

Professional Liability Predictions 2024

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1. All professions: The re-emergence of 'deep pocket' professional indemnity claims

Technology, ESG and the broader economic horizon will continue to combine to frame the challenges confronting the professions and their risk and liability exposures. Construction professionals, lawyers, auditors, accountants and surveyors are all facing climate change risks and sustainability demands from their clients, consumers and regulators. At the same time, cyber risks in all of their forms continue to be top of the list of threats for professional services firms, and this runs hand-in-hand with the need to achieve appropriate risk safeguards around the increasing use of AI in the provision of services. Finally, the broader economic environment presents headwinds for 2024. The Insolvency Service commented on 31 October 2023 that Q2 and Q3 2023 saw the highest quarterly insolvency numbers since Q2 2009. Combined with an apparent slowing in the real estate sector, and the consequent defaults, the potential for the re-emergence of 'deep pocket' professional indemnity claims must be real.

2. Accountants: Financial Reporting Council regulatory activism will continue

Increasing numbers of audits being investigated by the Financial Reporting Council (FRC) and increasing headline fines are trends that are set to continue. Audit quality is improving but until a homogenisation of improved audit practices is achieved across the board, accountancy firms remain vulnerable to findings that their audit work falls beneath the low bar justifying investigation and sanction. Historic audit work will also come under scrutiny in the event of corporate insolvencies, which are on the rise due to challenging economic conditions, interest rate hikes and the corresponding rise in the cost of debt. As regards level of sanctions and fines, the Carillion investigation headline fine for the firm under investigation of £26.5mn (reduced by 30% to £18.5mn to reflect the firm's co-operation and admissions) may be an outlier due to the unusual facts, however it has unarguably raised the overall ceiling for fines, and deterrence, not just fairness, is an important objective for the FRC, which explains why with each passing year we have seen FRC fines increase rather than stabilise.

3. Accountants: Expect a significant volume of trading loss 'audit' claims in 2024

The AssetCo and Manchester Building Society decisions started a trend of 'broadly-cast' trading-loss claims against auditors, and ensuing years have seen a run of settled cases in the absence of settled law. Multiple claimant law firms have been running such claims, structuring the arguments creatively. With litigation funders encouraged by recent successes, and the tide of corporate insolvencies rising along with interest rates, we predict more such claims in 2024.

4. Accountants: Capping audit liability - a new trend?

17 years after the Companies Act 2006 provided a legislative route for audit firms to seek to cap their liability, auditors are for the first time regularly looking to do so. Until now auditors, reflecting market pressures, held back from requesting any limitation on the financial liability that may be faced because of an error in the audit. However the tide has finally turned with many firms, including some of the big six, now considering making it a precondition of their appointment. With predictions about increasing audit claims and more Financial Reporting Council regulation, and with auditors and their insurers understandably nervous about both, it is perhaps surprising this has taken so long. How will the audit market and its clients address this evolution? Will this discourage claims where the amounts to be recovered are capped or help change the ongoing perceptions of auditor and client being too close? Could it even be the start of a new era of directors being more culpable for the errors in financial statements and, if so, will we witness an increase in D&O cover?



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5. Construction Professionals: It's not easy being green

There is increasing pressure on the construction industry to build in an environmentally sustainable manner; this brings with it risks for construction professionals. The construction industry is a heavy emitter of carbon dioxide. The Carbon Emissions (Building) Bill (now withdrawn), which would have required the whole-life carbon emissions of buildings to be measured, is an example of the type of governmental pressure which is likely to be exerted on the industry. We anticipate that this will be coupled with increasing consumer demand for carbon neutral and highly energy efficient buildings. This will bring new risks for all players in the procurement chain including construction professionals. Developers are likely to face scrutiny over ambitious net zero claims. This could in turn spark claims against designers for failure to meet energy performance criteria. Contractors will face risks in terms of the time that construction takes for workforces unfamiliar with green construction and the additional cost of using green materials.

