members, the decision to assist is down to the discretion of the MDO, unlike the legally enforceable, regulated terms of an insurance contract.

The Discount Rate

The Discount Rate, or Ogden Rate as it is known in the financial sector, also needs to be considered when thinking about indemnity. The Rate is set by the Lord Chancellor and used by courts to calculate future loss in personal injury cases. Its change from +2.5% to -0.75% in March of this year has meant that compensation awards have increased significantly for those suffering life changing illness or injury.

The swing of 3.25 percentage points reflects the interest an awardee could earn on their award if they invested it in ‘very low risk’ government bonds. Historically, even very low risk investments would make money over time, but due to economic factors very low risk investments will devalue the investment in real terms over time, so awards are being increased at the ‘front end’ to compensate. Award value is driven by a number of factors including the age of the awardee, loss of estimated future earnings and severity of the injury sustained, so the change to the Discount Rate will affect all claims regardless of the patient demographic.

Considerations

To summarise, a traditional method of indemnity operates on a discretionary basis and awards of compensation are rising due to the Discount Rate. As funds become compromised, it is possible MDO’s use of discretion will become more common and subscriptions will almost certainly rise. In an area of uncertainty, it is therefore critical that you strongly consider the choices available and undertake adequate diligence of any chosen providers:

- ⊕ **Regulation** – is the provider regulated by an external body?
- ⊕ **Solvency** – do they need to have assets at least equal to their claims obligations?
- ⊕ **Contractual obligations** – is the arrangement a contract enforceable at law?
- ⊕ **Understanding of your business model** – does the cover reflect your business exposure?

As a Primary Care Home, what are my exposures?

Understanding your exposures as you grow and establish your business is critical to knowing what insurance cover is the right cover. A defining feature of a Primary Care Home is the coming together of primary, secondary and social services. This means that a patient will experience many touch-points in their diagnosis and treatment, blurring the lines between where individual clinician accountability starts and ends. The structure of care delivery in PCH models is far less direct or linear than in a traditional GP practice, so while failure of care might be initially directed at just one clinician, it is likely the others involved in the care journey will be implicated in the action too. In these instances, it is critical to ensure that all clinicians have appropriate indemnity to avoid being exposed.

While the purchase of indemnity by individual clinicians helps mitigate risk, it doesn’t avoid it entirely. A successful defence of a claim is reliant upon a cohesive and joined-up approach between all supporting MDOs, but MDOs are also commercial and so there needs to be due consideration that they may well contest their own clinician’s liability while implicating others. It is therefore important that the



first step towards lowering exposure is to streamline the number of insurers and MDOs that provide cover for your clinicians.

Indemnity of each clinician is just the start. As the employer, the Primary Care Home can also be named as a defendant through being vicariously liable for the actions of their staff. Remember that if the covering MDO exercises discretion for their member, the employer automatically assumes liability for the clinician and any damages awarded, so it is important that the entity think about their own insurance as a precaution. We recommend Contingent Liability insurance as a backstop in the event that a clinician's insurance fails or is withdrawn through discretion.



Consider this: would you entrust 'discretionary cover' to any other arrangement, such as home insurance, payment for services or car breakdown cover? Given the time and resources taken to establish your business, why allow discretion to impact your ability to defend your right to be a clinician?

Entities also have their own exposures – the uninsured risks – such as receptionists, management and roles where indemnity has historically never been a consideration. In newly emerging care models, these previously innocuous roles are presenting their own risks by being more involved in patient outcomes. Whether it's failing to book a referral, giving the wrong blood results or devising protocols, if the result is patient detriment, the business is once again liable for any action that follows. This further extends to staff who may be seconded from secondary care, but working in a primary care setting. In some cases NHS Resolution (formerly the NHS Litigation Authority) and the Clinical Negligence Scheme for Trusts may decline to support secondary care staff in your business, so it is important that the business understands the extent of their cover before engaging such clinicians.

Finally, as the instructor of your staff's behaviours and provider of company protocols, the law sees the business as the 'master' and the employee as the 'servant' in any employment arrangement. The employee was following the instructions or guidance of the business and this means that the business is the backstop for any ensuing litigation. Draconian as this outlook may be, at law your business is ultimately responsible for the impact of business decisions on patient outcomes. Few businesses realise the significance of this exposure.

