DRN-5398873

The complaint

A limited company, which I will refer to as C, complains about the settlement of its commercial liability claim by Markel International Insurance Company Limited.

What happened

The parties are aware of the circumstances, so the following is intended only as a brief summary. Additionally, although other parties have been involved in the claim and complaint process, for the sake of simplicity, I have largely just referred to Markel, C and one of C's employees – who I'll refer to as E.

C operates as a domiciliary care provider, employing staff to provide care for customers in their homes. It had an industry specific commercial insurance policy, underwritten by Markel.

In 2022, E was assisting a customer to move from a bathroom to a bedroom, and the customer fell suffering an injury. The customer claimed for damages from C on the basis that C had been negligent in failing to provide the customer with an appropriately trained support worker.

C notified Markel of the claim, and Markel confirmed the policy would provide cover for this. However, there is a dispute over which part of the policy responds. C considers the insurance claim ought to be dealt with under the Public Liability section of the policy, which carries a £250 excess. Markel considers the Professional Indemnity section applies, and this effectively carries an excess of 10% of the claim – which in this case may be £17,000.

C brought its complaint about this to the Ombudsman Service. Our Investigator didn't recommend it be upheld though. He thought it was reasonable for Markel to have considered that the claim from the customer concerned the provision by C of professional services. C did not agree and so this complaint was passed to me for a decision.

I issued my provisional decision on 5 March 2025. The following is an extract from that decision:

> "I will just note that both parties have provided detailed submissions and made a number of arguments over the interpretation of the policy. I have considered all of these, but I will not refer to them all within this decision. This is not intended as a discourtesy, but rather reflects the informal nature of the Ombudsman Service.
>
> How should the policy be interpreted?
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> The policy C has with Markel is specific to the type of business C operates. It is a Homecare policy, and C's business is noted on the policy schedule to be:
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> > "Providers of Domiciliary Care comprising of personal care, administration of medicines, shopping, laundry, respite care, gardening and light household maintenance."
>
> The policy has a number of areas of cover. Whilst I have consider the context

provided by the rest of the policy, it is the Public Liability and Professional Indemnity covers that are most relevant to the current complaint.

The cover provided by the Public Liability section includes indemnity for:

> "legal liability to pay damages arising out of… accidental injury of any person… caused… in connection with the Business…"

I have set out C's "Business" above.

The Professional Indemnity section in the policy essentially provides an extension to this cover where the policyholder becomes liable to pay damages as a result of a breach of a professional duty by reason of negligence, on the part of the policyholder or its employees, in connection with the insured business.

The argument in this complaint is essentially over which of these sections responds in the circumstances. Given the difference in excess payable by C in relation to these, this is clearly an important issue.

Much of this complaint comes down to how the following term should be interpreted:

> "No indemnity will be provided [by the Public Liability section] in respect of
>
> 1 any liability connected directly or indirectly in any way with any error or omission in the provision of professional services"

The term "professional services" is not defined within the policy. As a result, it is necessary to consider what this term should be interpreted to mean.

There is a great deal of legal guidance available on contractual interpretation. But essentially this involves thinking about what a reasonable person, of the type the policy was intended for, with all the background knowledge that would readily have been available to the parties at the time the policy was entered, would have understood the contracting parties to have meant by the language used.

This is an objective test, and it means disregarding evidence about the subjective intentions of the parties. So, whilst I note C's representative – who also happens to have actually drafted this policy wording – has provided comments on what was intended from the wording, this has limited benefit in the circumstances.

Ultimately, it is necessary to consider what a reasonable domiciliary care provider would have interpreted the use of "professional services" to mean.

In thinking about this, I have borne in mind the legislation that relates to this area of work, as well as the CQC glossary of terms on the scope of registration. I think it is reasonable to conclude that all of this would form part of the background knowledge that a care provider, which is overseen by the CQC, would have had when taking out an insurance policy.

It would seem that the Children and Social Work Act 2017 introduced requirements for social work to have professional standards. I think that a reasonable person who is aware that carrying out work which is required to operate to a professional standard, would consider that work to be the provision of a professional service.

However, it also seems that there is a distinction made by the 2017 Act between social work and social care work. The Health Care Act 1999 – as amended by legislation including the 2017 Act – talks about regulating professions, which based

on what I have said above would include social workers. And secondly about regulating social care workers. The latter therefore does not appear, at least in terms of this legislation, to be considered a profession in the same way.

With reference to the CQC glossary, social care work includes the provision of personal care. And the term “personal care” would include physical assistance given to a person in connection with washing or bathing. This was effectively the activity E was engaged in at the time of the accident. Social work on the other hand would seem to relate more to the assessment of a person’s needs and the arrangement of a care plan to facilitate those. I consider this describes the actions C would have taken prior to E attending the customer.

Again, there will be various definitions of these terms that are available. But the point is, the legislation would appear to separate the activities into non-professional and professional. And I think it is reasonable to consider the difference to be between the actual physical assistance provided, and the assessment and planning that takes place to enable this.

