

Medical Malpractice Indemnity Solutions

OPINION

The Differences between Discretionary Indemnity and Insurance

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Editor's note: SMA Members would have heard by now that Jardine Lloyd Thompson (JLT) is the third and newest addition to the list of medical malpractice indemnity providers endorsed by SMA. As JLT offers their services as an insurance broker, SMA has asked them to pen an article to help SMA Members understand the differences between insurance-based and (the much more familiar) discretionary-based products.

This following article reflects the opinions of JLT and not necessarily those of the SMA. Past articles from the SMA Professional Indemnity Committee, and another provider of medical indemnity, can be found at <http://bit.ly/2PSFpPO> and <http://bit.ly/33IDw1U>, respectively.

Dear doctors of Singapore,

It has been almost three years since MOH Holdings moved all 9,000 of their public sector doctors onto a then new medical malpractice insurance solution. While the transition was smooth, we are still receiving queries from doctors regarding the differences between a Medical Protection Society (MPS) membership and an insurance solution.

We write to you today, in our capacity as insurance brokers, in response to the calls for an objective comparison between discretionary indemnity and insurance in Singapore. We will address the salient differences and suggest the areas a doctor should focus on when choosing between the different options in the market.

Discretionary indemnity

One of the benefits of joining mutual defence organisations, such as MPS, is having discretionary indemnity. As the name suggests, when a claim is made against a doctor, assistance will be provided solely at the discretion of the defence organisation.

Contractual indemnity: insurance solution

Doctors can purchase an insurance product, commonly known as “medical malpractice insurance”, for contractual indemnity. The terms of the contract define the scope of cover, establish the maximum amount covered for, and spell out

situations that will not be covered by the policy (otherwise known as exclusions).

Understanding the differences

There are unique features for discretionary indemnity and insurance solutions, and understanding them vis-à-vis your professional needs will allow you to choose the right option.

Wording/contract

By its nature, discretionary indemnity is not governed by a policy contract and, in some situations, can be more flexible in the manner with which the organisations can assist their doctor-members. However, if assistance is withheld, members will have limited recourse.

Insurance, on the other hand, is bound by a policy contract, which is a legal document binding both doctor and insurer to its clauses. While it may mean less flexibility, doctors who purchase insurance have contract certainty based on the terms and conditions within the policy contract.

Domicile/regulatory oversight

The UK's Department of Health and Social Care is studying the need to regulate discretionary indemnity providers. While there is no outcome yet, considerations for the regulation stem from the need to provide adequate cover for healthcare

professionals – to ensure that indemnity providers hold adequate reserves to pay for claims and for patients to have access to appropriate compensation.

Discretionary indemnity organisations trading in Singapore are neither registered nor regulated as insurance companies or financial institutions by the Monetary Authority of Singapore (MAS). Since they are not regulated as such, they are not obliged to fulfill the reporting requirements required of a registered insurance company or financial institution.

Insurance, on the other hand, is regulated by the MAS or their respective country's regulators. An insurer will have to comply with a minimum level of capital reserves in the country that they transact in. This reserve is illiquid and is there to ensure that the insurer has funds ready to honour their claims obligations. While having regulatory oversight provides insured doctors with additional assurance, it will come at a cost that will be passed on to the insured doctors through premiums collected.

Policy limit

Most times, discretionary indemnity, as its name suggests, does not have a concept of policy limit. While this creates greater uncertainty, confidence in its ability to meet members' needs is typically obtained from the historical experiences of the members of the organisation. This is in contrast to an insurance policy where limits are clear and defined, and its ability to meet policy payouts is dependent on its reserves, which are regulated by local authorities. Under an insurance policy, a doctor will select a limit and pay its commensurating premium, with a higher limit naturally drawing a higher premium.

Policy structure

In general, most discretionary indemnity providers are set up on an occurrence-based structure that provides cover for practitioners as long as they have an active occurrence-based indemnity/policy when the medical incident occurs. **This means that coverage depends on the timing of the medical incident.**

Insurance providers in Singapore offer both occurrence-based and claims-made covers. Claims-made covers protect practitioners from claims that are made against them during the indemnity period, regardless of when the medical event occurs. **This means that coverage depends on the timing of the claim.**

The discretionary indemnity model lends itself to an occurrence-based structure. However, an insurance model with a stated policy limit on an occurrence-based structure might see a doctor locked into a limit that is adequate at the point of purchase but may prove to be too low when a claim is brought against them several years later due to medical and legal inflation.