6. Construction Professionals: To certify or not to certify?

As we continue to see a squeeze on finances and an increase in contractor insolvency in the industry, the focus will turn on the role of professional certifiers, especially in respect of payments. It is common practice for construction professionals to take on roles, either as an employer's agent or contract administrator, that require them to issue payment certificates. While the majority of payment certificates are interim, allowing mistakes to be corrected in the next certificate, problems can arise where a final certificate is issued or where a contractor becomes insolvent part way through the project. A professional certifier always has a tightrope to walk in making sure it is being fair to the contractor while also protecting the employer's interests. However, in the current climate, one misstep could see the professional certifier faced with a claim for negligent certification as employers seek to recoup outlay that cannot be recovered elsewhere.

7. Financial Advisers: Post-implementation challenges presented by the new Consumer Duty

With the Consumer Duty in force from 31 July 2023, the implementation phase is now over but the challenges will continue. The Financial Conduct Authority (FCA) has emphasised that it is not a one-off duty but something advice firms will need to continue to monitor and improve upon. And the FCA will be testing firms' implementation and taking action where it is deemed insufficient. Firms will have to grapple with the challenge of what this means for the way they conduct their business. In the complaints area, firms now have an enhanced obligation to take appropriate action (including providing redress) where they have caused foreseeable harm to a retail customer. The likelihood is that this will lead to more voluntary and enforced past business reviews.

8. Financial Advisers: Unprecedented losses in bond markets come home to roost

Unprecedented losses in bond markets may lead to claims from those investing at the 'safer' end of the spectrum. In the past, volatility in markets has typically resulted in those with adventurous portfolios suffering the greatest losses. The period 2022-23 has been quite different with fortune favouring the bold. Assets viewed as lower risk, such as government and corporate bonds, have suffered significant capital losses. That means investors in cautious or balanced portfolios have incurred losses. As these losses are understood and crystallise, complaints and claims may be directed towards financial advisers on the basis that the risks of bonds weren't properly communicated and/or customers attitude to risk was underestimated.



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9. Insurance Brokers: Embrace AI but don't lose the personal touch

The rapid acceleration of the use of AI in insurance will see brokers engage urgently with the opportunities, and threats, it brings. As insurers increasingly automate their underwriting and claims processes, through use of big data and algorithms, the distribution model is set to change. In personal lines, such as motor and household insurance, the broker has already largely been replaced by online channels and machine-driven underwriting. While commercial clients tend to prefer to deal with humans, brokers can no longer afford to ignore the AI tools that will enable them to find the best products and premiums to meet their clients' insurance needs. Brokers must ensure their talent strategy promotes those who are comfortable interacting with AI and other technological advances, and those already in the market must ensure that they upskill. It is at the interface with their clients, in forming deep and meaningful business relationships and really understanding their clients' business and current and future insurance requirements, that the broker will continue to add value in delivering a truly bespoke service – a skill which cannot (yet) be replicated by AI.

10. Lawyers: SRA presses for increased fining powers

A further expansion of the Solicitors Regulation Authority's (SRA) power to impose fines without referral to the Solicitors Disciplinary Tribunal (SDT) is anticipated. In 2022, the maximum fine for traditional law firms was raised from £2,000 to £25,000, however the SRA is lobbying for more. Although solicitors often prefer to resolve conduct issues directly with the SRA to avoid the costs and adverse publicity associated with a referral to the SDT, there is a balance to be struck between the efficient disposal of cases and access to justice. This has been brought into sharp focus by the Economic Crime and Corporate Transparency Act 2023 which removes the statutory cap on the SRA's power to levy financial penalties for cases involving financial crime including so called Strategic Litigation Against Public Participation. The Law Society and the SDT have expressed opposition to this proposal and have voiced concerns about the SRA acting as "investigator, prosecutor and judge". The SDT provides a transparent and objective forum for the consideration of more serious cases and it remains to be seen whether the Legal Services Board will act on the concerns expressed by the Law Society. For larger firms whose turnovers would result in the imposition of higher fines this could have a significant impact.

11. Lawyers: Building Safety Act advice an emerging risk area

It is likely that claims will be made against solicitors arising from new requirements under the Building Safety Act 2022. The Act introduced protections for certain leaseholders from liability for cladding and fire-related remediation works. The costs of these works can be ruinous to a leaseholder, and lenders have been reluctant to lend against properties without assurances that the statutory protections apply to the lease in question. Mistakenly identifying a property as being protected by these provisions may result in claims against conveyancers by purchasers and lenders. Lenders require existing leaseholders to complete and send to their building owner a Leaseholder Deed of Certificate, in which the leaseholder certifies whether, as at 14 February 2022, the lease met the requirements for a "Qualifying Lease" under the Act. The risk for solicitors is checking whether the information provided is accurate. Solicitors acting for sellers may be put under pressure to sign undertakings, pursuant to which strict liability for errors would result – something to be avoided!

