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## How much cover should I have?

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If you are not sure what limit of cover would be adequate to meet claims against you and/or your practice, see our notes below where we provide you with some factors that you should take into consideration, when determining an appropriate limit of cover for yourself or your practice.

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We have received the following query from one of our clients:

Is R10M enough cover?

A patient of mine who happens to specialise in medical malpractice claims says it isn't in today's times.

He sketched a scenario where something goes wrong and a patient becomes debilitated for some reason.

He said the costs can quickly escalate to more than R20M, for example;

Caregiver costs, minimum of 2 would be needed per day if they work 12hr shifts, for the rest of that person's life.

There will be medical bills due to the current condition as well as future problems should complications arise.



There will be loss of income claimed, and depending on the persons profession, this can escalate exponentially.

My patient felt that there should be a top up package available to us for additional cover.

## THE SHORT ANSWER

Our client is 100% correct. If your proven negligence in rendering professional services leads to your patient's permanent disability, the claim against you, and legal costs if you defend the matter and lose, will very likely exceed the maximum limit of cover offered under the CFP Broker's medical malpractice insurance policy of R10 million.

All of you (unless you are a student or an intern) have the option of increasing your cover option either through your Association/Society/Membership company, or by contacting CFP Brokers, to R10 million. This will be subject to payment for the higher limit of cover.

If you would like a higher limit of cover than R10 million, then you would need to contact CFP Brokers for a quote. In order to provide you with quotes for higher limits, you would be required to complete a proposal form with information required by the underwriter, to determine your risk and what premium would apply. Depending on your claims'-history (this includes complaints against you to your regulatory body), insurers may not be willing to provide you with quotes for a higher limit of cover.

We can look at our claims' statistics for the policies for healthcare practitioners that we look after (over 8,000). To date, the highest claim that we have seen was for around R8 million, but we believe that claim to be inflated and without legal merit. If we have a look at averages, the average claim that we see falls way below R1 million.

Unfortunately, as a financial investment advisor would tell you, the past track record does not guarantee future performance- or in the case of liability- just because most of the claims that we see currently do not exceed R1 million- this does not mean that none of you could experience a claim for a much higher amount.

In insurance- we talk about frequency and severity. We see high frequency of low severity claims against our practitioners and a low frequency of high severity claims. The bulk of the matters we deal with are not for medical malpractice claims, they arise out of complaints to your regulatory bodies, very often where there has been no harm to a patient at all! So, for example, we see multiple complaints regarding billing.

The claim example provided above by our client, would be an example of a severe claim. At the end of the day, increased cover limits carry a higher cost. Each of you needs to make your own decision with regard to what limit of cover meets your requirements, weighing up many factors, including the cost of your cover.



If your only consideration when determining what an adequate limit of cover would be for you, is that you could potentially face a claim like the one outlined by our client above, then our advice is buy the highest limit of cover that you can afford, with the highest excess (self-payment amount) that you can carry.

There are some that argue though, that when plaintiff attorneys become aware that you have a high limit of cover in place under your insurance, this can lead to higher claims. The plaintiff's attorney and their client's decision to accept any proposed settlement offer, may be heavily influenced by the limit of cover that you have in place, and how close that settlement amount is to the limit you have in place.

If you want to base your cover requirements on factors other than the possibility of a worst-case scenario like the one outlined above, please see our guidelines below, on other factors that you should consider when determining what limit of cover is adequate for you and/or your practice.

## SUMMARY

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The default limit of cover on most Practitioner Scheme policies with iToo is R2,5 million. You should consider taking a higher limit, if you:

1. Treat minors, high net-worth individuals, sports' personalities, other celebrities, foreigners or people who you know will soon be emigrating.
2. Provide healthcare services of a nature where allegations of your negligence, could result in claims for death, hypoxic brain injuries, permanent disability or loss of amenities of life.
3. Will be permanently ceasing to practice in South Africa in the next year or so, whether through emigration or retirement.
4. Are a practice owner with exposure to public liability and vicarious liability claims.
5. Supply products to your patients and are exposed to products' liability claims.

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Unfortunately, liability insurance is not like car insurance. If you insure your car, you know at the outset what the value of the car is. The amount of a potential liability claim cannot be determined before you decide on the limit of cover, because of the unpredictable nature of liability claims.

Consider the above example in the question raised by our client.

Given the unpredictability of liability claims, no-one, not even your insurance broker, can confidently assure you that any limit of cover you select is going to be enough for any claim that you might face.