For an insurance coverage with a claims-made structure, it is important to review the availability of a run-off solution (commonly known as "tail cover") for when a doctor retires

from practice. A run-off cover would provide protection from claims brought against doctors in their retirement years for medical work done in the past. This would also provide doctors with the opportunity to increase their policy limit protection (in their last year of practice) to cater for medical and legal inflation on a claim brought against them in the future.

This is a simple summary of the differences. You should clarify with your insurance/indemnity provider and/or employer regarding the type and the extent of your cover. It is also extremely important that you obtain a letter of good standing (also known as a case history letter) from your incumbent indemnity provider before you switch providers. This letter will provide you with a record of all your previous claims history (if any) and may also be a requirement for purchasing indemnity from certain providers. At the same time, and for prudence, do conduct a thorough check of your clinical practice history and make any circumstance/claims notification for any matter that might have previously been unnotified.

Further considerations

When choosing between indemnity models, a doctor's key considerations can be broken down into the three following points.

Claims support

In our experience as insurance brokers, the most important aspect of any indemnity is the support rendered when there is a claim. At its core, indemnity solutions are promises to assist and support doctors when they need it. Your indemnity providers must return your calls for help with timely answers backed with high levels of technical expertise. It is important that:

1. Your medical indemnity broker/insurer/provider is responsive and able to quickly triage the severity of the claim matter. After the diagnosis, the correct measure must be taken to address the claim – whether to recommend mediation or immediately move things forward with legal representation.
2. An experienced panel of medico-legal lawyers supports the programme. Doctors need to have access to specialist legal advice and representation covering a range of professional issues, such as clinical negligence claims and disciplinary hearings. Your medico-legal lawyers should be focused entirely on your defence.
3. Your insurer or indemnity provider must be forthcoming in paying claims and swift to assist you in resolving matters to enable you to continue with your practice without having to worry about the claims.

Credibility and longevity

Ideally, your medical indemnity provider should remain in business while you are practising medicine and continue to thrive even after you have retired. They should hold good

standing among the medical community and the protection they offer should be credible and sound. The provider should be vetted for solid business fundamentals and be adequately capitalised for the long term. This is important to ensure that you are protected through and beyond your career as a physician. The history and outlook of your indemnity providers must be thoroughly reviewed.

Coverage

Coverage analysis should be conducted based on the breadth and depth of protection. Breadth considers whether the scope of cover is adequate for the work that the doctor performs and depth considers the sufficiency of the limit of liability.

The traditional breadth of protection required in Singapore is coverage against medical negligence claims, legal representation costs in the event of a disciplinary inquiry and coverage for the clinical staff working for the doctor. To take a longer-term view, the breadth must be broadened to encompass new modes of treatment like telemedicine.

The limit of liability required is a rather subjective consideration. Insurance or indemnity is a shield and not a sword. It is meant to restore individuals to their initial level of utility. This means that the doctor will be defended only up to the level of cost imposed on the doctor by the claim's financial obligation. Being under-insured will, therefore, be disastrous, as the insurance limit will not be high enough to cover the

payout, but being over-insured, or having a "sky is the limit" level of coverage, is also an unnecessary expenditure. It is thus important to consider both the highest and the average payout for your specialty.

Concluding thoughts

Insurance or indemnity is, at its core, a financial tool that allows doctors to practise medicine with peace of mind. We hope that the points set out in this article will help you to make an informed decision before you purchase your indemnity.

Both indemnity models have their respective strengths and weaknesses, but from a macro perspective, it is good that the pseudo-monopoly of the past is now more of a free market, such that doctors now have a choice of different medical malpractice indemnity providers.

The choice of your medical malpractice indemnity is an important one – it is protection for your livelihood and whichever model you choose must protect you in both the present and the future. ♦

With best regards,

Marsh-JLT Specialty
FINPRO Healthcare Team