12. Lawyers: The risks associated with the use of AI

AI is set to fundamentally alter the practice of law but with it brings the prospect of claims. Law firms have been using AI for some time, for example in litigation disclosure platforms. What is new is generative AI that creates or 'generates' content so as to assist legal research, the review of contracts and summarising legal documents. Crucially, although the current generation of AI chatbots can possess huge amounts of information, they cannot evaluate its truth. The result is that the answers they provide may not be accurate; so-called 'hallucinations'. It follows that if lawyers use AI without proper thought or exercise of human judgement, mistakes will be made and claims will follow. The use of AI also creates the likelihood of other types of claims such as breach of confidentiality, intellectual property infringement, breaches of cybersecurity and privacy laws and publication of defamatory content. It can also be used to develop deepfakes, malware, ransomware, phishing attacks and other tools that facilitate cybercrime. In short, AI will bring huge advantages to the legal sector but lawyers who fail to appreciate its risks use it at their peril.

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13. Lawyers: The claims environment will heat up in respect of climate change advice

We predict that the incidence of claims against lawyers in relation to climate-related advice will increase unless firms and in-house legal teams support their colleagues to upskill in this area. In October 2023, the Law Society issued guidance to the profession on climate change, governance and the risks associated with greenwashing. The Law Society distinguished between the advice on issues such as greenwashing, that in-house lawyers may be under a duty to provide to their company's Board, and advice given to clients by solicitors in private practice. The Law Society also identified the areas of risk for companies and clients and the relevant legislation that lawyers should have in mind when advising. The message from this is two-fold. Training is key to ensure that solicitors are competent to give advice in this critical but emerging area. In addition, solicitors must scope out their retainers carefully, so that clients are clear about the limits of the advice they will receive and when they may need to instruct a specialist.

14. Media and Lawyers: Reforms will curb Strategic Litigation Against Public Participation

A new early dismissal mechanism will be coming into effect next year to address Strategic Litigation Against Public Participation (SLAPPs) in economic crime proceedings (under the Economic Crime and Corporate Transparency Act 2023). If a claim is held to be a SLAPP, the court will only allow it to continue if the claimant can show that it is likely to succeed at trial. If it does proceed, a court may not order a defendant to pay the claimant's costs (except where misconduct of the defendant justifies such an order). The reforms will give defendants an opportunity, for the first time, to be able to strike out SLAPPs. Where a SLAPP case is allowed to proceed, defendants will not face the risks of excessive costs burdens in paying the claimant's costs. However, the test to determine if a claim is a SLAPP may include an assessment of the claimant's conduct of the litigation and we anticipate that this will be an area of dispute, given the lack of clarity around the threshold for improper conduct. It could also result in SRA scrutiny and professional negligence allegations against claimant solicitors where the conduct of the litigation is held to have been improper.

15. Pensions: A consolidation agenda

Significant changes and reform should continue to be expected by all those in the pension industry. This time it is the efficiencies of scale and using investments to drive growth which is the focus of the proposals. In July 2023, the Chancellor announced a number of reforms for Defined Contribution (DC) and Defined Benefit (DB) schemes which had consolidation at their heart. For DC schemes, the Chancellor indicated that "a programme of DC consolidation" was required to deliver diverse portfolios and best possible returns. Schemes that do not deliver "the best possible outcomes" will face regulatory intervention and wind up. For DB schemes, the Chancellor said the market was too fragmented and the government would introduce a new 'Superfund' in which public sector funds may lead the way. A change in government is unlikely to derail this consolidation agenda, with Labour making similar proposals. The Pensions Regulator is also supporting this direction of travel, announcing in October 2023 that its regulatory approach is evolving to "help shape the pensions market to fewer, larger well-run schemes" and, only a month later, approving the first DB Scheme transfer into new Superfund, Clara-Pensions. As insurers will know all too well, years of reform in this sector have illustrated that there are always mistakes to be made or discovered when changes are introduced.