When deciding on the limit of cover you are going to select, these are some of the factors you should carefully consider:

1. What is the **nature of the healthcare services** that you provide? Can you face allegations that your services have resulted in a patient's death, or permanent disability, including for example brain injury? The compensation claimed in such instances is likely to be significant, as pointed out by our client in his query above.
  - 2.1. What is the **age of the patients** that you are treating? If you face a claim that your negligence has resulted in the death or permanent disability of a patient who is a

breadwinner, then you could face claims from their dependants for loss of support. These claims could be substantial depending on the income-earning status of the patient.

- 2.2. If a claim arises out of the treatment of a younger patient, the amount of the claim may also be significant if compensation is required over the life-time of the patient for institutionalisation, or on-going provision of healthcare services and care, adaptation of motor-vehicles and their home, and loss of future income.
3. If you 'mess up' what is the extent of the possible loss/damage/harm/injury that your work could cause? Remember to include in your consideration, your potential **public and products' liability exposures** (please see definitions document for explanation of these liabilities).
4. Please remember that you do not have separate limits of cover for each section of the policy. Therefore, if you have a limit of cover of R2,5 million and you are on a cover option which includes public and products' liability- then the limit of cover of R2,5 million is shared across all the sections of the policy including medical malpractice. If you own a practice, you are exposed to claims for public liability and such claims could erode the limit available to pay out any further claims you may have under another section of the policy, for example a claim for medical malpractice.
5. If a **high net-worth individual**, like a sports' personality alleges that your negligence has caused them to suffer permanent disability, the claim is likely to be significant especially if the claim includes compensation for loss of future earnings.
6. If you treat **foreigners** whether in South Africa or abroad, any claim that they make for compensation is likely to be significant- because they will seek the equivalent in rand value of what it would cost them in their own country for future medical expenses, care-givers, loss of income, etc. Given our exchange rate against the US Dollar, British Pound and the Euro, claim amounts are likely to be significant.
7. If you work in a **hospital**, and they require you to have a certain limit of cover in place, this is a good start, but should not be the end of your consideration of the correct limit of cover.
8. If you are a **practice owner**- remember that you are vicariously liable for the negligent actions and omissions of your employees in the course and scope of their employment. You could therefore be sued for claims arising out of their negligence. For more information, please see our notes on vicarious liability. You need to consider whether the limit that you have in place would be adequate if it also had to cover claims arising out of the negligence of your employees.

## 9. **VAT implications**

- 9.1. If you/your practice is registered for VAT, be aware that the limit of cover under the IToo policy is VAT inclusive. VAT implications are not a consideration if you and/or your practice are not registered for VAT.
- 9.2. In terms of section 8(8) of the VAT Act, you will be required to pay VAT on any payment made by your underwriters/insurers to a third party, on your behalf, in respect of damages or a settlement amount paid out under any liability policy, including your iToo medical malpractice insurance.
- 9.3. iToo will indemnify you for this VAT payment, if you are a VAT vendor, i.e. they will pay the amount to you to pay across to SARS. However, the VAT indemnification will fall within your chosen limit of cover, as your policy provides a **VAT inclusive limit**.
- 9.4. This means that if, for example, you have a claim for your full limit under the policy, you will be out of pocket for the VAT on that amount because your policy will not pay out anything over and above your chosen indemnity limit. A VAT inclusive limit, therefore erodes the limit of cover that you have selected, by the VAT amount. In order to determine your actual limit of cover, under an insurance policy which provides you with a VAT inclusive limit of indemnity- you need to deduct VAT from the limit.

#### **10. Legal costs and expenses included in the limit you select**

- 10.1. The limit of indemnity is costs inclusive. This means that it is not only intended to cover any settlements or damages awards you may need to pay out, but it also covers all your legal defence costs and potentially the other side's legal costs too if you lose your case and costs are awarded against you.
- 10.2. The rule of thumb is that you should generally be looking at around 25% of the claim amount as an indication of what the legal costs will be to defend the matter. Litigation is not a quick process and can drag on for years. It is a common misconception that if you successfully defend a claim that you will be able to recoup all of your legal costs incurred in defending the claim. Depending on the nature of the costs order awarded by the court, you are usually lucky if you can recover 70% of your costs as the costs that you are allowed to recover are determined by reference to an outdated court tariff.

