BAR MUTUAL

Bar Mutual and Topical Claims Risk Issues relating to Personal Injury Practice

On behalf of Bar Mutual's Board of Directors and Managers, I welcome this opportunity to present a paper to the PIBA Conference. As an organisation, Bar Mutual is always keen to know what is going on within its membership, what issues are concerning them and what issues are impacting on their practices and to demonstrate that it is not some aloof, London-centric organisation. We regard this opportunity as part and parcel of fulfilling the ethos of a mutual insurance company, especially one that is a compulsory mutual as is the case with Bar Mutual. Although the insurance that Bar Mutual provides serves the public interest in providing comprehensive professional indemnity insurance for self-employed barristers, the essential ethos of Bar Mutual is that it exists for the benefit of its members

It is particularly good to be able to speak to this specialist Bar Association, which represents those who practise within the third-largest area of practice by reference to Bar Mutual's underwriting criteria. At the 2018 policy year renewal this time last year (as you know, we are currently in the midst of the 2019 renewal), Personal Injury accounted for the equivalent of 1,401 exposure years[1] from a total of 13,528 exposure years. Only Crime and Family: Children outstripped this.

Perhaps a less happy indication of Personal Injury's importance to Bar Mutual is that, of the 15,406 notifications that Bar Mutual had received between 1 April 1988 and 30 September 2018, 2,277 (or almost 15%) arose from Personal Injury. And in monetary terms, as at 30 September 2018, Personal Injury accounted for £30.98m (or almost 16%) of Bar Mutual's total claims expenditure since it commenced business in 1988. On any measure, PIBA's membership is a very important part of Bar Mutual's membership.

In this paper, I intend to touch on several matters that impact upon your potential professional liabilities as self-employed barristers and your insurance for those liabilities. The first is the General Data Protection Regulation ("GDPR"), which has given rise to a number of issues relating to insurance that the Executive Committee has asked me to address. Secondly, I propose to touch on the potential for claims arising out of changes to the discount rate used to calculate damages in personal injury cases (especially those involving catastrophic injuries). Finally, I shall

[1] An 'as if' figure, amalgamating percentage of practice declarations so as to give an equivalent number for declarations of 100% of practice.

comment on the desire in some quarters within the personal injury legal community for qualified one-way costs shifting ("QOCS") to be extended to apply to professional negligence claims arising from personal injury disputes.

The General Data Protection Regulation and Bar Mutual Cover

My first point is that there is nothing new about the possibility of claims against barristers when confidential information is misplaced or inadvertently disclosed to third parties without authority. Bar Mutual has always received notifications from time to time from Members who have carelessly left papers or laptops on public transport. Similarly, it has received notifications arising from emails carelessly addressed to opponents that contain confidential or privileged information. Accordingly, the introduction of GDPR has not created a new claims risk that Bar Mutual and its members had not already faced under pre-existing law, whether deriving from the common law (including equity) or statute.

As far as Bar Mutual is concerned, it is simply a matter of returning to fundamentals. Clause 1.1 of the Terms of Cover, the insuring clause, reads:

> "Subject to the provisions of these Terms of Cover, Bar Mutual shall indemnify the Insured against any and all Claims which are first made against him during the Period of Insurance in respect of any and every description of Civil Liability whatsoever arising out of or in any way in connection with the Insured Practice whensoever and wheresoever the act or omission or other circumstances or event giving rise to such liability may have occurred."

It will be noted that the only restriction on the type of liability that can give rise to a right to indemnity is that it must be a "Civil Liability", which is left undefined other than specifically to include liabilities to pay wasted costs orders and to pay adverse costs orders in such disciplinary proceedings for which cover is provided (as defined in the Terms of Cover). Accordingly, it matters not whether a claim arising from a Member's failure to comply with data protection laws is based on negligence, breach of confidence/privacy or breach of statutory duty. Provided it arises from the Member's Insured Practice (another defined term in the Terms of Cover, but which need not detain us for present purposes), the only other obstacle to be surmounted is the definition of "Claim".

The relevant part of the definition of "Claim" is as follows:

> "A demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages."

