More on the 'medical indemnity crisis': a lawyer answers some questions from GPs

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The principle of restitution, the payment of call instalments and the accountability of judges are among the issues raised by a group of GPs concerned about their present medical indemnity cover after the failure of United Medical Protection.

In early May, I was guest speaker at a meeting of Canberra general practitioners on the topic 'Current Medico-Legal Issues'. I offered at the start to answer questions throughout the talk. Questions on the current medical indemnity crisis came thick and fast and showed such concern about the predicament in which many doctors currently see themselves that I am recording some of the questions asked and my responses.

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Indemnity insurance on a mutual basis

Q *Why should the medical profession be required to cover its own claims when this does not happen with other professions? How can a relatively small group of professionals cover the very large potential claims that have arisen?*

A The reasons for doctors taking out their own professional indemnity insurance are largely historical. It was initially thought to be more cost-effective to insure on a mutual indemnity basis. However, it is not – and has never been – legally necessary for doctors to insure in that way. Also, medical indemnity organisations have taken out re-insurance with general insurance companies to help guard against losses. No commercial insurers in Australia now sell medical malpractice cover direct to doctors.

Series Editor's comment

The two major English medical defence organisations (MDOs) adopted on their formation in the late 19th century the model of the 'Shipowners' Mutuals', which had been first set up in the 18th century. The idea was to have doctor-owned organisations that would defend when defence was proper, and pay fair compensation when it was clearly due, the latter role being portrayed as the 'conscience' of the profession. That model was adopted in what were then the British colonies.

In the USA, in the tradition of the market economy then booming in that country, doctors sought cover largely through commercial (for-profit) malpractice insurance.

The principle of restitution

Q *Why are wealthy plaintiffs entitled to recover much larger amounts of compensation than poor plaintiffs?*
(This question arose from discussion of Calandre Simpson's $14 million compensation award.)

A The tort system is based on attempting to put people in the same position as before the tortious act or omission, so far as that is possible. People who suffer injury as a result of the fault of another person can therefore recover not only the cost of medical treatment to treat their condition, but also lost wages and other out of pocket expenses and the cost of future care. With improved medical treatment, people who would previously have died – or died early – as a result of medical injuries may now live a normal life span.

Actuarial calculations can estimate the cost of round-the-clock care of the person through life, indexed to cover anticipated inflation. With babies injured at birth, this means that compensation awards need to be very substantial.

In Calandre Simpson's case, one reason for the large size of her compensation award was that she comes from a wealthy family. She was entitled to compensation that would place her, as much as possible, in the same circumstances she would have faced had she not been injured – for example, the damages included $330,000 for 'increased holiday costs'.

Series Editor's comment

The equitable principle of 'restitution' means that the compensation awarded must fully provide for the damage caused. The amount of the award is the cost required to restore the plaintiff to the position he or she would have been in had the 'damage' not occurred. There is increasing recognition that equity ultimately must be balanced by affordability if perverse effects are not to occur, such as obstetricians stopping delivering babies rather than face the cost of funding more claims like the Simpson claim.

Paying UMP call instalments

Many doctors are paying the calls made by United Medical Protection (UMP) by instalments (some doctors at the meeting had received an invoice on the day I was speaking). Must doctors continue to pay calls now that UMP has announced its plans for liquidation?

This is a difficult question on which professional advice should be sought. It appears to me that there is still a contract between the doctor and UMP. A doctor who does not pay the call will not only have no cover against potential liability but will also be in breach of the contract and possibly face a penalty for that breach. The period of the liquidation may be substantial and it is possible that it may not proceed.

Series Editor's comment

This is in the hands of the provisional liquidator. If he decides the outstanding balance of the call is a recoverable debt, he can demand payment. If it is not met, the member will become 'unfinancial' and hence lose all access to protection and indemnity. In a statement posted on UMP's website on 17 May 2002, UMP's provisional liquidator said:

'In relation to the payment of the 2002 Call instalment, notwithstanding the status of Provisional Liquidation of UMP, AMIL and MDU, members remain legally obliged to pay Call instalments. Failure to pay an instalment by the due date may result in expulsion from membership and the loss of membership benefits, as well as accelerate the obligation to pay other outstanding instalments. The failure to pay a Call instalment may (subject to its final terms, which are still being discussed) result in a member losing the benefit of the Government Guarantee.'

Federal Government's guarantee of UMP

The Federal Government has agreed to provide a $35 million capital guarantee for UMP until mid-year. What will happen after that? Will claims be paid if the event occurs before that time but the claim is made afterwards?

