

# Personal Risk Mitigation- IS YOUR INDEMNITY FIT FOR PURPOSE?



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Image needed



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It is ironic that while significant progress is being made in the collaborative development and understanding of corporate clinical governance, risk and its mitigation across professional sport, the doctors supporting this progress and who work in this unique environment are failing to recognise and attend to their own personal risks and liabilities through ‘appropriate’ (GMC) indemnity.

No amount of governance or risk mitigation can or will prevent mistakes or disasters from occurring – if it did the likes of the MDU and MPS together with the world’s insurance industry would have turned out the lights and shut shop years ago. The reality of course, is that mistakes and accidents will happen and the most important risk mitigation exercise that any doctor can undertake is to be ‘certain’ that his or her indemnity is fit for purpose;

that it will respond - not might respond - to the full and declared scope of the doctors practice. Indemnity is the absolute and last line of defence for any doctor - there should be no compromise.

A doctor who is ‘uncertain’ about the scope of his or her indemnity cover will not only be failing to manage their own risk but will also potentially be in breach of GMC statute and failing to adhere to the FSEM professional code. For avoidance of doubt the **ISO 31000 Risk Management Definition** of ‘uncertainty’ is a state of being that involves a deficiency of information and leads to inadequate or incomplete knowledge or understanding. In the context of risk management, uncertainty exists whenever your knowledge or understanding of an event, consequence, or likelihood is inadequate or incomplete.

While it may be impossible to eliminate risk, it is possible to eliminate uncertainty by getting better information and improving your knowledge and understanding of the risks you face.

### What are the unique risks posed by professional sport?

Long and detailed, but essentially the threat of claims being made against a doctor by anyone other than the patient / player / athlete, commonly referred to as third party claims. The rightful view that a club has a duty of care to the player as an employee has, together with the general exclusion of team doctors on clubs and NGB’s Employers Liability Insurance, led to the emergence of claims against clubs rather than named doctors. In turn clubs have and are, as third parties, increasingly joining their own club doctors in claims.

The recent case of Cillian Willis, a rugby union player forced to retire after suffering concussion and now taking legal action against his former club Sale Sharks for allowing him to play on after a head injury in a match three years ago, has once again brought to the fore the issue of professional sports clubs running the risk of being sued by players if they do not follow guidelines around managing concussion injuries.

While it may be the club that is named on the court papers it is almost inevitable that the actions and decision making of the club medical staff will also be called into question. Those medical staff can be brought into any litigation, including the club joining the doctor in the claim, and it is therefore vital that all health professionals ensure that their indemnity will cover third party claims but also review their practice on managing concussion as well as that of their club.

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The risks are of sufficient concern to have been encapsulated in the recently updated FSEM Professional Code 1.7 and serve to highlight the requirement for third party cover, irrespective of the sport involved.

### FSEM Professional Code 2016

1.7. Ensure that you have adequate indemnity protection against damages, claimants’ costs and defence costs relating to a claim brought by a patient’s employer, club, agent, sponsor or event organiser in relation to alleged negligent treatment of a patient. Members and Fellows should discuss indemnity options with their employer and medical defence organisation. Indemnity insurance may only cover the Doctor for claims made by the patient, and not by their club, agent, sponsor or other.

### So what is the MDU and MPS position on cover for third party claims?

The following are extracts from letters issued to respective members of the MDU and MPS.

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

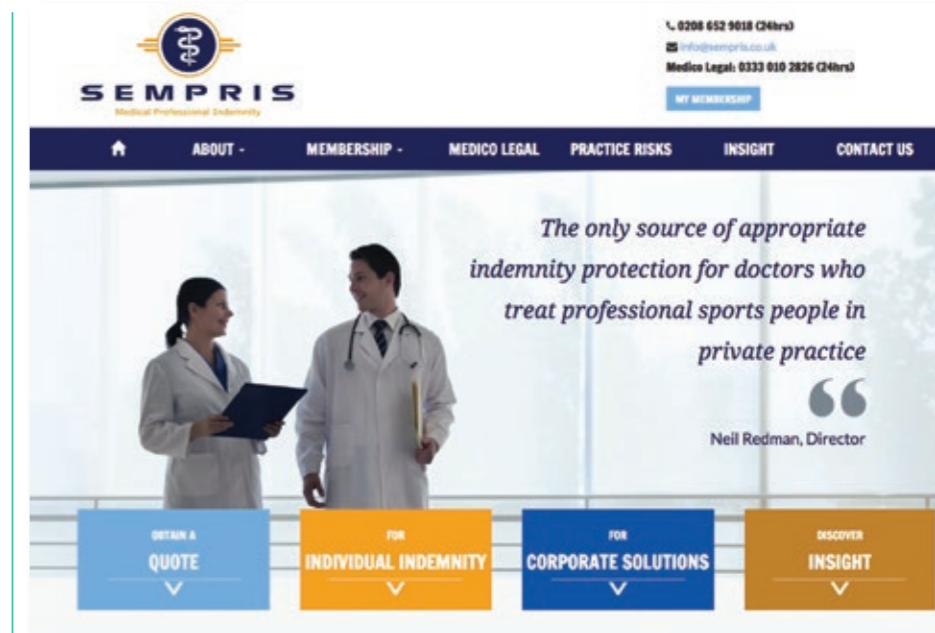
1. The employer, agent or sponsor of a sportsperson who is an individual patient (third party);
2. Any club, team or organisation (third party) for, with or under which a sportsperson who is an individual patient plays a sport; or
3. The organiser or owner of any sporting event (third party) in or for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

### The MDU Sports Medicine Special Provision

1. Employer includes any person to whom or through whom a sportsperson provides his/her services;
2. Sportsperson 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, sponsored or unsponsored.

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

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



### The MDU and MPS have advised me I am covered to treat professional sports person

If a doctor has declared the full scope of his or her practice and has been offered indemnity with the MDU, MPS or MDDUS he or she will be covered to treat professional sportspeople, but only in respect of claims made by the player / patient. What both organisations are not making clear to their members is that claims made against the doctor by a third party, such as a club, agent or sponsor, will not be covered.

### SEM, increasingly operating in the grey zone

Sports medicine is highly specialised, operating in an increasingly complex environment with unique risks and challenges for the practitioner. Increasingly referred to as operating in the grey zone, it is reasonable to assume that if it is grey to you as practitioners it will be grey to your indemnifiers, particularly those whose constitution is based on providing discretionary indemnity (MDU, MPS, MDDUS). Remember, your indemnity is your very last line of defence in a claim and you need to be guaranteed it will respond and not might respond to your “request” for assistance.

### Discretionary vs Contractual Indemnity

The specific reference to a ‘request’ for assistance refers to the discretionary indemnity provided by the MDU, MPS and MDDUS which is offered 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 provided 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.

Would you drive a prized Ferrari through the frenetic streets of London without insurance, relying only instead on the ‘right to apply’ for assistance from an organisation who will not guarantee they will support you in the event of an accident that may not even be your fault; who are beyond reproach should they decide not to support you and who’s actions are not enforceable in a court of law? The enlightened would call it gambling and there are many who will testify to its failing. The choice is yours but make sure it is a fully informed one and you understand the risks.

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*SEMPRIS is a specialist indemnifier with contractual membership benefits tailored to the professional practice of doctors in all specialties, with dedicated third party cover for doctors involved in the treatment and care of professional sportspeople.*