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Career threatening injury in professional sport: 6 key points about insurance

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The tackle which goes wrong, the tendon which snaps, the heart condition which suddenly rears its head; few things are dreaded by professional sportspeople and their clubs as much as a career threatening injury or illness. Many put worry at the back of their minds by the thought that they have "insurance."

This short article sets out 6 key points about "insurance" which can apply where there has been a career threatening injury.

Please note that an individual can have a different status for the purposes of employment law and tax law.

Firstly, what type of insurance is it?

Trawling through details of policy documents is not every lawyer's cup of tea, let alone for many sportspeople. However the type of policy is extremely important – whether it pays out an "income replacement" or a lump sum once and for all payment is key in the event of injury/illness. In this area it can be easy for all policies to be labelled "PHI" contracts but this is not always the case. Key types of policies in common use in professional sport are:

- **Income protection policies (sometimes known as PHI):** these are generally policies which provide for payment of a % of salary after a defined period absence (often 12 or 26 weeks) due to illness or injury until that person retires. Short term income protection policies can now also be bought. They can be arranged by clubs, employers or individually. The premiums and terms can vary hugely between policies;
- **Personal accident policies:** personal accident policies may sound initially similar to PHI policies but are not. These provide a lump sum payment when policy terms are met such as death, permanent total disablement or loss of a particular limb etc. Sometimes such policies allow for players to top up payments so that they receive a greater lump sum in the event of a qualifying injury. This can be helpful to cover, for instance, the cost of paying off several mortgages/predicted cost of a career change. It does not, however, provide for any continuing income. An example of such a policy is the Joint Professional Rugby Players Insurance scheme;
- **Critical illness policies:** these, like personal accident policies, pay out a cash lump sum if the individual is diagnosed with one of a number of listed conditions. This list can vary hugely between policies. There tends not to be overlap between the triggering events for personal accident and critical illness policies; and
- **Payment protection insurance.** these are designed to cover a specific debt repayment in the event that the individual became unable to work (e.g to cover a mortgage or particular credit card, or to cover the cost of paying the premiums under an income protection policy). These policies have in recent years been found by the FSA to have been widely missold, and this has given rise to a number of follow on claims by individuals.

Employers are also obliged under the Employers Liability (Compulsory Insurance) Act 1969 to take out insurance to insure against liability for injury or disease to their employees arising out of their employment. Some sports injury cases will give rise to a tortious claim against the club and questions as to whether the club is covered under this insurance.

What is the trigger question? Any occupation or given occupation?

Not all injuries or illnesses will trigger payments under a policy. In both income protection policies and personal accident policies it is especially important to check whether payments are made if the individual is unable to carry out "any occupation," or their "own employment" or "profession." These sorts of terms are sometimes defined differently by different providers, but the practical distinction can be stark, especially in the sporting context.

To give a practical example, a minor knee injury may end the professional tennis career of a tennis player but they may still be well capable of working in a supermarket, office etc. If they are only insured for "any occupation," they may not be covered, even though their career is over and their income loss, huge. This distinction is not only important for sports lawyers, it is important for any doctors compiling medical reports, club doctors, physios and ordinary GPs. Insurers regularly require disclosure of all GP, consultant and sometimes physio or other medical professional's notes covering the "relevant period." One instance of incorrect or loose use of language in one entry in several years of medical notes can scupper a claim. In some cases it is not uncommon for the insurer to argue that the "relevant period" goes back years, especially if arguments might be run on material non disclosure (see below). There is also a (sometimes practically time consuming) duty to report records for ongoing medical appointments once the injury has occurred.

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Material non disclosure, pre existing and excluded conditions

Insurance contracts are contracts of "utmost good faith" ("uberrimae fidei"). They may be avoided by the insurer if the insured person fails to mention, any relevant facts which would be material to the insurer's assessment of risk in relation to the insurance policy. With insurance, if in doubt, always disclose.

The facts of **Godfrey v Britannic Assurance Limited** [1963] 2 Lloyd's Rep. 515, demonstrates the practical danger of not disclosing a previous "twinge." Mr Godfrey applied for life insurance, but did not inform the insurers of some previous ill health he had had in the past. He subsequently died of nephritis.