(This question raises issues of the widely feared 'tail' of liability claims – claims incurred but not yet reported. Since the asking of this question, the Federal Government has announced a six-month extension of its guarantee for UMP, although at the time of writing legislation from the State governments backing this guarantee has not yet been passed.)

This is a question I cannot answer. Certainly it is unlikely commercially that another insurer will pick up the tail. Also, the Government will probably not openly undertake to cover potential liabilities that cannot be estimated (even if there is later political pressure to cover the doctors concerned). People may ask why the Government should bail out doctors when it has not done the same for those who have lost money through the collapse of other insurance companies, for example HIH.

Series Editor's comment

UMP's insurer Australian Mezzanine Investments Pty Limited (AMIL) appears to have enough reserves to meet the current value of known claims and reported events. The provisional liquidator was originally reluctant to pay out known claims as that may have been seen to give preferential treatment to some creditors (known claimants) over others (potential claimants). However, on Friday 24 May, the NSW Supreme Court, having received a Letter of Comfort from the Federal Government, authorised the provisional liquidator to make payments on reported claims. UMP, as opposed to AMIL, appears to have little reserves available to meet claims reported in the future from currently unreported incidents.

Some of the other MDOs are offering limited 'prior acts protection', the longest apparently only back to January 2001. What rescue package may become available, if any, to help doctors fund claims arising from earlier events is entirely unknown at the time of writing.

Divestment of a doctor's assets

Could doctors avoid potential financial ruin by divesting themselves of their assets?

This action will not protect an uninsured doctor unless the assets are divested well before the claim is made. 'Fraudulent' divestments of assets to avoid legitimate creditors can be set aside and the assets retrieved. Also, doctors who want to transfer assets to their partners or children may have to pay substantial capital gains tax.

Series Editor's comment

Beware. The divorce rate in Australia is very much higher than the litigation rate. Also, children grow up and have a nasty habit of putting out their hands, when they turn 18, demanding access to their money.

Indemnity insurance and registration

What would happen if all, or even 80%, of NSW doctors refused to renew their professional indemnity insurance, so flouting the legal requirement that doctors must be covered by insurance in order to practise?

(This question was also asked in relation

to ACT doctors, who are not legally required to be insured in order to practise.)

A Clearly, this would be a breach of the Health Care Liability Act 2001 (NSW) (s 19) which requires medical practitioners to be covered by approved professional indemnity insurance.[1] If they are not, their registration may be cancelled by the Medical Board and they will be committing unsatisfactory professional conduct, for which they may be further disciplined by the Medical Board.[2]

However, that would not necessarily occur. The Board has a discretion whether to cancel the doctor's registration and it would obviously be a social disaster if all, or most, doctors were barred from practice overnight. However, these doctors would risk losing their assets if a claim was made.

Series Editor's comment

The requirement to have professional indemnity as a condition of medical registration has only applied in NSW since the start of this year. Clearly, the NSW Government could suspend temporarily the obligation by amending the relevant regulation.

Judicial error

Q *How are judges held accountable if they 'get it wrong'? Medical practitioners' boards can deregister doctors for unprofessional conduct or if they are unfit to practise on health grounds. In NSW, the board may also investigate unsatisfactory professional performance of doctors under the Medical Practice Act 1992 (NSW) Part 5A.[3] But what about judges: how can they be kept in line and removed from office if they are 'unsuitable'?*

(This question followed questions about cases in which judges apparently extended the liability of doctors beyond that previously applied by law. Cases that were mentioned included Kalokerinos v. Burnett*, in which a doctor was held liable for failing to follow up a patient who decided not to attend the specialist to whom the GP had referred her;* Lowns v. Woods*, in which a doctor was held liable for not attending a person he had not previously seen when asked to do so; and* Woods v. Procopis*, in which a doctor was initially held liable for not advising the parents of an epileptic boy about rectal diazepam, even though Australian doctors do not usually recommend that course – this finding was reversed on appeal* [Procopis v. Woods].[4-8]*)*

A There are procedures for having a judge removed from office but this is only done if the judge has committed very serious misconduct.

The tenure of the judiciary is carefully safeguarded in order to protect judicial officers from the fear of possible consequences when they are handing down their judgments. It is also a principle of the rule of law in a democratic society that judicial decisions should not be subject to attack by the legislative or executive branches of Government. This does not mean that judges are not accountable. Their decisions are recorded and read critically by other lawyers as well as the public at large. The judgments are also subject to further meticulous examination if the case is the subject of an appeal.

