

OCCURRENCE-BASED OR CLAIMS-MADE:

WHICH MEDICAL MALPRACTICE PROTECTION IS RIGHT FOR YOU?

No indemnity model is perfect. They differ in characteristics and features such that individual doctors need to decide which would be the most suitable for their type of practice. To provide SMA members with generic information on indemnity models, the article, "Your Medical Practice Protection: Know Your ABCDEs before Something Goes Bump in the Dark" was published in the November 2015 issue of *SMA News* (<https://goo.gl/PvrE1J>). Following that, Dr Benny Loo, representing doctors in training in the SMA Council, conducted an interview with Dr Teoh Ming Keng, a medico-legal advisor in the Medical Protection Society (MPS), in a bid to address the many queries from doctors on how changes in the medical indemnity landscape could affect them. The interview was published in the March 2016 issue of *SMA News* (<https://goo.gl/kXJoul>).

SMA invites Mr Michael Griffiths, Regional Director, Healthcare, Aon Singapore, to provide insights on occurrence-based and claims-made indemnity covers. Michael has more than 20 years of experience in managing medical malpractice insurance, professional indemnity insurance, directors' and officers' liability insurance, and other specialist classes for major hospital groups, clinics and individual healthcare practitioners. He also has substantial experience in risk management, risk retention programmes and captive management in the Australian market.

Comment from the Editor: Malpractice indemnity is a difficult and complex topic. In the article published here, the author writes mainly about claims-made indemnity cover. Some readers, commenting on the "Ahead of Print" release of this article, said that it is not always clear which parts are about claims-made indemnity in general, which are about individual policies, which are about group cover arrangements and which apply to specific arrangements in current use (ie, the MOHH-Aon-MPLC programme that covers the majority of our young doctors).

In 2015, MPS announced they were making important changes to the medical malpractice protection offered to obstetrician members in Singapore. MPS was replacing the traditionally offered occurrence-based solution with a claims-made solution. At short notice, obstetricians in Singapore were forced to consider the type of protection that they carry against medical malpractice claims, and were immediately faced with an array of unfamiliar concepts and terminology: claims-made, claims-occurring, occurrence basis, run-off cover, nose cover, etc. In the inevitable confusion that followed, letters were written to newspapers, Government officials were lobbied and some even referred to a looming "indemnity crisis". In this article, we address issues that surround claims-made and occurrence-based protection to provide Singapore doctors the knowledge that will help them make informed choices.

In order to understand the nature of occurrence-based and claims-made protection, we need to consider the sequence of events that leads to medical malpractice claims. There are two important dates: the date when the patient was treated and the date when the patient brought their claim against the doctor. These two dates may occur close to one another or, as under Singapore law, may be as far apart as 24 years. Given that a doctor may have changed between different insurance or indemnity providers in the intervening period, it is necessary to determine which protection will respond: the protection that was in place on the date of the treatment or the protection that was in place on the date that the claim was brought?

The answer to this seemingly innocuous question reveals the key

difference between occurrence-based and claims-made protection. Under occurrence-based protection, it is the policy in place at the time of the treatment that responds. Under claims-made protection,¹ it is the policy in place at the time the claim is brought against the doctor that responds. Simple enough, but the implications can be material.

First, let us consider the case where a medical malpractice claim is brought against a doctor with occurrence-based protection. The doctor will need to determine the date or dates of the treatment and then identify the provider of indemnity or insurance at the relevant time. So long as the provider is still operating, the doctor will be able to lodge the malpractice claim, which will then be managed in accordance with the insurance policy terms and conditions, or in the case of a discretionary mutual, at the discretion of the mutual.

If the cover is claims-made, the doctor will lodge the malpractice claim with the current provider at the time of the claim. Such a claim will, depending on the type of protection, be managed either in accordance with the insurance policy terms and conditions or at the discretion of the mutual.

The mechanics of claims management for occurrence-based and claims-made protection are not significantly different.