Roskill J held that the insurer could avoid the policy for material non disclosure regardless of the fact that Mr Godfrey had not mentioned the previous ill health, as he thought it would not be relevant.

In the income protection, personal accident and critical illness context arguments with insurers about material non disclosure can be stressful to manage, as well as potentially fatal to the claim. By the time argument about material non disclosure arises, the individual has already suffered the injurying/illness event, as a result of which it is usually impossible on the market to purchase any alternative cover.

These common law rules have, to some degree, been softened by the operation of the Consumer Insurance (Disclosure and Representations) Act 2012 most of which came into force on 6 April 2013.

This provides for insurers to ask a series of questions and sets out the remedies which are available to an insurer if the questions are not answered correctly. However this Act applies only to an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession so it is not clear how/if this could apply in the income protection field.

Policies may also expressly exclude pre existing conditions, which may be defined broadly and may exclude certain other conditions. It is relatively common in income protection policies to see exclusions for mental health conditions, for sexually transmitted diseases and for injuries brought about by the insured's fault.

Care and precision can be needed when drafting correspondence with insurers and instructing medical reports, for instance to avoid a situation where:

- it is investigated whether a reactive arthritis could have been triggered by an STI;
- there is lengthy legal wrangling, years after the event, about whether the injury was caused or contributed to by the individual's fault; and
- notes which record a medical professional's concern as to how the sportsperson is dealing with a career threatening physical injury is misinterpreted as a diagnosis of an excluded mental health condition (eg. anxiety or depression).

Returning to work after injury

It might be that, following an injury, a sportsperson may now be a disabled person within the meaning of the Equality Act 2010 such that their club, and any other service provider, would be under a duty to make reasonable adjustments. Income protection insurers sometimes will provide both practical and, in some cases, financial, assistance with adjustments to assist an individual to return to work. As the hugely successful Paralympics showed, some who became disabled while professionally competing in one sport, have become world leading competitors in another sport. Another helpful source of assistance is the Government's Access to Work scheme which is accessed through the jobcentreplus.

Are terms of a policy implied into a contract of employment?

In the event of dispute, does the sportsperson sue the club, or the insurer or both? The answer to this question is not always straightforward. In **Jowitt v Pioneer Technology** [2003] ICR 1120 the Court of Appeal considered a case where a contract of employment for a technician stated that "the company runs a scheme that it is designed to provide an income during lengthy period of of absence due to prolonged sickness or injury…for as long as they are unable to work up to date of retirement…" The employers had covered their contingent liability by taking out a policy with income protection cover for employees provided they could not carry out "any occupation". Mr Jowitt was injured. The insurer claimed he could carry out some work, albeit not his previous employment. The employer's doctor considered he could not.

Sedley LJ held that the policy terms could not be incorporated into the contract of employment. The effect of the employment contract was that Mr Jowitt could claim a payment if he was "unable to work" within the organisation or could realistically be expected to find employment elsewhere (and it is clear that the Court of Appeal considered that this meant elsewhere in a similar line of work for which he was trained, not any work whatsoever). The practical effect was that:

- Mr Jowitt could not sue the insurers as he was not privy to the income protection policy; and
- However Mr Jowitt could successfully sue his employers directly under his contract of employment, applying the more generous interpretation of his ability to work, regardless of whether his employers would be covered by the income protection policy.

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Dismissals from employment where there is income protection cover

In **Aspden v Webbs Poultry** [1996] IRLR 521 the High Court found that there could be a term implied into a contract of employment that an employer may not terminate the contract of employment of an employee who is in receipt of PHI benefits (other than for reason of gross misconduct), where the effect of the termination would be to disqualify the employee from their benefits under the PHI policy. This Aspden implied term can be hugely important in cases where a club is considering terminating the employment of a sports person who has become "injured out" of a team.

There has been a recent trend to row back on **Aspden**, most recently in the case of **Lloyd v BCQ** [2013] 1 C.M.L.R. 41. In **Lloyd** the Employment Appeal Tribunal (EAT) found that an entire agreement clause in the contract of employment (which post dated the income protection policy) prevented the **Aspden** term from being implied. Mr Lloyd was terminated because of his continued absence from work and the lack of prospect of him returning.

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