So how do you move forward?

The protection of your business should be your main priority and it should consider all available solutions to achieve this. Any decision should be reviewed in the context of:

+ *Limiting risk*

Insurance contracts are definitive, explicit and binding on the insurer. They cannot be avoided through discretion and clearly define the extent and scope of cover at policy commencement. They offer a regulated and solvent solution to indemnity, which also contains a method of recourse should you feel unfairly treated. If you feel such a contract has failed to support as presented, you can challenge the insurer through an industry-recognised complaints process. Non-insurance contracts do not offer this protection. Given that your main objective is to transfer risk away from the business to a company more financially positioned to accept it, this point should be your main consideration.

+ *Joined-up cover*

We strongly encourage that any solution is as co-ordinated and as streamlined as possible. To achieve this we recommend finding a provider that can cover all of the practice's exposures including the business name, its clerical and all clinical staff. They say "too many cooks spoil the broth" and this adage is never truer where multiple providers are involved in the defence of litigation.

+ *Insuring your entity*

Litigation can attach at all levels, including against the name of the business. If your business continues to allow GPs to maintain defence organisation cover, it is critical that you take steps to protect against the dangers of discretion and vicarious liability that could attach back to the business. As has been identified, risk can take many forms, so it is important any cover you select considers your business to be as important as the people employed by it.

+ *Limits of indemnity*

The cover needs to be fit for purpose. In a market where claims are destined to rise, it is prudent to ensure that you select insurance that has a high 'any one claim' limit while reinforcing this with a robust 'aggregate' annual limit in the event of multiple claims. If your organisation is at the higher end of the patient population (40k-50k) for a Primary Care Home, you will have more clinicians delivering care and as such a greater chance of claims.

+ *Conducting due diligence*

It is impossible to know what you need if you don't know what you have. Make sure that you check all existing cover for suitability and document the gaps. Who is covering the secondary and social care professionals and what cover is there for your business within that arrangement?

+ *Reviewing the MDO cover already in place*

Many practices feel that even individual MDO policies offer a degree of protection for the business beyond just the named insured member. Common assumptions include the belief that there is an automatic extension of cover to practice nurses and other Allied Healthcare Professionals such as Emergency Care Practitioners, Pharmacists and Physician Assistants. While this may be true in some instances, the newly emerging roles are complex and broad, and present significantly higher exposures that may fall outside of what your current indemnity provider may be willing to cover. Moreover, each MDO will approach risk in different ways, so we suggest avoiding the assumption that all providers extend cover equally or that qualifying criteria for such extensions are similar between providers. In the context of discretion, it is critical you ascertain your exposures as they stand today as you may have clinicians in your business who are presently uninsured.

Testimonial

In July 2017, Thanet Health CIC contacted MIAB to explore indemnity options available to us for a new contract we were bidding for. As we had purchased a Surgery Insurance policy through them, and were happy with their service, they were our first port of call.

Based within the Accident and Emergency department at Queen Elizabeth The Queen Mother Hospital in Margate, the new contract aims to reduce pressure on A&E resources by managing all minor illness patients where appropriate.

The service is made up of GPs, Paramedics and Nurses, who are able to treat non-life threatening accidents and injuries quicker than at A&E, where people with life-threatening conditions can be treated first.

Montrose Bill, MIAB's Specialist Insurance Adviser for medical indemnity (right), advised us on our requirements and the points to consider, such as what activities the staff will undertake, their protocols and the number of patients they are likely to treat.

Liaising with MIAB's panel of insurers, Montrose sourced a bespoke policy with an appropriate limit of indemnity, which included cover for the business, paramedics and nurses. The GPs were able to maintain their existing cover, which reduced our overall exposure and cost.

We were able to hold the quote until the contract was signed with the CCG and we were ready to proceed, which we did in October 2017.

We are very happy with the quote and service from MIAB, and wouldn't hesitate to recommend them to other service providers.

- Graeme Haggerty, Practice Manager, Minster Surgery



Montrose Bill - MIAB Specialist Insurance Adviser


Contact Us

Thousands of medical organisations trust us to care for their business already, why not join them and speak to our indemnity team about how we can help insure your Primary Care Home.

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 **Opening Times**
Mon to Fri 08.30 – 17.30

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