One point to highlight is that where occurrence-based insurance protection is taken out, the impact of inflation can be significant. If a long period elapses between the time of the treatment and the time of the claim, medical or litigation inflation could lead to material increases in the

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settlement amount of a malpractice claim. Under an occurrence-based insurance protection, the claim will go back to the insurance policy that was in place at the time of the treatment and the amount of cover available will depend on the limit of indemnity chosen at that time.

For this reason, doctors who take out occurrence-based insurance protection need to make allowances for future inflation when selecting their limit of indemnity. Doctors who take out claims-made protection have the opportunity to select insurance protection limits based on current-day litigation trends.

An important difference between occurrence-based and claims-made protection comes to light when a doctor retires or ceases practice. For a doctor who has carried occurrence-based protection throughout his or her career, there is no need to purchase further cover in retirement. Any claims brought against that doctor in retirement will be covered by the protection in place at the time of the treatment. The important proviso here is that the occurrence-based protection provider at the time of the treatment must still be in business at the time the claim is brought. By contrast, doctors who have carried claims-made protection throughout their career must make arrangements to ensure continuing cover in retirement. This type of cover is known as run-off or tail cover and is typically purchased in multi-year blocks.

So which of these two types of cover is better? The key to answering this question is to consider the doctor's employment status. The majority

of doctors practising in Singapore do so as employees of either the public sector institutions or the larger private healthcare providers. For employee doctors, the primary defence against medical malpractice claims is not insurance or indemnity from a medical defence fund but the indemnity provided by their employer. It is the employer who is ultimately liable for the actions of their employees. In Singapore, employers of doctors currently adopt one of two strategies in order to protect themselves and employees against liabilities arising from the actions of their employee doctors:

1. Employers take out protection for each individual employee doctor. This protection acts as the first line of defence, shielding the employer from having to offer indemnity to the employee doctor.
2. Employers take out a group protection for claims brought against either the employer or its employees.

From the point of the employee doctor, it makes little difference whether the protection that their employer arranges is occurrence-based or claims-made. Individual protection is available on both occurrence and claims-made basis, while group protection is typically only offered on a claims-made basis. But in either case, it is the employer who bears ultimate responsibility for the actions of employee doctors both during the period of employment and after they resign or retire.

There is a difference for doctors acting as independent consultants in the private sector, or employed by a small clinic they have set up alone or in partnership with other

doctors. In such cases, there is no protection available in the form of indemnity from their employers and so a personal, occurrence-based protection will, if available, be selected by independent consultants due to the cover that it offers in retirement.

Finally, we need to consider the case where doctors' circumstances change during their career, requiring a move from one type of protection to another. Moving from an occurrence-based protection to a claims-made protection is straightforward. The occurrence-based protection will continue to cover future claims arising from date of treatment "prior" to the change of protection. The claims-made protection will provide cover for future claims arising from treatment "after" the change of protection.

Aon is opining on the theoretical distinction between claims-made and claims-occurring. It should be noted that there are situations with claims that can straddle the transition which can challenge and complicate this theoretical distinction.

Moving in the other direction, from claims-made to occurrence-based protection, is a little more complicated.

If a doctor moves from claims-made protection to occurrence-based protection, it will be necessary to take one of the following steps:

1. For employed doctors (and leaving to one side the legal question on sources of indemnity) to obtain a

confirmation from their employer of ongoing availability of indemnity and insurance for future claims that might arise from treatments given during the time of their employment.

2. For independent doctors, to ask the new occurrence-based provider to cover treatments in the past that will give rise to future claims.

Singapore doctors currently have a choice of three providers of malpractice claim protection: Medical Protection Society, NTUC Income and Aon Singapore Medical Indemnity. Genuine competition between providers is the best guarantee of access to the required protection at a reasonable price. It is important that doctors make informed choices when selecting their provider. We recommend that advice is sought from a licensed insurance intermediary specialising in medical malpractice protection in Singapore so that cover purchased is appropriate for the doctor's specific circumstances and needs. ♦

Note

1. We are aware of a Singapore-based protection provider referring to claims-made protection as "claims-occurring" protection.

SMA urges you to take this article only as general education. For information about, and terms applying to, your specific indemnity cover, you must refer back to the programme's specific terms and conditions. If you are in any doubt about any point, you should contact your indemnity provider for clarity.