

Protect your future by insuring your past

Written by Tristan Lennox-Gentle, Director of MIAB

The Clinical Negligence Scheme for General Practice (CNSGP) launched on the 1st of April. A welcome relief for many GPs who previously considered leaving the profession due to unsustainable indemnity costs through medical defence organisations.

Whilst the scheme is good news, many clinicians have discovered it isn't as simple as severing their current arrangements, and moving to the state-backed scheme.

A majority of the 'big three' defence organisations have historically offered occurrence-based indemnity. This type of cover is designed to cover their members as long as cover was in force at the time the alleged negligence occurred, rather than at the time the negligence was notified to the member. The remainder opted for an alternative arrangement, which indemnifies in a different way.

The alternative - known as 'claims-made' or 'claims-paid' - means the provider may only respond to a claim if the alleged negligence is notified to the insurer while the policy is still in force, or as the name suggests, when the claim is made. Under such arrangements, if a claim comes to light, but the policy has ended, cover may not respond and you will be left without insurance to defend litigation against you. We can say with certainty that most insurance contracts are claims-made, and that similar structures were also adopted by defence organisations in the 12 - 18 months leading up to April 2019.



Before taking any action with your current indemnity, it's important to ask your provider if they have a contingency for run-off. If the answer is 'no', ask what you need to do.

Why is this important?

Put simply, a large chunk of GPs will be able to make a clean move to state indemnity on the 1st of April. However, a significant number of GPs will not, and may find themselves paying retrospectively to cover past works because of the terms of their current arrangement. Equally, for a majority of allied healthcare professionals such as nurses, primary care pharmacists, paramedics and ECPs who were covered under insurance contracts, the liability for past works will remain a future exposure - even after moving to the state-backed scheme.

If you don't have an occurrence-based policy or maintain your cover, what are your exposures?

Claims arising from past work

Discussions are on-going between defence organisations and insurers, but for now, it's yet to be confirmed whether claims arising from past works will be covered by the government. Instead, the liability for compensation awards for negligence rests firmly with the treating clinician and the employing entity.

If you have delivered clinical advice or treatment prior to the 1st of April 2019, and do not maintain cover, you are financially exposed, both professionally and personally, no matter how slim you think the chance of negligence may be.



Cost

Often the cost of run-off cover is comparable to your expiring premium (in the first year at least). This is because the risk of a claim against you on the first day of run-off cover is comparably as high as the last day of your expiring 'full' policy. However, you should expect your premium to reduce over time in line with risk. While run-off cover remains a choice for you and your business, the spiralling cost of compensation awards and defence costs far outweighs the premium associated with transferring the risk to an insurer.

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Contractual obligations

Are you required by your regulatory body, practice or CCG to hold clinical negligence cover for your work? What are the rules of these same organisations in regards to maintenance of indemnity for past work? It's not uncommon for APMS contracts to dictate the insurance requirements as part of a tender. It's equally not uncommon for the same contract to stipulate a period of time for which cover needs to be maintained after a contract ends.

We're also aware of Performers List requirements outlining a minimum of three years' run-off as a condition of a GP's rehabilitation from a GMC sanction. If you're unsure, check with your appropriate bodies to avoid any potential breach of requirements.

The law regarding claimant's rights

An adult has three years from the date of realising that negligence has occurred to bring litigation against a third party. Children have three years from the time they turn 18. On this basis, to consider yourself immune because your clinics were delivered weeks or months ago is a dangerous approach. Many claims for clinical negligence take time to manifest, with some not being notified until several years after the original misdiagnosis.

"I'm unlikely to have a claim"

Agreed. Most clinicians go their whole career without as much as a blemish on their professional record. However litigation can be wrongly directed, allegations can be falsely made, or you might be joined in litigation for your peripheral role in a much larger matter. In all instances you should seek legal representation and advice – all of which comes at a great cost, a cost which you will have to personally bear if you do not maintain insurance.

Exposing the practice

If you're a practice or federation and have delivered healthcare contracts previously requiring insurance, it's important cover is maintained for these too. As an employer you are vicariously liable for the actions of your employees, and are able to be joined in litigation just as much as the treating clinician. Whilst it's possible to deflect action, this comes as a cost. Equally there is no escaping your overarching responsibility for the quality of care delivered in your business' name. If your business isn't insured, and isn't a limited company, the liability of any costs - and awards - will be shared between all partners who are jointly, and severally liable.

The decision to buy run-off cover should be made after careful consideration of all the associated risks. If you run a business, it's imperative that you do all you can to protect your exposures, including insisting that all of your practitioners are indemnified for their work, both past and present. Equally as a clinician, the risk of claims can be too much to bear for many, especially as claims can spiral into five or six figure settlements for the most minor of allegations.

The stress of a claim, coupled with the financial burden and drawn out litigation process can place a millstone around the neck of a defendant. The only truly responsible way to minimise this burden and provide adequate recourse for your patients is to maintain indemnity in the immediate term. Until the position of the state is to accept liability for past works, we strongly advocate maintaining insurance for as long as it's affordable.

For more information and a no-obligation quote, speak to Specialist Adviser, Montrose Bill.

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