#### **11. Limit in place at the time you notify potential claim is limit that we be applicable at time actual claim resolved**



- 11.1. Be aware that the limit of cover that you have in place under your insurance at the time that you notify a claim or incident which may give rise to a claim, is the limit which will apply when that claim is finally resolved whether by way of settlement, damages paid or otherwise.
- 11.2. It can sometimes be years from the time of your notifying a claim to its resolution, especially if appeals to higher courts are involved. There are often substantial delays in obtaining a court date and bringing a matter to finality in the courts.
12. **Retirement and run-off cover.** Under iToo's policy, you are provided (subject to terms and conditions) with up to 6 years' run-off cover (depending on how long you have had cover in place under CFP Broker's medical malpractice insurance policy) when you retire or otherwise **permanently cease to practice in South Africa**. The run-off cover does not cover continuing services- it allows you an extended period within which to report claims/complaints that you only become aware of after you retired or permanently ceased to practice.
  - 12.1. Be aware that the limit of cover that you will have in place for the 3 - 6 years' run-off cover that you are entitled to, will not increase over that 3 – 6 year period; it remains the same as the limit that you had in place in the year that you retired or ceased to practice and it cannot subsequently be increased.
  - 12.2. It is therefore really important that you don't decide that as you are winding down your practise, and doing less work, before you retire that you are going to take the lowest limit available. I would urge you to take the highest limit available in the final year that you are taking out cover- as you do not want to be underinsured at any point, but even more so in the event of a claim when you are no longer earning an income.

### **13. Appeals and interest considerations**

- 13.1. Your limit of indemnity needs to be adequate to fund your legal defence costs if you decide that you wish to take a case on appeal. Please note that the insurers will generally only fund an appeal against an adverse finding, where their legal counsel advise that the appeal has a reasonable prospect of success.
- 13.2. Interest on the amount claimed may also, depending on the nature of the claim, begin to run from date of demand. If you defend a matter and lose, then you may also be liable for interest on the amount claimed, which could be substantial if the litigation has taken a few years to conclude.

#### **14. The Prescription Act of 1969**

- 14.1. Bear in mind that in terms of the Prescription Act of 1969 which determines the prescription of a legal claim, the general principle is that a person has 3 years from the date **they become aware that they have suffered a loss within** which to institute a claim to recover their loss. Remember- the claim does not prescribe 3 years after you rendered the service, but 3 years after the claimant becomes aware that they have suffered a loss (and of the identity of the person who caused them to suffer the loss).
- 14.2. Should a person fail to institute action within the prescribed period, their claim is extinguished (is said to have prescribed) and any claim which they subsequently bring can usually be defeated by the defence of prescription. However, you would still incur legal costs as you would still need to defend the matter up until the point that your defence of prescription is accepted by a court. In some cases, prescription of a claim is not clear-cut and there may be legal arguments with regard to whether or not the claim has in fact prescribed.
- 14.3. It could be a problem if, having notified a potential claim when you became aware of it (which is a condition of the cover), the claim is only formally made 5 years later - because the limit you had in place 5 years earlier is going to apply, and it may be inadequate given inflation, fluctuations in exchange rates, etc.
- 14.4. If you treat **minors**, be aware that legal prescription does not run on a minor's claim. Any claim that a minor may have against you will only prescribe one year after he or she attains the age of majority or three years after they become aware that they have suffered a loss (whichever method provides them with the longer period of time to bring their claim). This is one of the reasons why obstetricians face such high medical malpractice insurance costs- they essentially can face a claim up to 19 years after any delivery.
- 14.5. There are certain other exceptions to the general 3-year prescription period, for example, legal prescription does not run on a claim where the potential claimant is insane or in a vegetative state.

#### **15. 'Aggregate' limit of indemnity**

- 15.1. Under the iToo insurance policy you have what is known as an aggregate limit of cover. This means that you only have one limit available to you for the entire period of insurance



(which usually runs for 12 months) for **all** claims/complaints made against you during that period.

- 15.2. Be aware that any claim that is covered under an extension of the cover, will also be covered under the aggregate limit. So, for example if insurers pay costs to assist you with a complaint against you at the HPCSA or AHPCSA, the costs they incur, will reduce your limit available during that period to cover any other claims or defence costs.

### **16. Can you increase your limit of indemnity during the policy period?**

- 16.1. Generally, you can increase your limit of indemnity at any time. You do not need to wait for the renewal of the policy subject to you making payment for the increased limit of cover.
- 16.2. Be aware though that the new increased limit will only apply to claims or potential claims arising from services or products that you have rendered after you have put the new limit in place. This is therefore not a means to rectify an inadequate limit after you become aware of a potential claim which would exceed your current limit.

We hope that these notes have been of assistance to you. If you would like further assistance or to discuss your cover requirements, please do not hesitate to contact us **during working hours (Monday to Friday 8.30am to 4.45pm)**. After Lockdown has ended, please contact us on our landline numbers reflected in the footer of this communication.

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Claims, incident notifications and general enquiries

General enquiries