

REPORT

Vicarious liability and the non-doctor owner

Do you have the
right insurance?

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Nihal D'Cruz and **Timothy Bowen** discuss why it's important to determine if your practice needs its own medical indemnity insurance.

So if a patient sues for something they say went wrong with the care they received, you're covered right?

You may own a medical practice with others, such as fellow doctors, other professional colleagues, family members or friends.

You're required by your medical registration to have professional indemnity insurance, which you take out.

So if a patient sues for something they say went wrong with the care they received, you're covered right? Not necessarily....

DIFFERING PRACTICE STRUCTURES

Business structures for medical practices are becoming more complex. The sole doctor practice, employing a number of nursing or administrative staff, is becoming increasingly rare. Doctors practice together in partnerships, or via corporate entities. There may be a number of people 'controlling' those entities, and they may not merely run the practice, but also have other business interests.

All of these complexities are relevant to determining what kind of insurance you need to protect your practice against a claim by a patient.



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DIFFERENT KINDS OF 'CLAIMS'

Even though a patient may incorrectly claim against the practice and its staff, it can still be necessary to involve lawyers to protect the interests of the practice and its staff, particularly to ensure a misdirected claim is abandoned. This can be costly.

It is not just claims your practice may face from patients. They might also make complaints to a health complaints body, which can require a response from the practice. If a patient passes away, the role of the practice and its staff can be investigated by the Coroner. Complaints or claims could also be brought by practice staff involving alleged bullying, harassment or unfair dismissal. These matters can require specialist legal advice, which without the benefit of insurance can also be very costly.

Below provides a good example of a typical situation where insurance for a medical practice, not just the doctors working there, is needed.

A TYPICAL PRACTICE NOW

ABC Pty Ltd operates the ABC Medical Centre, which is a non-procedural general practice. ABC Pty Ltd is part-owned by Dr Chan and Dr Jones, who also run the day-to-day operations of the practice. Ms Allen, who is not a doctor, is the other owner of ABC Pty Ltd. Whilst Ms Allen has a financial interest in the practice she is not involved in its day-to-day operations.

ABC Pty Ltd employs two other GPs, and both nursing and administrative staff in the practice.

All the doctors working in the practice, other than one of the employed doctors (Dr X), have their individual medical indemnity insurance with MIGA. Dr X is insured with another medical indemnity insurer.

ABC Pty Ltd does not have professional indemnity insurance in its own right.



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IT COULD HAPPEN TO ANYONE – THE MISFILED IMAGING REPORT

Dr X was treating Mr Harvey who presented with left knee pain. Dr X believed that Mr Harvey had suffered a minor strain to his left knee which should settle with RICE (rest, ice, compression and elevation). As a precaution Dr X referred Mr Harvey for x-ray investigations of the left knee. He told Mr Harvey that he doubted the x-rays would reveal any serious abnormality.

Mr Harvey underwent x-ray imaging which revealed some bone abnormality. The reporting radiologist recommended further investigation.

The radiology report was forwarded to Dr X at ABC Medical Centre. When received by ABC Medical Centre the radiology report was accidentally misfiled by busy administrative staff and not referred to Dr X.

Mr Harvey's knee symptoms were improving and he did not go back for medical treatment until a few months later with an unrelated medical condition. During the consultation Dr X discovered that he did not have any record of having received the results of the left knee x-ray. A subsequent search located the original radiology report, which revealed a suspicious lesion in the left knee area. Mr Harvey was referred for further investigations.

Ultimately he was diagnosed with an advanced cancerous bone tumour near the head of the left tibia. His treatment needs were significant, and prognosis uncertain.

THE PATIENT SUES DR X AND THE PRACTICE

Mr Harvey consulted a solicitor to explore a claim for the delay in diagnosis of his tumour. He subsequently pursued a damages claim against both Dr X and ABC Pty Ltd, the latter as operator of the practice and the employer of the administrative staff member who had

misfiled the original x-ray report (the latter on the basis of 'vicarious liability').

Neither Dr Chan nor Dr Jones' medical indemnity insurance extended to cover ABC Pty Ltd, and Ms Allen was not insured.

Dr X's solicitors informed ABC Pty Ltd that they considered it was primarily responsible for Mr Harvey's claim due to a failure of practice systems and its staff, leading to the misfiling of the report.

As ABC Pty Ltd did not have its own professional indemnity insurance, ABC Pty Ltd was required to defend the proceedings out of its own funds. It instructed its own solicitors to represent it, which involved:

- Obtaining evidence on the respective responsibilities between Dr X and the practice and its staff
- Seeking medical evidence on Mr Harvey's condition and prognosis
- Liaising with the other parties, including with Dr X's solicitors, about an appropriate share of liability between Dr X and ABC Pty Ltd
- Advising on settlement options and attending a mediation/settlement conference
- Being ready to defend the claim at trial if it could not be settled on a reasonable basis.

The costs to ABC Pty Ltd were significant, running into the tens of thousands for its own legal costs, and potentially into the hundreds of thousands or even more for its liability to Mr Harvey, depending on his condition and prognosis.

In this context, Mr Harvey could also make a complaint to a health complaints body against the practice, which could require a response, leading to further processes and costs.

WHY PROFESSIONAL INDEMNITY INSURANCE FOR THE PRACTICE WOULD HAVE HELPED

Whenever company structures are created by individuals (which can include medical and non-medical ownership) and the “company” employs staff including doctors, the “company” has a vicarious liability for the conduct of its employees in the course of their work.

The “company” can also be liable directly for any acts and omissions of its owners and managers, including around practice systems and choice of suitable staff. In this situation, medical practices should consider arranging their own professional indemnity insurance to cover their exposure in the event of a claim or other complaint.

In the example above “the company” cannot rely on the individual medical indemnity insurance policies of the doctors who partly own the practice.

In situations where the doctors working in the practice are insured with different insurers, or the practice is part-owned by a non-medical individual (or another entity) who does not have medical indemnity insurance, the practice entity will always need its own professional indemnity cover.

MIGA’s Professional Indemnity Insurance for Healthcare Companies would cover ABC Pty Ltd in relation to its own liability, and also its vicarious liability for the conduct of its employees in the course of their work.

CONSIDER YOUR SITUATION – PROTECTION FOR YOUR PRACTICE OR HEALTHCARE COMPANY AND EMPLOYED STAFF

If you answer ‘Yes’ to any of the below questions then your practice or healthcare company may need its own medical indemnity insurance.

Does your practice or healthcare company:

- Employ or contract health care professionals, including doctors, other professional staff and support staff?
 - If ‘Yes’, are your staff, including doctors, insured by different insurers? Do you understand the scope of their cover?
- Employ administrative staff to support the doctors and other professionals in the practice?
- Engage locums and other temporary staff?
- Provide services to doctors and other health care professionals for a fee?
- Lease its facilities to other health care professionals?
- Own or lease machinery and/or medical equipment to provide the services (e.g. diagnostic equipment)?

WHAT YOU NEED TO CONSIDER

MIGA offers superior cover, complemented by expert medico-legal support from MIGA’s claims solicitors and an innovative and industry leading Risk Management Program. At MIGA, we are here for you...Always. 

If you are not insured with us, give us a call on 1800 777 156 to see if MIGA can offer you more value and better protection. Further details about the cover we offer practices and healthcare companies is available at www.miga.com.au/healthcare

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