It follows that assessing a person’s needs, creating a plan to meet those, and making arrangements for that plan to be facilitated would be social work and would be the provision of a professional service. Whereas actually providing the physical personal care that is required under this plan would be a necessary and valuable service, but would not be a professional service.

What is the claim about?

I have considered the legal claim brought by C’s customer. This is focussed on the fact that E was a support worker provided by C. And the allegation is that C was negligent in failing to provide the customer with an appropriately trained support worker.

Notably, the allegation does not appear to be directly that E acted negligently, causing the accident, and that C is vicariously liable for this.

So, the allegation and claim centre on C’s actions in making arrangements for the care plan to be facilitated. They do not, at least at this stage of proceedings, appear to centre on the actual personal care provided.

I note C has said that the way the customer pleads the legal claim and the language used is not determinative of what the actual insurance claim is. But where the cover provided is essentially legal liability insurance, I disagree. The insurance responds to the legal claim, so the language of that claim is central. I am not persuaded that the relevant legal protocols are necessarily as indicative though. What I consider to be key in this complaint, is what activity the legal claim relates to. Does it relate to facilitating the implementation of a care plan, or to actually providing personal care. At this stage, I consider it relates to the former. And I consider this to have been the provision of a professional service.

Taking everything into account, I consider that Markel has acted fairly and reasonably by currently considering this insurance claim under the Professional Indemnity section.

Clearly, there is some cross over in the circumstances of the accident in a practical sense though. And it may be that, as proceedings develop, the focus of the legal claim shifts onto considering whether E acted negligently when providing the

personal care. This may be what C is alluding to.

If this does happen, I consider the Public Liability cover is likely to be a relevant area of cover – though possibly in conjunction with the Professional Indemnity cover. If there is an outcome to the legal claim whereby both E's acts and C's arrangements are found to have contributed to the accident, a decision might be required in terms of how much of any compensation awarded relates to each area of cover. It would then follow that the percentage-based excess on the Professional Indemnity cover would only apply to the level of the award relevant to the actions of C in making the arrangements. This is not something that is possible to assess as part of this complaint though.

Markel has also said that it is not seeking payment from C of 10% of the legal costs until Court proceedings issued, and the allegations committed to pleadings. I consider that this is fair and reasonable. If matters change and it becomes clear, before proceedings are issued, the legal claim is proceeding with the customer alleging both negligence of C and of E, Markel may wish to consider waiting until the legal case has concluded before seeking this payment. But these were not the circumstances at the time of C's complaint, so I make no formal direction on this point."

I asked both parties to provide any additional comments or evidence they wanted me to consider. Markel did not have anything to add. C did respond with some additional comments. I have considered these in full, but will summarise them as being:

- C does not consider the Children and Social Work Act is relevant, nor that the obligations of a "professional standard" apply.
- In order to be a social worker, it is necessary to be registered with Social Work England. And neither C nor E are so registered.
- There are differences between the care plan that would be devised by a care practitioner to a local social worker.
- The Health and Social Care Act 2008, defines "social care" to "include all forms of personal care and other practical assistance provided for individuals…", and does not confer professional standards on care providers.
- The CQC does impose standards, but these are "fundamental standards" not "professional standards".
- Ultimately, C was not providing a "professional service" when allegedly negligent in failing to provide the customer with an appropriately trained support worker.
- The proximate cause of the legal claim is the alleged tipping of the customer from the wheelchair. And so, the insurance claim should be considered under the Public Liability section.
- Even if the Professional Indemnity section is also engaged, it will not be possible to split the liability between the policy sections, and my proposed guidance would create uncertainty. So, if both sections are engaged, the Public Liability section should take priority.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I am not upholding this complaint. This is largely for the reasons set out in

my provisional decision and repeated above, so I do not intend to go through all of these again in this part of my decision.

I do appreciate C's comments that it (nor its employee) is not registered as a social worker. And I also note that there will be differences between exactly what is provided for under a plan devised by a local social worker and by a private company such as C.

However, the policy terms do not require C (or E) to be registered as a professional. Rather they refer to the provision of professional services. My discussion in the provisional decision was around the type of work C provides as being akin to that provided by a social worker. Whilst I do understand that there will be differences, particularly in the scope of a social worker's remit, I do consider that the type of activity is largely the same as it relates to the activities relevant to this complaint. And I am persuaded that a reasonable person, with all of the relevant background knowledge, would consider C to have been providing a professional service when arranging the care of its customer.

I do also appreciate C's comments over the proximate cause of the claim. And I agree that, had E not, allegedly, tipped the customer from the chair it is unlikely a claim would have been made. But the legal claim has been positioned on the basis that the failure is of C in how it made the relevant arrangements that led to this situation. So, at this point, I consider it is fair and reasonable that Markel has considered that the insurance claim ought to be considered under the Professional Indemnity section of the policy.

If there is ultimately found to be a 'joint liability' between the actions of C and those of E, I also appreciate that it might be difficult to apportion this between the two. As I've said, this isn't really something that I can make an assessment on at this point though.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask C to accept or reject my decision before 17 April 2025.

Sam Thomas
Ombudsman