SEMPRIS

Medical Professional Indemnity

A Response to UKADIS on the Doping Discussion & Indemnity Implications for Sports Medicine Professionals

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The duty, moral and ethical issues raised regarding anti doping by UKADIS are numerous and complicated and have the capacity to bridge GMC Guidelines, Conduct Codes (GMC, FSEM, WADA and UKAD) and statute in the form of Contract and Health and Safety Law. Other than to empathise with the state of incongruence that continues to exist between professional medical codes and the WADA Code (post 2015 update) and to laud the decision by DCMS to commission a review of Duty of Care in sport, I am not in a position to comment.

I am in a position, however, to comment on the indemnity implications of doping and the unique indemnity issues that surround Doctors employed by or contracted to provide medical services to Clubs, Associations, Institutes etc.

Indemnity is a turgid, complex subject; a necessary evil in many eyes and one that generally struggles to capture the necessary level of attention and understanding of doctors in areas of practice which are unique to the treatment of sportsmen and women.

In attempting to provide an indemnity perspective it is necessary to go into some detail. Detail which not only highlights the unique practice / indemnity risks Doctors face in working in sport, but which will also question whether your indemnity is 'appropriate' under the GMC's revised statute – August 2015 (see below) and if it will respond in an environment that, 'operates increasingly in the grey zone.'

If it is grey to you as practitioners it is likely to be grey to indemnifiers, and particularly to those indemnifiers whose constitution is based on providing discretionary indemnity (MDU, MPS, MDDUS) with no right of appeal by its members, as distinct contractual indemnity (insurance) with the right to appeal.

The following quotes, from Dr Christine Tomkins, Chief Executive, The Medical Defence Union, highlight the MDU's own concern over the suitability of discretionary indemnity:

- 'We have made the case to the Department of Health that, in the public interest, insurance should be mandatory for doctors and dentists, and discretionary indemnity should no longer be acceptable'.
- 'The MDU does not believe that discretionary indemnity provides acceptable safeguards for practitioners and patients in today's medico-legal climate. We continue to believe it is in the public interest that all healthcare professionals are insured'.
- 'We have been using our best efforts to highlight the problems with discretionary indemnity for well over 10 years and find it hard to believe it is still allowed in the UK. In Australia, for example, it was outlawed in 2003'.
- 'The MDU believes that doctors, dentists and patients should have the reassurance of a contractual guarantee of indemnity for clinical negligence claims'.

Ironically, in 2013, the MDU switched their members' indemnity from insured to discretionary. The rather surprising rationale offered for this 180 degree about turn, and which totally contradicted the claimed unsuitability of discretionary indemnity, was 'changing insurance market conditions'. Conditions, curiously that the indemnity insurance market itself remains unaware of but which have enabled SEMPRIS, by example, to support the same subscription premiums that it launched with six years ago in 2010. I leave you to judge the true rationale but it would appear to have nothing to do with the underlying strength, condition or capacity of the indemnity insurance market, which goes from strength to strength.

GMC Prescribing Guidance, Sports Medicine, Para 75. states:

"You must not prescribe or collude in the provision of medicines or treatment with the intention of improperly enhancing an individual's performance in sport"

It is likely that a Doctor accused of doping or complicity would face a GMC enquiry with the threat of removal from the register. If not sufficient a deterrent, it is likely, subject to the same individual circumstances, that some indemnity providers will take a correspondingly hard line.

According to the type of indemnity held, a distinction may be made between the type of support a Doctor 'requests' from their indemnifier. Is it to defend you, meet your costs and secure your continued membership to practice at a GMC inquiry? It might be to assist you in an inquest or fatal accident inquiry or, for a breach of professional confidentiality and the Data Protection Act? Or it might be to support you in a claim for clinical negligence, whether received from an athlete / player or, more disturbingly, the club, institute, governing body or association (third party) for whom you provide contracted services, and who is vicariously liable for your actions and negligence. The cover, type and structure of indemnity you hold, discretionary or contractual, will have a distinct bearing upon what is and what is not likely to be supported.

Breach or disregard of the GMC prescribing guidance resulting in a 'request' for assistance at an enquiry or worse still, for a negligence claim, will offer secure ground for an indemnifier to question or decline a 'request' for assistance. Corresponding breaches or disregard of the FSEM Professional Code where applicable, and or those of WADA and UKAD are likely to provide further grounds for an indemnifier to question or decline a 'request' for assistance.

Discretionary and Contractual Indemnity

The specific reference to a 'request' for assistance refers to the discretionary indemnity benefits offered by the MDU, MPS and MDDUS which are provided under a membership agreement setting out the right to apply for indemnity. A person who has been accepted as a member and paid a subscription is entitled only to 'request' the benefits of membership, including indemnity which is granted at the absolute discretion of the Board or Council. There is no contractual right that this is granted, or to appeal if it is not, and it is not enforceable in a court of law.