16. Pensions: Prolonged high inflation rates may lead to claims

With the Bank of England confirming in November 2023 that it does not expect inflation to reduce to its target of 2% until 2025, there is the risk that pensions advisers or providers may face claims from those whose pension payments are failing to keep pace with inflation. While the application of the triple lock means that the state pension will increase by 8.5% in 2024, for occupational pension schemes the majority of the increases are likely to be capped at 5%. As the Consumer Price Index is 6.7% and Retail Price Index was 8.9% (September 2023), pensions in payment (like wages) are therefore falling behind inflationary increases. While some schemes may voluntarily consider discretionary increases, this is going to be rare. Public pressure to reassess this may well escalate over time given the stubbornness of inflation in the UK economy. For those who bought their annuity during decades of a low inflation economy and have no inflation proofing, the lack of any increase will be causing a significant challenge. The concern is, will they start questioning their advisers or providers about why this was recommended or permitted?



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17. Surveyors and Valuers: Risk minimisation will be crucial as the use of PropTech and specialist third party suppliers increases

The use of PropTech and specialist third party providers will increase professional risk exposures if not carefully sourced. Reliance on technology to optimise the provision of valuation, property/facilities management, climate analysis and building design/cost services is on the rise. So too the use of specialist third party providers to assist with innovation and service delivery. The appropriate attribution of risk is, however, crucial to ensuring that professionals do not sleepwalk into potential liabilities for which they should not be responsible or, if genuinely unavoidable, that those exposures are properly understood, managed and priced. Never has it been more crucial to ensure that terms of business, with both those third-party service providers and the end recipients of the professional's advice, minimise potential risk exposures wherever system/third party supplier defaults arise. The importance of reviewing those terms, particularly reasonable exclusions and/or limitations of liability and clauses designed to legitimately restrict responsibility and reliance, cannot be understated.

18. Surveyors and Valuers: Sustainability and ESG matters should form an integral part of the valuation approach

It is inevitable that a multi-tiered approach to real estate valuation will emerge and, with it, a greater exposure for those who fail to factor sustainability, in all its guises, into their advice. The Royal Institution of Chartered Surveyors, in its UK supplement issued in October 2023, notes that "wherever appropriate, the relevance and significance of sustainability and ESG matters should form an integral part of the valuation approach and reasoning supporting the reported figure". In short, minimum energy efficiency standards, energy performance certifications and flood (or subsidence) risk assessments, not to mention the maintainability of income (and capital expenditure required to preserve it) wherever revenues are likely to influence the value of an asset over the anticipated life of the loan, look set to play an ever-increasing role in valuation methodology and, in consequence, valuation conclusions. The profession needs to have sustainability at the forefront of its mind when both valuing assets and caveating its conclusions.

19. Surveyors and Valuers: Deteriorating claims environment for 2024

The predominantly benign climate that has prevailed in recent times looks set to deteriorate, although the impact is likely to be far more localised and muted than before. While nonprime lending is just subprime rebadged, residential loan default rates remain low despite recent interest rate growth. High employment, providing it continues, coupled with a better understanding among the experienced lenders of the pitfalls of early foreclosure, will restrict claim volumes as the market softens rather than falls. Claims growth is most likely in the commercial space as mid-tier development projects come unstuck due to rapid cost inflation and reductions in returns. Retail, office and hospitality venues remain under serious pressure and the landlord exodus from the private rented sector gathers pace. Likely claimants will be those in the higher risk arena, including short term/mezzanine funders, peer to peer, crowdfunding and niche investment lenders. Aggrieved borrowers can also be expected to fuel LPA Receivership claims. However, even where claims emerge, the automated valuation model tech processes many professionals have introduced since 2008 should enhance defence prospects.

20. Technology Professionals: More AI in judicial decisions

The topic of AI will feature increasingly in judicial decisions. We already have the first cases which discuss the use of AI in an intellectual property, regulatory and data protection context. The prevalence of (elements of) AI in software will mean that the use of AI and the AI's performance itself will soon become the central topic of legal proceedings. While we expect the resulting decisions to be made along previously established principles governing the liability of the individuals behind the development of the software, the ability of AI to change the human output and to do so at a scale and speed otherwise not achievable means an increased exposure to risk for insurers (including the risk of class actions should the software be widely enough used).



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