

Why Gamble With Your Future? – The Importance of Top-Up Insurance

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Elsewhere in this supplement, you will find helpful guidance on many aspects of personal financial planning, from investments to pension arrangements. Most barristers take those matters seriously. Yet the statistics show that a large number of barristers are risking their future financial security by taking out inadequate professional indemnity insurance, year after year. When questioned, the majority of these would respond with the words “too difficult”, “too expensive”, or “why would I need it?”. This article seeks to put the debate into perspective.

BMIF was set up over 20 years ago as a mutual insurer to provide accessible, affordable indemnity cover to the entire profession. However, its objective was always to cover small to medium sized claims, which comprised the vast majority of claims against barristers, rather than very large claims. That basic cover was for a minimum of £250,000.00, rising to £2.5 million, depending on income. Although for many years BMIF offered cover of an additional £2.5 million over and above the first £2.5 million, that risk was always fully reinsured.

When I first became Chairman of BMIF 10 years ago, I was surprised and concerned to learn how little top-up insurance was purchased by members of the Bar. It soon became clear that one reason was that the providers of top-up insurance were not well known or always easy to get in touch with and there was a lack of awareness of the available sources of excess insurance.

In order to remedy this, BMIF forged links with two brokers offering a programme of top-up insurance for barristers. As a result, for several years, barristers have been able to obtain a quotation for top-up insurance from either or both of these brokers simply by ticking the appropriate box in their renewal form. This has led to a significant increase in the number of barristers taking out top-up insurance. However there are still many who do not.

In addition to now being readily available, by ticking a box, top-up cover is also offered at remarkably competitive rates. The premiums for top-up cover, except for those with a significant claims history or certain practitioners at the tax bar, are at a fixed price for each layer, which is not affected by area of practice, fee income or claims

history. By comparison to those available for other professionals, the premiums are also extremely low.

Many readers may however still point out that all of this does not answer the question of why they should need top-up cover at all, let alone cover at the higher levels available, currently up to a maximum of £100 million per claim. Although most claims remain small, in recent years there have been an increasing number of large claims where the potential exposure is significantly above the level of cover offered by BMIF. That experience reflects claims against other professionals; in particular solicitors where the largest claims notified have risen from about £50 million to almost £2 billion over the last few years.

As well as becoming larger, claims against barristers in commercial disputes have become more frequent. In an increasingly litigious society, claims against professionals, although once a rarity, have become commonplace and the sweeping away by the House of Lords in *Hall v Simons* of the protection once afforded to barristers has encouraged claimants to view barristers as potential targets.

Although a barrister's best protection is as always to exercise skill and care and to keep good records, including written notes of advice given, coupled with the robust defence of unmeritorious claims by BMIF, I predict that large claims against barristers are likely to increase over the coming years, particularly in the fall-out from the current financial crisis. When deciding how much top-up cover is needed, care must be taken to consider the range of likely claims. Although a broad brush approach of either “50 X the highest earnings in the last six years” or “as much as you can afford” may offer the simplest way, there are a few specific points worth bearing in mind.

Firstly, there are the provisions for “aggregation” in the terms of cover. Although the size of individual transactions on which a barrister gives advice may be comparatively modest, it is important to remember that if more than one transaction is based on the same error, all claims arising from that mistake may, depending on the facts, be aggregated so that only a single limit of indemnity is available. To take a simple example, if a barrister negligently drafts an agreement for the hire purchase of a photocopier, and that draft agreement is used in 1,000 transactions,

then the losses in all 1,000 transactions may be aggregated and treated as one claim for the purposes of the limit of cover.

Secondly, it is surprising how often barristers overlook the fact that professional indemnity cover is provided on what is known as a “claims made” basis. That is to say, even if the negligent error was committed several years before any claim was made, it is the professional indemnity policy for the year in which the claim is made which is relevant and which will respond, rather than the policy for the year when the error was committed. As a result, barristers need cover which will protect them not only in respect of the work that they are currently carrying out but also in respect of advice they have given in the past. With the provisions in section 14A of the Limitation Act 1980 permitting claims to be brought long after the expiry of six years in certain cases, or where the barrister has acted for infants or those under a disability, it can be seen that when fixing their level of cover for any given year, the barrister needs to take into account work done over the last six years and even longer.

Finally, and on a similar note, barristers should be wary of falling into the trap of assuming that once they have retired or gone on the Bench, they no longer need to worry about top-up insurance. Despite receiving a letter from me on their retirement from the bar stressing the importance of adequate run-off cover, a surprising number of those leaving practice opt to reduce their cover to the minimum of £500,000, to reduce their premium. Many others fail to extend their cover after the first six years when claims under Limitation Act section 14A or by infants remain a real possibility. The proper advice to those retiring is that that is the time when they most need top-up cover to protect them, as their income is likely to be significantly reduced and an underinsured claim would be potentially devastating.

The real benefit of top-up insurance is that if you insure adequately, you should be able to face the risk of a claim, however unlikely, with the peace of mind that comes of knowing that you have sufficient insurance protection either to meet any claim, however unlikely, in full, or at least to persuade any claimant not to pursue you beyond your limit of insurance. Commercial claimants are unlikely to have much pity on those whom they consider to be inadequately insured.

Top-up Insurance

How much cover do you need?



The bare necessities or the comfortable bespoke

In 2015, the Chairman of the Bar Mutual stated that “in its twenty-seven year history Bar Mutual has unfortunately had to address the fall-out for Members with inadequate cover on several occasions. In almost all cases the problem was avoidable.”

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