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Healthcare Professionals: Be Careful What You Indemnify

With the increase in collaborative working and working at scale it is becoming common for the owners of a primary care practice to be asked to provide indemnities, say in a sale or purchase contract or in a merger agreement. But what does giving an indemnity actually mean, and what are the risks to you?

What is an indemnity?

An indemnity contract arises when one person takes on the obligation to pay for any loss or damage that has been, or might be, incurred by another person. It is therefore a promise to make a future payment.

Why might you be asked to give one?

Over the centuries the English Courts have developed common law rules for assessing liability for breach of contract. These rules attempt to strike a fair balance between the interests of the party in breach and the party which is the victim of the breach. The factors which determine such balance include remoteness of causation, foreseeability of loss and mitigation of loss. By asking you to give an indemnity, the other party is attempting to move the balance in their favour.

A 1996 judgement by Lord Hoffman explains the difference in assessment of damages by common law rules and by indemnities:

"A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee."

Using the Court's common law rules for assessing liability, there would have been no liability against the doctor because, although they were negligent, the negligence hadn't been a factor in the subsequent injury, which was caused by a mountaineering incident unrelated to the knee problem.
If there had been an indemnity in place the Courts might well have found the doctor liable not only for the injury but also for the costs of the expedition, the rescue and all the medical treatment. This is because if the doctor had made the correct diagnosis the mountaineer would never have gone on the expedition in the first place, and therefore wouldn't have suffered the subsequent injury, paid for the expedition or needed to be rescued.

So should indemnities ever be accepted?

There are certain areas where they've generally become accepted by lawyers as being appropriate – such as in a Practice merger and relating to TUPE transfers. Typically, the disposing practice agrees to indemnify the acquiring practice for any employment claims arising during the period before the transfer.

Legal advice should always be sought before binding yourself into an indemnity. A good solicitor would review the wording of the indemnity to ensure it is not unduly onerous. For example, in the case of TUPE transfers, an indemnifying practice should retain the right to defend and settle the claim itself, rather than simply committing to pay whatever is being asked of them by the other party.

Conclusion

Negotiation of contracts generally has little to do with what's fair or unfair and much more to do with the negotiating strength of the parties. Often any party of whom an indemnity is requested is in such a weak bargaining position that they find it difficult to resist the request. Although it's easier said than done, it's always better to negotiate from a position of strength. In the context specifically of GP practice mergers, if you can see a time in the next few years when it's going to be necessary to find someone to take over your practice, do it sooner rather than later and try to keep a 'Plan B' in the background throughout.

If you have any questions about indemnities or any other queries relating the running of your primary care practice, please don't hesitate to get in touch with one of our specialist team of expert solicitors.

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