Discretionary indemnity is, therefore, the ultimate test of good faith. I would reiterate that by operating in an increasingly 'grey zone' Doctors are, potentially, pre-disposing themselves further to the vagaries and uncertainty of discretionary indemnity and assistance.

In contrast Contractual indemnity, as offered by insurers is where a proposal is submitted, accepted, a premium paid and a contract – insurance policy – is issued. The policy sets out the terms and conditions between the parties, what is insured and what is not insured. Most importantly, it is enforceable in a court of law, and will normally state the maximum limit of the compensation that will be paid. This type of policy provides access to the Financial Ombudsman Service and is also regulated by the Financial Conduct Authority.

GMC Statutory Indemnity Requirement – revised 2015

Since 1 August 2015, it is a statutory requirement for doctors to have 'appropriate' indemnity cover pursuant to **The General Medical Council (Licence to Practice and Revalidation) (Amendment) Regulations 2015** ("the Regulations"). Regulation 2(2) defines "appropriate cover" as "…cover against liabilities that may be incurred in practising as such which is appropriate, having regard to the nature and extent of the risks of practising as such…

Doctors will be in breach of the new statute if they do not have appropriate indemnity for the full scope of their practice and for claims brought in both negligence AND contract.

The following tables, provided by the MDU and MPS in correspondence with their respective members, sets out the current, discretionary indemnity terms provided in relation to sports medicine provision. Both indemnifiers have expressed their concerns surrounding indemnity for treatment of professional sportsmen and women and are explicit in not providing indemnity support for claims arising from contract, i.e. employment or contracted services (third parties).

Doctors seeking clarification from the MDU or MPS of the terms should insist upon written responses to questions posed in relation to their cover and declared their full scope of practice. The detail and nature of the questions is essential in determining if you are 'appropriately' indemnified under the terms of both the GMC statutory indemnity requirement and your indemnifier.

The MDU will not indemnify members for any damages, claimants' costs and / or defence costs which related to a claim against them by:

1. the employer, agent or sponsor of a sports person who is an individual patient (third party);
2. any club, team or organisation (third party) in or for which a sports person who is an individual patient plays a sport; or
3. the organiser or owner of any sporting event (third party) in or for which a sports person who is an individual patient plays a sport.

MDU Sports Medicine Special Provision:

1. Employer includes any person to whom or through whom a sports person provides his/her services;
2. Sports person means a person who plays or participates in a sport for remuneration;
3. Remuneration includes payments in cash or kind, whether made directly or indirectly or by way or sponsorship;
4. Sport means any sporting activity, whether amateur or professional, paid or unpaid, sponsor or unsponsored.

The MPS does not provide indemnity for doctors who are employed by, or contracted to, a Premiership Football Club. In addition, Members should:

1. 1. not enter into a written or oral contract with an employer (third party) to treat employees for reward
2. 2. only accept referrals from other healthcare professionals not from clubs directly (third party)
3. 3. address any professional fee notes to the patient and not the employer (third party)
4. 4. review any existing relationship with an employer of a patient very carefully (contract – verbal, written, implied)

FSEM Governing Principles

The fundamental professional obligations of a Practitioner practising within the specialty of Sport and Exercise Medicine (SEM) are the same professional obligations which any other physician or health care provider owes to their patients which, among other professional obligations, include the following: To take out and maintain adequate insurance or professional indemnity cover for any part of the Practitioner's practice not covered by any Employer's indemnity scheme.

It is a statement of fact that almost every club, sporting institution and governing body, with the exception of professional football (SEMPRIS Medical Malpractice includes medical malpractice cover for Physiotherapists, Sports Therapists, S&C coaches and Sports Scientists) does not insure itself against medical malpractice or for the medical negligence of employed or contracted medical staff for whom it carries a vicarious liability (Radwan Hamed vs Spurs).

It follows, therefore, that in acknowledgement of the FSEM governing principle AND GMC Statutory indemnity requirement 2015, all doctors employed by or contracted to sports organisations, (and / or providing medical services for an event or the organiser or owner of any sporting event), must hold indemnity capable of responding to claims from those parties if they are to be compliant with GMC statute and FSEM Governing principles. MDU and MPS terms state they will not respond to such claims.

Radwan Hamed vs Spurs

The case highlighted the exposure and liability that doctors can incur through the provision of contracted services or employment by a Club, institute etc. It is important to note that this was a claim made by a player against Spurs, the Club, not the Club Doctor. Spurs elected to join their Club Doctors in defence of the claim against them (a third party claim against the Club Doctor by the Club). The Club accepted that they owed a duty of care to the claimant as a result of both the doctor/patient and employer/employee relationships that existed between them.

Although the Club accepted they owed a duty of care to the Claimant as both Doctor and employer, they denied any breach of duty of care. The claim against Spurs was then restricted to allegations of negligence by the Club Doctors (for whom the Club are vicariously liable); but, as Dr X was Head of the Medical Services Department at the Club, Spurs accepted that Dr X – and therefore, vicariously, the Club – were liable, not only for the Doctors individual acts of negligence, but any systemic failure that amounted to negligence. By the end of the trial the Doctor's indemnifiers agreed to indemnify the Club for any damages found due from the club to the player.

