
Liability Briefing

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Personal liability of employees

The risk to employees of claims of professional negligence being made against them personally was highlighted by the Court of Appeal case of *Merrett v Babb* (2001). Employees may or may not be covered by professional indemnity (PI) insurance taken out by their employers – problems can arise when they are not. This *Briefing* explains what employees and employers can do about it. It is not likely to be a common occurrence, but if it does happen the consequences can be financially serious.

PI insurance operates on a claims made basis (ie it is the policy in place *at the time the claim is made* which is relevant, not that in place when the work was carried out). This means that if an employee moves to another job and there is an allegation of negligence for work carried out during his previous employment, the relevant policy is that of the previous employer at the time the allegation is notified.

Merrett v Babb

Mr Babb was employed by a firm of chartered surveyors, Clive Walker Associates, which was instructed to carry out a survey for a building society. Mr Babb prepared the report, signed it and returned it to the building society, which deleted references to Mr Babb and Clive Walker Associates, and passed the report on to the purchaser, Miss Merrett.

After Miss Merrett had moved in, settlement cracks appeared which had not been identified in the report. By this time Mr Walker, the sole principal of the firm, had become bankrupt and the trustee in bankruptcy had cancelled the PI insurance. Mr Babb had left the firm some time before but Miss Merrett sued him personally.

The court found that Mr Babb had been negligent and he had to pay the damages and costs himself as he was not covered by insurance. The PI insurers of his current employer were not liable because Mr Babb was not an employee of the firm when the report was written.

This is not new law. It does though highlight a risk for employees, albeit not one which is likely to happen very often.

Employees may not be covered by PI insurance if, for example:

- The employer (eg a staff agency) does not have any PI insurance at all. Employees working for local authorities and those working in-house may also find that their employer does not have any PI insurance.
- The wording of the employer's PI insurance policy does not cover employees.
- The employer's PI insurance cover is not sufficient to meet the claim being made.
- The excess on the policy is so high (or so many claims are made in one policy year) that the employer cannot afford to pay the excess when a claim arises. The employer may then claim back the amount of any excess from an employee responsible for the negligence.
- There is no cover because of late notification of the claim to insurers, or other non-compliance with policy conditions.
- The employer becomes insolvent and the liquidator or trustee in bankruptcy does not maintain PI cover.
- The employer retires and does not maintain insurance.

NB: An employer's PI insurance will not, in any event, extend to cover an employee's private work, whether paid or unpaid.

Directors of companies and members of limited liability partnerships may also be sued personally.

How does it affect you?

If you are an employer – Your staff will want to know that you have an appropriate level of PI insurance in place and that it is maintained for the whole of the limitation period, covering both employees and ex-employees. They will be particularly concerned if a sole practitioner retires or an organisation is dissolved.

If you are an employee – There is (and always has been) a risk of you of being sued personally in negligence. Usually an aggrieved claimant does not do so because they know that your employer is likely to carry PI insurance, you are unlikely to have sufficient funds to meet a claim, and most commercial organisations at least would prefer not to sue individuals. Therefore, the problem is only likely to arise in one of the situations outlined above. If she was to have any chance of recovering damages, Miss Merrett had no choice but to sue Mr Babb personally.

If you are an employer, what should you do?

First and foremost, ensure that you **take out and maintain adequate PI insurance**, that the policy covers your employees and that you comply with the policy conditions.

If you are a **director** of a company or **member** of an LLP, ensure that you are covered personally (if necessary by being named as an insured, as well as the company or LLP).

Your **terms of appointment** could be amended to make it clear that, whether or not a particular employee is named in the appointment, the contract is with your practice and the client acknowledges that your employees have no personal liability.

There could be a clause in the appointment along the lines of that set out below:

Save in respect of death or personal injury, the Client will look only to the Consultant (and not to any individual engaged by the Consultant [including any directors or members of the Consultant]) for redress if the Client considers that there has been any breach of this Appointment. The Client agrees not to pursue any claims in contract, tort or for breach of statutory duty (including negligence) against any individuals working for the Consultant in carrying out its obligation under the Appointment at any time, whether named expressly in the Appointment or not. The Client acknowledges that such individuals are entitled to enforce this term of the Appointment pursuant to the Contracts (Rights of Third Parties) Act 1999.

Similar provisions could be inserted into a **collateral warranty**. If there is a clause excluding the Contracts (Rights of Third Parties) Act, it should say 'except as provided *in clause X*' [ie the clause above] to avoid inconsistency between that clause and the one above. Since the 1999 Act does not extend to Scotland, references to it should be omitted in contracts subject to Scottish law.

This wording is for general guidance only and may not be appropriate for your particular contracts. You should seek legal advice on the best wording in your circumstances.

Reports: a disclaimer could be included to state that the report is made on behalf of the practice, that no individual is personally liable and that by receiving the report and acting on it, the client – or any third party relying on it – accepts that no individual is personally liable in contract, tort or breach of statutory duty (including negligence).

You will want to make sure that, if you are a **sole practitioner who retires** or a **partnership which dissolves** (but not because of insolvency), there is sufficient insurance cover to protect you and any former employees. The limitation period for bringing actions for professional negligence is quite long, perhaps more than 15 years (longer in Scotland); the insurance cover should be maintained for the full limitation period if possible.

Make copies of this **Liability Alert** available to your employees.

If you are an employee, what can you do to protect yourself?

Take steps to **avoid giving the impression** that you are acting for the client personally rather than on behalf of your practice. For example, ensure that the practice name appears on all letters, e-mails, drawings, certificates, reports etc. Sign 'on behalf of [practice name]'.

Where the service is provided by you personally (for example in the case of a mortgage valuation or quinquennial church survey, where special rules apply, or

work as an expert witness, adjudicator or arbitrator) , ensure that none the less **the contract is with the practice.**

Ask your employer to confirm that **PI insurance** is in place, that it will cover you both during and after your employment and that it includes a waiver of subrogation rights.

Check your **contract of employment** to see whether your employer agrees not to sue you personally if you are negligent (either to recover the excess under the policy or the full amount of a claim if insurers do not meet the cost).

Also check your contract of employment to see whether you have an **indemnity** from your employer against claims in negligence made against you personally. This will not give protection in all circumstances, (eg the insolvency of your employer or work outside the scope of your employment) but it could still be helpful. This is especially important for employees in the public sector who are 'self-insured' and do not maintain PI insurance.

If your current or former employer becomes **insolvent**, check whether the receiver or liquidator will continue the PI cover and if not, make enquiries to see if you can take out insurance yourself.

It may be possible for you to take out **your own insurance**, independently of your employer, but this is difficult and expensive to arrange. It also raises difficult questions of double insurance. Run-off cover (either on moving from one job to another or on retirement) is not generally available for individual employees, despite what the judge said in *Merrett v Babb*. A new employer cannot take out PI insurance cover for an employee's work with a former employer, because the new employer (and his insurers) would have no way of assessing the risk or of obtaining documents with which to defend a claim. There would also be a risk in taking out insurance. Part of your protection as an employee is that employees are not thought to carry insurance and are unlikely to have sufficient assets to be worth suing. Although a claimant is not strictly speaking entitled to know whether a defendant is insured or not, claimants may be more likely to pursue you if you do have your own insurance.

This *Liability Briefing* is for general guidance only and legal advice should be sought to cover any particular situation.

This *Liability Briefing* is available at www.cic.org.uk/liability.

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