The key point to take from this definition is that Bar Mutual cover is about indemnifying Members for demands for compensation or damages. Necessarily, a fine imposed on a Member who has been held to have breached the provisions of data protection laws is not compensatory; nor can it tenably be described as damages. It therefore does not come within the definition of "Claim", so Bar Mutual will not indemnify Members who are fined by the Information Commissioner or the courts for breaching the GDPR (and public policy would in any event prevent recovery under an insurance policy of any fine that was imposed in furtherance of the public interest).

What of the costs incurred in responding to an alleged breach of the GDPR and any proceedings that may ensue? Clause 1.2 of the Terms of Cover grants an indemnity for "Defence Costs", which is subsequently defined as costs or expenses incurred in the defence of a Claim (see above), provided the Claim falls within the scope of clause 1.1 and is not excluded by any of the specific exclusions to be found in clause 3 of the Terms of Cover. This means that where a Claim is asserted against a Member, he or she will be entitled to be indemnified for costs incurred in his/her defence with Bar Mutual's consent. Not so, when the matter is an investigation by the ICO or subsequent proceedings seeking a fine against the Member.

To summarise:

- If a (former) client – or, indeed, any third party – alleges a Member has breached the GDPR, thereby causing him to suffer loss or damage, and demands compensation for that loss or damage, the Member's cover with Bar Mutual responds to that claim as it would to any claim. Bar Mutual will treat that claim identically to the more customary cases such as those involving allegations of under-settlement or incorrect identification of a defendant to sue.
- Where a Member is investigated by the Information Commissioner and/or proceeded against for a fine, he is not covered by Bar Mutual for any fine imposed or for any defence costs incurred in his defence.

The Executive Committee has also asked me to address the question of cover for GDPR breaches in the context of attempts by instructing solicitors to impose unlimited, contractual indemnities on Members that they instruct. The Managers of Bar Mutual have also informed me that several chambers have consulted them about how to respond to these demands.

Again, it assists to go back to basics. Clause 3.1(x) of the Terms of Cover deals with contractual liabilities in the following terms:

> "Claims or Disciplinary Proceedings in respect of any liability incurred under any express term of a contract, save to the extent that
>
> (a) such liability would have arisen as a matter of law in the absence of such express term and would otherwise fall within the provisions of these Terms of Cover; or
>
> (b) the contract is between the Insured Member and instructing solicitors or a client and, insofar as its terms concern a contractual liability of the Insured Member, is in a form previously approved by Bar Mutual.
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> In giving its approval, Bar Mutual shall be entitled to impose terms as to the maximum amount to be indemnified in respect of such liability under these Terms of Cover or such other terms as it, in its absolute discretion, shall think fit. Bar Mutual may also withdraw such approval, provided always that not less than one month's notice of such withdrawal is given to Members."

Insofar as the indemnities sought would require Members to indemnify solicitors in respect of their (the solicitors') liabilities under the GDPR, no such right exists at common law, equity or under statute. Even under the Civil Liability (Contribution) Act 1978, there is no *right* to an indemnity where a concurrent wrongdoer is held liable for the same damage as that for which the party seeking contribution or indemnity has become liable. While an indemnity may be awarded under section 2 of the Act, it is very difficult to envisage circumstances in which a court trying a claim for contribution between an already liable solicitor and a barrister would effectively excuse the solicitor by ordering the barrister to bear 100% of the common liability.

Furthermore, where the solicitor's GDPR liability is a fine, it is difficult to see how the 1978 Act applies at all. A fine imposed under the GDPR is necessarily penal in nature and bears no relation at all to damage that may have been suffered by a third party (assuming any damage has been suffered at all). In addition, there would in

any event be a public policy issue as to the recovery by a solicitor of a fine imposed on him/her from another person.

In light of the fact that a barrister owes no duty of care to an instructing solicitor qua instructing solicitor (the situation is obviously different where the solicitor is also the lay client), the proposed contractual indemnity terms referred to above are a clear attempt by solicitors to create an avenue for redress that would not be available but for its incorporation into a contract with the barrister instructed on the relevant case.

What then is Bar Mutual's attitude to this situation? Bar Mutual regards any Member's liability under a contract to indemnify an instructing solicitor for its GDPR liability as one that would not arise absent the contract. Any Member who enters into a contract with an instructing solicitor that contains such a provision does so at his own risk unless Bar Mutual's prior agreement has been obtained and will be not covered by Bar Mutual in the event of the solicitor invoking it.

