

Event Horizon - Familiarity breeds content

Regulators are looking afresh at the activities of professionals and litigation is sure to follow. But how will these claims be paid for, asks Peter Smith?

For many professional groups, the principle of self-regulation – once the very definition of professionalism – has been under attack for some time now and the credit crunch may finish it off completely.

In the legal profession, The Law Society and Bar Council have already separated their regulatory and representative functions, but both remain under pressure to make these regulators, the Solicitors' Regulatory Authority and the Bar Standards Board, completely independent, while a similar separation of powers is under way at the General Medical Council.

It is likely that these regulators will reorientate themselves towards the role of accountants. The events leading up to the credit crisis has led politicians and regulators to look again at the oversight that their profession receives, while for other groups of regulated 'professionals' – bankers, financial advisers and intermediaries – the noises coming out of the Financial Services Authority (FSA) are extremely ominous.

Increasingly, the FSA is changing its attitude toward being a 'consumer champion' rather than guardian of their respective professions. More generally, there is also much discussion that a 'principles-based' approach of financial regulation should be exchanged for something much more prescriptive.

For practitioners, this is not good news, coming as it does at a point in the economic cycle when professionals – and, more to the point, their professional indemnity cover – become prime targets for individuals and companies with axes to grind.

For after the event (ATE) legal expenses insurance for professional negligence claims, one particularly striking development is that the number of policies we have written for professional negligence claims jumped by 40 per cent in 2008, and we would expect to see further growth this year.

This is a reflection of both the increasing number of claims being brought against professionals, greater interest amongst professional negligence claimants in insuring against the cost of losing their cases and, to a lesser extent, a greater willingness amongst their solicitors to take on cases using a conditional fee agreement (CFA).

CFA and ATE take-up

However, the use of CFAs and ATE for professional negligence remains surprisingly low, especially when compared with their usage in clinical negligence, which shares many professional negligence features. Both are complex, high value forms of litigation, in which proving liability can be awkward. Yet, for those not eligible for Legal Aid, CFAs have become the most commonly-used method for funding cases.

The arrangement works through the solicitor agreeing to work on a CFA (no win, no fee) basis (with a maximum allowable fee uplift of 100 per cent), while the client takes out an

ATE insurance policy against having to pay the costs of the other party and other disbursements if the case is proving unsuccessful.

In most cases, the premium is deferred, which means that the client does not need to pay for the premium at the outset and is able to reclaim the cost from the losing party if the claim is successful. This means, in principle, that the client faces very little outlay at the outset of a case and is almost entirely insulated from the consequences of an unsuccessful claim. ATE cover is also available for non-CFA cases, but it does mean that clients miss out on the benefits offered by a CFA.

So even allowing for the fact that showing the injury or loss suffered by the claimant is usually easier in clinical negligence than it is in many forms of professional negligence, this discrepancy is difficult to explain.

One factor may be that professional negligence litigators are usually based in the same departments as commercial litigators (another set of litigators whose uptake of CFAs has been slow until recently). Clinical negligence lawyers, by contrast, very often combine their practices with personal injury claims, an area in which CFAs and ATE have become almost the default funding choice.

This situation may change, however, as claimants become more aware of the existence and advantages of using CFAs and ATE. Moreover, in a recession, the means available to individuals and companies of bringing claims through the traditional funding method are extremely limited.

Claimant-friendly system

The number of clinical negligence claims has grown strongly over the past decade, fuelled by the availability of CFA and ATE funding, which enabled many victims of medical accidents to bring claims that they would not otherwise have been able to fund. The same is likely to occur with professional negligence claims.

If claimants are to take advantage of the path likely to be created by the regulators, then for many victims of professional negligence, CFAs combined with ATE will be the only way to bring their claims.

Defendant Insurers fight back

The only potential fly in the ointment is Lord Justice Jackson's ongoing review into the civil justice costs regime, which is due to report by the end of the year.

Jackson LJ is under pressure – most notably from the defendant insurance industry - to address the recoverability of costs such as CFA uplifts and ATE premiums introduced by Access to Justice Act 1999 almost a decade ago.

It is very difficult at this stage to predict what he will recommend, but if he does water down recoverability, this would very much restrict access to justice and would deny many people with meritorious claims from taking legal action.

In the meantime, the growth of CFAs and ATE is likely to unlock a new raft of actions

against professionals of all kinds.

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