If a judge's decision is later considered to have been 'wrong' and is not overturned on appeal, it will not be followed in later cases. Decisions of judges at first instance have little precedent value in any event; but this observation applies also to decisions made on appeals. The decision may be 'confined to its facts' so that a different principle can be applied in a later case, on the basis that the facts are not the same as in the earlier case.

Series Editor's comment

Judges, like doctors, are human, and hence fallible. However, in my experience of the medical defence industry since 1989, judicial error is uncommon – and, dare I suggest, less common than medical error.

The fact that some doctors do not like certain decisions do not make those decisions bad ones or bad law. Most cases (for example, *Kalokerinos v. Burnett*, *Lowns v. Woods* and *Woods v. Procopis*) are badly reported in the medical press. If the facts are reported incorrectly, it is not surprising that some doctors take issue with the judgment said to have flowed from those facts.

Standards of proof for cases

Q *Why is the standard of proof in civil cases simply a 'balance of probabilities' and not the criminal standard 'beyond reasonable doubt'?*

(The questioner said he would rather face a criminal penalty and risk the damage to his reputation on a criminal charge, than face civil litigation with the lower standard of proof but equal potential harm to his professional reputation.)

A Criminal liability requires a higher standard of proof because conviction may have serious consequences, such as imprisonment, deregistration as a medical practitioner and damage to the person's professional and general reputation. Civil proceedings are obviously also distressing and attract publicity, but the effect on professional reputation and practice is likely to be short-lived.

Although the standard of proof in a civil case is a balance of probabilities, proof is almost always required from another medical practitioner to support the patient's allegation that the defendant doctor failed to take reasonable care. Liability is based on fault, not mere misadventure.

Series Editor's comment

Doctors are offended by the 'balance of probabilities' test because it is alien to the 'scientific' tests they apply daily – for

continued

example, when assessing a proposed new treatment. The insistence on greater application of evidence-based medicine is totally at odds with the lesser test of the balance of probabilities.

Legal costs a large proportion of award

Q *If a large amount of the settlement of each claim is allocated to legal costs, aren't lawyers the real winners in medical indemnity claims?*

Some medical defence organisations settle claims solely because it is commercially advisable not to defend them. Why is that so if most patients lose and are then ordered to pay the defendant's costs (even where the plaintiff's own solicitors are not paid because of no win–no fee arrangements)?

A There is certainly a perception that lawyers' fees are very substantial and sometimes out of proportion to the amount of compensation ultimately awarded.

This perception underlies the proposal put forward as this issue goes to press by NSW Premier Bob Carr to limit the amount that lawyers can charge for medical litigation. The NSW Government has introduced a Civil Liability Bill into Parliament which 'aims to cap general damages payouts to $350,000 for pain and suffering, and reduce compensation for loss of earnings', as reported in the *Sydney Morning Herald*, 29 May.[9] The newspaper report states that 'Amendments flagged yesterday lift the cap on what plaintiff lawyers can earn from cases, from 15 to 20%, and extends caps to defence lawyers acting on behalf of insurers'.

Lawyers' fees and other legal costs are generally ordered to be paid by the losing party but the amount that must be paid is not the whole amount of the costs. What the winner is entitled to recover from the losing party is the amount of 'party–party costs'. An additional amount of 'solicitor–client costs' must be paid by the winning party. Thus, even if a doctor 'wins' when sued, he or she (or the insurer) will have to pay his or her solicitor at least the solicitor–client costs for defending the action and, if the plaintiff is impecunious, the whole costs of the defence. Therefore, even if the plaintiff is unlikely to win, it may be commercially expedient not to defend the claim because these costs will still have to be paid even if the plaintiff loses.

Series Editor's comment

In 'no win–no fee' arrangements, if the plaintiff loses the case, the plaintiff's lawyer will receive no payment but also has no liability to meet any costs order made against the plaintiff. However, very few (less than 5%) of claims run to trial: a little under a half are abandoned by the plaintiff long before trial, and a little over a half are settled by the MDO – because the plaintiff's claim is considered likely to satisfy the legal test of negligence. MT

References

1. Health Care Liability Act 2001 (NSW) s 19.
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8. Melnitchouk O. Extending liability for medical negligence. Torts Law J 1996; 4: 259.
9. Morris L. Pass liability laws or we'll use force, warns Carr. The Sydney Morning Herald 2002; May 29: 1.