The only exception is where the contract caps the indemnity at £100,000 and includes a clause equivalent to clause 12.4 of the Combar Terms, which reads:

> However, if:
>
> (a) the Barrister is liable to the Solicitor,
> (b) the Barrister is liable to the Lay Client or
> (c) the Solicitor is liable to the Barrister (save in relation to fees)
>
> solely as a result of breach of these General Terms or of any other contractual provision of the Agreement and would not otherwise have been liable (whether at common law (including in negligence), in equity or otherwise), that liability shall be limited to the sum stated in the Agreement. If no such sum is stated, the limit of that liability will be £100,000, being the highest limit of cover for such liabilities provided to Barristers by the Bar Mutual Indemnity Fund.

The sum of £100,000 does not include any liabilities to pay interest on the sum due under the indemnity or to pay adverse costs, which remain subject to the Member's "normal" limit of cover. This position is consistent with that adopted by Bar Mutual in relation to liabilities solely in contract raised by Members practising in other areas.

For Bar Mutual, the GDPR also highlights another important issue: the retention of documents. The question of retention of documents and information is very

important in the context of claims against Members. You know from your own practices that contemporaneous documents or information will almost always be regarded as the best evidence of what happened, and of people's motivations, in the past and will normally be preferred over oral witness evidence on the relevant issue. This applies just as much to claims against barristers. The availability of such documents and information is of invaluable assistance to the Managers and those lawyers instructed to defend you as they evaluate the merits of claims and determine how best to safeguard your interests and Bar Mutual in respect of any particular claim.

As such, Bar Mutual believes that you should be treated as having good reason to retain such documents and information. With this in mind, I would urge you to continue to retain notebooks and (as regards documents that are more likely to be retained in soft copy) emails and, importantly, their attachments, attendance notes and documents you have drafted and to do so for ***at least fifteen years*** (which is the long-stop limitation period under section 14B of the Limitation Act 1980).

This is especially important for this audience. Many (if not, most) of you will have practices that involve (to a varying degree of frequency) advising and acting for infants and protected parties (and their litigation friends) who may have suffered catastrophic and life-altering injuries. You will be well aware that, given the terms of sections 28 and 28A of the Limitation Act 1980, you face the risk of claims being advanced against you more than just 15 years after you were instructed in the original personal injury claim. Indeed, the Managers have informed me that they recently opened a file in respect of a clinical negligence matter (which Bar Mutual treats as Personal Injury, not Professional Negligence, for rating purposes) in which the relevant, allegedly unduly pessimistic advice was given in 1995. This is undoubtedly an extreme example, but the availability of the contemporaneous documents will be a crucial issue in the event of a claim actually being pursued against the unfortunate Member in question so long after the event.

Bar Mutual is currently unaware of any challenge by the Information Commissioner to the stance on retention of documents and information set out above. If such a challenge were to be mounted, there would be no Bar Mutual cover available as of right, as I have already explained. However, uniquely among professional indemnity insurers in the London market and because it is a mutual, Bar Mutual retains a discretion to provide cover even where there is no cover as of right or where cover in

a particular situation is excluded in the Terms of Cover. Clause 1.3 of the Terms of Cover says:

> "Notwithstanding anything to the contrary in these Terms of Cover, Bar Mutual, in its absolute and unfettered discretion and on such terms as it may think fit, may indemnify the Insured in respect of any Circumstance or Claim or any loss, costs or expenses (whether or not arising from or involving any Circumstance or Claim), notwithstanding that the Insured is not entitled to be indemnified by Bar Mutual in respect of the same and/or notwithstanding that the same may fall outside the scope of or within the exclusions contained in any insurance which is afforded to the Insured by virtue of these Terms of Cover."

I cannot bind the Claims Committee as to how it would respond to a request for assistance to respond to an ICO investigation that challenges the Member's retention of documents and information for a longer period than the ICO believes is necessary, but such a challenge could easily be a matter of concern to the Bar as a whole and to Bar Mutual itself, thus bringing the case within the criteria under Bar Mutual's Rules for the provision of discretionary funding.