A number of key points here – firstly, to understand that the claim event occurred in 2006, prior to the MDU and MPS revising their terms of cover and withdrawing cover for Premiership doctors and, or, third party claims. In 2008 and 2010 the MPS and MDU respectively withdrew or amended key elements of their cover for claims involving elite and professional sportspeople and third party claims (the green boxes prior refers). If the Hamed vs Spurs claim event occurred today or indeed at any time post 2008 or 2010, neither the MDU nor MPS would have supported the Doctor in a third party claim by the Club against them.

Secondly, in a pointed response to the concern echoed in the thread over the increased incidence of Doctors reporting to Sports Scientists as heads of medical departments, it is the acknowledgement by both the Court and Spurs that as 'Head of the Medical Department', Dr X and therefore, vicariously, the

Club were liable not only for the Dr X's individual acts of negligence, but any systemic failure that amounted to negligence. This is absolutely key as (1) we know that Sports Scientists are not required to carry professional indemnity and (2) they are not trained or equipped to maintain and manage a medical facility, i.e. the systems that support and underpin that facility. In these circumstances it is inevitable that a claim targeted at a Club involving a Sport Scientist without indemnity would defer to the individual indemnity of the Club Doctor – as a third party claim. As above, the MDU and MPS will not respond under the terms of their indemnity cover.

Thirdly, in sport, 'safety' is seen as medical territory and therefore the Doctor's problem. Common Law duty of care requires all employers to protect employees from risks occasioned by their activities. In discharging the medical duty to the Club Doctor whether as an employee or contractor, the employer has a vicarious liability for the actions and negligence of the Doctor. Be under no misapprehension, that in the event of negligence or systemic failure of the medical system resulting in a claim for breach of duty of care, the buck will stop with the Doctor.

"Only applies to football…"

The issue and threat of third party claims doesn't just apply to football. As stated clearly in the MDU and MPS terms, it applies to any sporting activity, whether amateur or professional, paid or unpaid, sponsored or unsponsored. Notwithstanding a breach of the GMC's statutory indemnity requirements, cardiac, concussion and other catastrophic events can and do occur across all sport, not just high value footballers.

If you're a Responsible Officer or a Suitable Person…

GMC guidelines indicate that as you will be making a recommendation about a Doctors' whole scope of practice, you may wish to assure yourself that the Doctors' who have a link with you (for revalidation purposes) have adequate indemnity and appropriate indemnity in place for any medical work they do in the UK.

Examples of Contracted services that can give rise to a third party claim

The following sample scenarios highlight circumstances under which a doctor will be exposed to the potential risk of a third party claim in the event of alleged negligence.

- Doctors employed by clubs, bodies etc – claims directed by players/athletes at clubs, governing bodies, or sports organisations rather than at named doctors, where the club 'joins' the doctor in the alleged negligence claim. (Radwan Hamed vs Spurs)
- Any direct arrangement, written or oral, with a Club or Sports Body to provide services for reward – Contract
- Orthopaedic Consultants, Radiologists, Cardiologists or SEM Physicians undertaking and invoicing clubs for pre-transfer medical assessments / reports on a player – Contract
- Routine screening programmes of players (typically radiology or cardiology) undertaken on behalf of a club and invoiced to the club – Contract

- Routine attendance (medical cover) at matches at request of clubs with consideration of any kind, including seats, hospitality etc. – Contract

- Invoices / fee notes addressed directly to a Club or Sports Body – Contract

- Subrogated claims – The principle under which an insurer that has paid the loss under an insurance policy held by a club is entitled to recover the loss from a third party (negligent doctor)

SEMPRIS was launched in 2010 in response to the decisions by MDU and MPS to withdraw or amend key elements of indemnity cover for Doctors involved in treating professional sportsmen and women. It covers all aspects of private practice including non sport related independent practice and professional issues not covered by Crown Indemnity. It remains the only UK Indemnity Scheme to provide Doctors with contractual, claims made, indemnity for:

- Clinical negligence claims to cover costs and damages, fees and disbursements arising out of the defence or settlement of a clinical negligence claim

- Damages, claimants' costs and / or defence costs relating to a claim brought by a sport person's employer, club, agent, sponsor or event organiser in relation to alleged negligent treatment of a player.

- Pre-signing medical assessments undertaken directly for clubs.

- £10m standard cover for each and every claim subject to a £20m annual aggregate, far exceeding most hospital requirements, with an option to increase the limit to £20m for each and every claim.

- Treatment provided when travelling overseas with teams.

SEMPRIS also covers payment of costs, fees, expenses and damages arising from:

- General Medical inquiries

- Disciplinary inquiries

- Inquests and fatal accident inquiries

- Criminal investigations arising out of professional practice

- Reputational harm

- Breach of professional confidentiality and Data Protection Act

- Loss of documents

- Public Liability

- Good Samaritan Acts

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