

## **complaint**

Mr K's complaint is about SCOR UK Company Limited declining claims under his Professional Indemnity Policy.

## **background**

Several patients made claims against Mr K following breast enhancement surgery. The patients alleged that the implants used were defective. Mr K notified SCOR but his insurance claims were declined because SCOR said they related to product liability and his policy was for professional indemnity.

Our adjudicator thought that the policy did cover the claims and recommended that SCOR accept them. SCOR referred the case to an ombudsman but said that it would indemnify Mr K against damages and related costs arising out of a finding against him of professional negligence.

## **my findings**

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

The policy covered civil liability for professional negligence, which was defined to include *'negligence or breach of duty owed to any person (including statutory or contractual duty) in the provision of professional services'*. Professional services were defined to include the *'treatment' or 'care' of a patient 'in a professional clinical or professional medical capacity'*.

The policy excluded claims *'arising in any way out of the manufacture, distribution or sale of any products outside the proper course of the provision of professional services'*.

SCOR said that the claims against Mr K weren't about his skill or technique in inserting the implant but about an alleged defect in the implants he sold the patient. It argued the patients were relying on statutory obligations in respect of the supply of goods or commercial product liability contractual obligations. And it said those were not characteristics of the claims that the policy was intended to cover.

I haven't seen the underlying court papers, but Mr K's summary of the claims against him (which SCOR hasn't challenged) said they had two main elements. These were: (a) the supply of implants, which weren't of satisfactory quality in breach of terms implied into the contract with the patient and (b) negligence in recommending those implants and/or in relation to advice given.

Since these operations all took place before it became apparent that there might be a problem with the implants, both Mr K and SCOR seem to agree that negligence is the weaker element of the claims. Nevertheless, there are claims against him alleging negligence in the provision of professional services. Unless there was an applicable exclusion, I think Mr K would be entitled to be indemnified against those claims.

But, in any event, I think the policy also covers the elements of the claim relating to statutory or contractual liability arising from the supply of the implants. I don't think there is any serious argument that surgery is not *'treatment'* and so does not qualify as a *'professional*

*service*'. The definition of professional negligence specifically includes breach of statutory or contractual duty in the provision of professional services. Mr K's patients claim that the implants he supplied were not of satisfactory quality. I think they are alleging breach of a statutory duty and a contractual one too, since the relevant statute implies a condition into the contract between Mr K and his patients. On the face of it, those are claims which appear to be covered.

SCOR has argued that the policy was never intended to cover product liability and separate policies for that cover exist. But, the policy only excludes claims relating to product *'supplied outside the proper course of professional services'* which implies that there were always circumstances, within the proper course of professional services, in which it was intended to cover product liability.

SCOR also says the policy was only intended to cover 'professional negligence' and that implies some degree of fault in the application of professional judgement or expertise. I think the essence of SCOR's argument here is that liability resulting from a contractual condition implied by statute does not involve a *'breach of duty owed to any person'*, since the liability can arise whether or not Mr K was in any way at fault.

If so, I don't agree with this argument. The relevant statute refers to the statutory condition it implies into the contract being 'breached'. Parties to a contract are under an obligation not to breach it. I don't think it makes any sense to speak about somebody being in breach of a condition in a contract without in some sense being in breach of a contractual obligation or duty owed to the other party to the contract.

I think the claims against Mr K that the implants he supplied were not of satisfactory quality were claims that he was in breach of a contractual duty owed to his patients in the provision of professional services. I think that fits the natural meaning of the words used in the policy. I think I would need some clear justification to depart from the natural meaning of those words and I can't see one here. I think the meaning of the words used in the policy is clear enough but if there were any ambiguity, normal principles of interpretation provide that it would be interpreted against the person who wrote it.

SCOR has argued that, even if the claim is covered by the insuring clause, the exclusion relating to the sale of products applies. It says this is so, either because the sale of the implants should not be regarded as a part of the treatment or the provision of defective products shouldn't be regarded as being in the 'proper' course of professional services.

I don't think either of these can be right. It's not possible to carry out this surgery without implants and patients rely on their surgeons to supply the implants. The implants are integral to the treatment and I don't think their sale can be separated from it. I don't think it can be argued that the selection of an implant (defective or not) for use in surgery was in any way outside the proper course of the provision of professional services. If SCOR is suggesting that the selection of an implant about which no problems were known, but which later turned out to have potential defects, was somehow an improper provision of services, I disagree.

I think SCOR was wrong to decline these claims on the basis it did and SCOR should now deal with them in accordance with the remaining policy terms and conditions. SCOR has only been prevented from approving any costs or other liabilities incurred or any settlement entered into to date by its own unwillingness to accept the claims and so will have to indemnify Mr K for them in full. It's up to SCOR to decide how it wants to conduct the claims in the future.

The policy covers claims made against Mr K during the insurance period or made against him after the insurance period but arising out of circumstances reported to SCOR during the insurance period.

SCOR has suggested that a claim was not made against Mr K until after the insurance period. And Mr K has argued that he should not be prejudiced for not reporting a claim after SCOR had made clear it was not accepting the claims he'd already made. I don't have enough information about the individual claims to decide which ones might or might not have met the policy requirements on timing and reporting.

The decision I've made is that SCOR should deal with Mr K's claims in accordance with the remaining policy terms and conditions. That will involve SCOR looking at when claims were made and reported. If the only reason a claim was not reported was because SCOR had already indicated it was not accepting claims of that type, and SCOR decides to continue to decline it on the basis that it was not reported on time, that may be the grounds of another complaint.

SCOR has also pointed out that Mr K provided his services through a company and so it should be the company and not him which sold the implants. The outcome of the legal claims will determine whether Mr K or his company is liable for any defects in the implants. What matters for the insurance claim is that Mr K is insured and has claims made against him which are covered by the policy. If SCOR wants to raise the provision of services by the company as a defence in the legal proceedings, it needs to accept the claims and assume conduct. The claims against Mr K are that he sold the implants and SCOR has to deal with them in accordance with the policy.

### **my final decision**

My final decision is to uphold the complaint. SCOR UK Company Limited should deal with the claims in accordance with the remaining policy terms and conditions.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 16 March 2016.

Jonathan Coppin  
**ombudsman**