The Discount Rate and Claims Issues

All present will recall their surprise (to use a neutral term) when, on 27 February 2017, the then Lord Chancellor announced that the discount rate used to calculate personal injury damages would be reduced from 2.5% to a figure as low as -0.75% with immediate effect. I have little doubt that many present will have faced a busy March 2017 as instructing solicitors (whether for claimants or defendants) sought advice on extant settlement offers and whether they should be accepted with alacrity (if your lay client was a defendant) or replaced with higher offers that took into account the new rate (if your lay client was a claimant).

The claims risks arising from the rate change can be put into two groups: those relevant to breach of duty and those relevant to causation and loss.

To date, Bar Mutual has received no notifications in which the reduction in the discount rate is a factor in the claimant's case on breach of duty. Bar Mutual is not surprised by this. The Bar is a referral profession. In the absence of instructions to advise on the implications of the rate reduction in any given case, the likelihood of a claimant being able to persuade a court that a barrister was pro-actively obliged to draw attention to the impact of the rate reduction (by implication, on all of his or her cases) ought to be very low. You can be sure that should such an allegation be advanced, Bar Mutual will reject it and persist with that rejection in its usual, vigorous

manner. The real target of breach of duty allegations of this sort should be the solicitors, who (unlike barristers) have day to day conduct of the case.

It should go without saying that any of you who failed to take into account the rate reduction when advising on quantum or preparing a schedule of loss after 27 February 2017 will have no tenable defence on breach of duty. No such claims have been advanced to date. Bar Mutual trusts that the hue and cry in the legal press that followed the announcement of the reduction will mean that no such claims will be advanced in the future.

Where the effect of the rate reduction undoubtedly will be felt in claims terms by you and Bar Mutual is in valuing loss of opportunity claims arising from personal injury practice. While the Managers have yet to receive a claim where this issue is relevant, there can be little doubt that, over the next few years, those acting for claimants will strenuously endeavour to frame their case on quantum in such a way as to be able to plead a notional trial or settlement date of the underlying personal injury claim that is after 27 February 2017 and before the date of any change in the discount rate undertaken in accordance with the Civil Liability Act 2018.

Provided the way in which the causation and loss counterfactual chronology is advanced by claimants is credible, Bar Mutual's liability exposure in high-value Personal Injury claims that it cannot dispose of on breach of duty or causation grounds (as to the latter, the Supreme Court's recent reversal of the Court of Appeal's aberrant decision in *Perry v Raley Solicitors* [2019] UKSC 5 will assist greatly) may increase substantially, since the value of the allegedly lost opportunities to recover any or more damages will have to be calculated using a rate of -0.75%. Should a deterioration in the claims experience for Personal Injury result, it may be difficult for Bar Mutual to avoid increasing the rating it applies to the fee income you declare at each annual renewal when calculating your premiums for each new policy year. How wide this "window of opportunity" for claimants will be will turn on the outcome of the Ministry of Justice's consultation, which closed on 30 January 2019, and on how quickly a government with so much else on its plate addresses this question, which can only be a matter of speculation.

The likely increase in the value of Personal Injury-related claims that will be notified to Bar Mutual touches on an issue that I have consistently raised in my reports to Members each January: the imperative of purchasing adequate insurance. Very

shortly after the reduction in the discount rate, a member of this Association notified a potential claim arising from a high-value, foreign road accident case. The potential breach of duty was entirely unrelated to the discount rate, but the pleaded schedule of loss totalled a little more than £2m, calculated using the old rate of 2.5%. On any measure, the "new" value of the personal injury case was greater than £3m (and liability had been admitted). The Member's limit of cover was £2.5m, the maximum limit available from Bar Mutual. He had no top-up cover for the 2016 policy year. He has subsequently informed the Managers that the potential difficulty relating to breach of duty has been resolved, so there will not be a claim against him. However, you can easily imagine the prospect that would have faced that Member if it had not been possible to resolve the breach issue favourably for his lay client, especially since it involved an area of law that those acting for/insuring his instructing solicitors would have been well-placed to argue was one that was really the province of counsel, potentially leaving the Member to bear all of the professional negligence damages payable to the former client.

To the extent that those of you who are instructed for claimants in catastrophic claims do not already purchase cover in excess of Bar Mutual's maximum limit of cover of £2.5m plus defence costs, I urge you to reconsider your decision. I also extend this exhortation to all present in respect of limits of cover that are within the Bar Mutual primary layer of cover and would add to it a warning not to reduce your limit of cover as you near retirement or cease practice. Do not overlook the fact that Bar Mutual provides insurance on a "claims made" basis, i.e. the cover which responds is that for the year in which the claim against you is first made or (if earlier) the potential claim against you is first notified by you to Bar Mutual. It is ***not*** the year in which your alleged breach of duty occurred. In January last year I drew attention to the following sad case involving a personal injury practitioner who had reduced his limit of indemnity as his practice reduced and who was then alleged, some years before, to have advised the litigation friend of an infant severely injured in a road accident to settle at an undervalue:

> During the past year, it has been necessary for a (now retired) Member to contribute a six figure sum from his own assets, in order to settle a claim against him. Furthermore, Bar Mutual is also entitled to demand from Members a pro-rated contribution towards the defence costs incurred in the defence of a claim when their third party liabilities exceed their limit of cover. Had that Member paid no more than (at most) an additional £100 to increase his limit of cover by £500,000 [to £1.5m], the claim would have fallen within that limit and the personal contribution he made would not have been necessary.

QOCS and Personal Injury-Related Professional Negligence Claims

As all present will know, the introduction of QOCS in personal injury litigation was Sir Rupert Jackson's recommended "quid pro quo" for the abolition of the recoverability of after the event insurance premiums from defendants and was justified on the premise that there will almost invariably be an asymmetric power relationship between a claimant and a defendant in such litigation because in almost all cases the latter party will be backed by insurance and the former will not be. Sir Rupert briefly considered whether QOCS should be introduced for professional negligence litigation (see page 90 of his Final Report) but, while expressing a personal view that it would difficult to justify such an extension, concluded that this should be the subject of a separate consultation.

Subsequently, in a paper prepared for a Civil Justice Council Costs Forum on 21 March 2014, Professor John Peysner of the University of Lincoln put the contrary view, and strongly:[2]

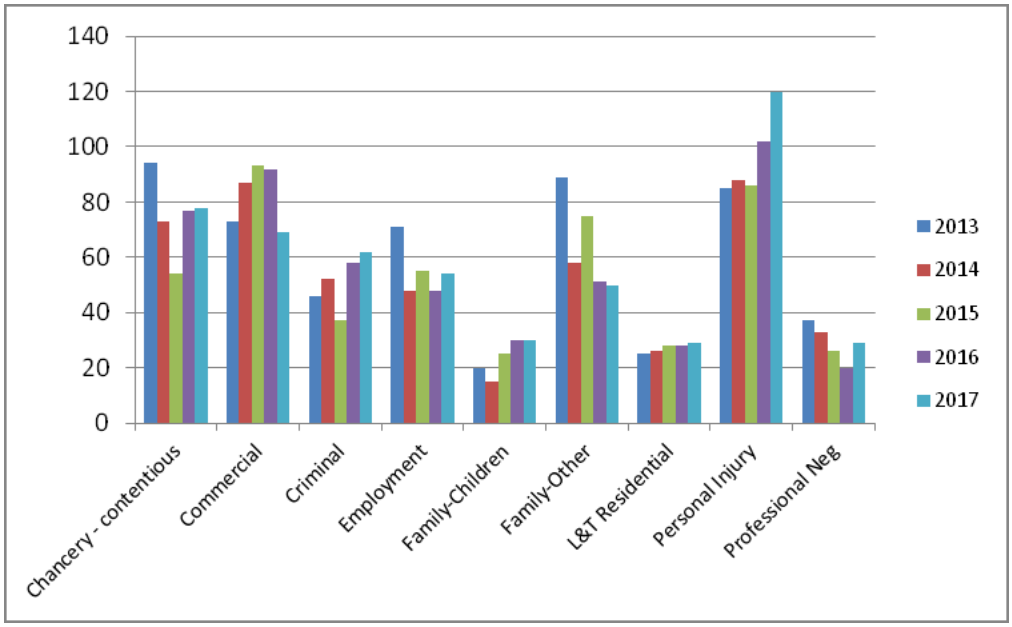
> "…if a lawyer is pursuing a personal injury case and through negligence loses the cases [sic] or under-settles QOCS does not cover any resulting professional negligence case. The claimant is potentially injured three times: one in the accident; twice in losing compensation and thrice in being deprived of an effective remedy against incompetence. This situation is completely illogical and needs to be addressed. Such an extension would not open the floodgates as damages are often low in such cases. As such they may well be unattractive to lawyers acting on risk based arrangements."

The learned professor did not back up the assertions in this paragraph with any evidence, although he did say there was "evidence" that suggested QOCS needed to be "swiftly extended" to cover personal injury-related professional negligence cases.

I am sure that those of you here today who have been involved as a defendant or as counsel acting in the sort of cases to which Professor Peysner refers will immediately appreciate that the assumption that the damages in them are "often low" is incorrect; the contrary is usually the norm. Nor has Bar Mutual noticed any reticence in the pursuit of claims arising from personal injury litigation since 1 April 2013 – again,

[2] See https://www.judiciary.uk/wp-content/uploads/2014/05/impact-of-the-jackson-reforms.pdf.

quite the contrary, because the number of Personal Injury notifications received over the last five complete policy year has jumped by 50%:



This issue was considered as part of the Ministry of Justice's Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which was published last month. To quote paragraph 106 of the Review:

> A professional negligence claimant lawyers' representative group argued that there was a lack of evidence and flaws behind Sir Rupert's methodology in his original report regarding professional negligence, and that the "one size fits all" approach of LASPO should not apply to these claims. They argued for the extension of QOCS to these claims and provided some data, which suggested that claims volumes had dropped post LASPO indicating, they suggested, an access to justice problem. Defendants generally disputed this, arguing that professional negligence claims did not feature an 'asymmetric relationship' and that there were often professional body complaints procedures and ombudsmen for many of the relevant professions.

The Review concluded non-committally (at paragraph 20) that "the Government would wish to be satisfied that these risks [relating to the benefits achieved by the reforms in Part 2 of LASPO] have been addressed before considering the case for extending costs protection further."

While this would appear to remove any prospect of any extension to QOCS to include personal injury-related professional negligence disputes in the near future and while the current Government remains in power, it is important for all present to appreciate what such an extension would mean for Bar Mutual and for them. It would almost certainly lead to an increase in the number of claims advanced against

the Personal Injury Bar and, thus, notified to Bar Mutual. An increase in the number of claim notified would inevitably lead to an increase in the amount Bar Mutual is forced to pay in defence costs. All of that (increased) defence costs expenditure would be irrecoverable from claimants, unless it were possible to demonstrate that individual claims were frivolous or "fundamentally dishonest". If one takes a case like *Dunhill v W Brook & Co* [2018] EWCA Civ 505, in which it was possible to make a six-figure costs recovery after the Member had to endure a seemingly interminable nine-year ordeal before his professional reputation was finally cleared, the worth of a claimant (or his or her litigation friend) having to face the discipline of taking into account the risk of an adverse costs liability when deciding whether to pursue a case to trial or on appeal is amply demonstrated.

Without it, increased claims experience and cost would almost certainly result in Bar Mutual having to increase the rating it applies to Personal Injury practice. It would also have to reconsider whether it could sensibly continue to adopt the same rigorous, merits-based approach to handling Personal Injury-related claims as it currently applies to claims from all areas of practice. A move to an approach to claims handling that is more frequently seen with commercial insurers (that is, it is preferable to pay a claim in order to cap the insurer's exposure even if there is a meritorious defence) may be needed in order to avoid rating increases. Accordingly, Bar Mutual trusts that, in the event of the possibility of an extension of QOCS to claims against personal injury lawyers arising again, the Personal Injuries Bar Association will join it to oppose such a move.

Conclusion

Despite the somewhat gloomy nature of the last two issues I have discussed, I hope you will not be too downcast. Declared fee income from Personal Injury practice has increased by over £100m (or 67%) over the past ten years. The premium income Bar Mutual has derived from that fee income by applying a rating of no greater than 1.5% (and currently a rate of 1.2%) has contributed to Bar Mutual's stable financial position. If Personal Injury's claims experience were to deteriorate over the next few year in the respects I have considered (and in other ways), Bar Mutual is very well-placed to meet the challenges to which this deterioration may give rise.