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Commentary: Change In Obstetrics Indemnity Cover From Occurrence-Based To Claims-Based

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ABSTRACT

The Medical Protection Society (MPS) has changed its obstetrics indemnity cover from occurrence-based to claims-based for all members of the Obstetrical and Gynaecological Society of Singapore (OGSS), for policies renewed on and from 1 March 2015. This paper will discuss the impact of this change in light of the extended limitation period for claims by minors and explores possible solutions.

Keywords: Obstetrics indemnity, occurrence-based, claims-based, tail cover, limitation period

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INTRODUCTION

The history of medical indemnity insurance in Singapore has not been uneventful, and includes various changes of insurance providers,[1] the collapse of an insurer and the consequential withdrawal of coverage.[2] The latest in this saga is MPS's abrupt announcement in January 2015 of a change in its obstetrics indemnity cover from occurrence-based to claims-based for all OGSS members, effective for policies renewed on and from 1 March 2015.

Under occurrence-based coverage, the insurer will cover the claim so long as the doctor was insured at the time of the occurrence of the event leading to the claim (the Relevant Event). Under claims-based coverage, the insurer will cover the claim only if the doctor was insured both when the Relevant Event occurred and when the claim is brought.

Comparison of Premiums

The common perception (often used to justify the switch from occurrence-based to claims-based coverage) is that claims-based is cheaper than occurrence-based

coverage. Since MPS's change in basis of coverage, premiums have dropped from $36,000 to $22,045.[3] However, in practice, lower premiums only apply to the first few years of the policy. As the MPS website warns, "the cost of claims-made [coverage] will rise annually to reflect the increasing risk [doctors] accumulate".[4] Claims-based premiums typically reach maturity around the 5-year mark.[5] After the premium matures, the rates of claims-based and occurrence-based coverage tend to be similar.[6] Further, the comparison of premiums does not factor in the cost of tail cover, which, for OGSS members, will be substantial. A long-term premium differential may, in fact, be a misperception.

Disadvantage of Claims-Based Coverage

Claims-based cover leaves doctors unprotected in a number of scenarios, two of which are significant. The first is when the doctor changes insurer, where the original insurer provided claims-based coverage. In such a case, the new insurer will not cover the doctor in respect of Relevant Events that occurred while under the original insurer. To eliminate this gap, the doctor will have to purchase additional coverage at an extra premium (retroactive cover). Retroactive cover has to be purchased to cover the entire period for which claims may be brought by any patient.

The second gap is upon retirement. In order to remain covered for Relevant Events that occurred while they were in practice, doctors will have to purchase extended reporting benefits (tail cover or run-off cover), post-retirement, to cover the period for which claims may be brought by any patient.

For completeness, the authors note that occurrence-based cover does not give a complete guarantee of support when a claim is made; obviously the insurer would still need to be in existence and able to pay out.[7]

Effect of the Limitation Act

Most claims made against doctors are for personal injury and are founded on the tort of negligence. The Limitation Act[8] specifies that such claims must be brought within a limitation period of three years from the Relevant Event.[9] The limitation period is extended in certain circumstances, for example, in the case of latent injury, the three year period runs from the date that the claimant has the knowledge or should reasonably have the knowledge for bringing the action.[10]

More relevantly for doctors, in cases where the claimant also suffers from a disability (which includes minority),[11] the limitation period is extended to three years from the date when that claimant ceases to be under that disability. The age of majority in Singapore is 21.[12] Effectively, patients who receive treatment as minors (including at birth) may make claims until the date that is three years from their 21st birthdays. Obviously, the greatest impact of the extended limitation period for minors will be felt by specialists dealing with neonates and infants: obstetricians, anaesthetists assisting at delivery and paediatricians.

Practical Impact of MPS's Change of Indemnity Cover

MPS's change of indemnity cover has implications for two particular groups of OGSS members. First, OGSS members who are considering a change to other insurers offering occurrence-based cover (e.g. NTUC Income[13]) will have to purchase retroactive cover for the period that MPS was insuring them on a claims basis i.e. from 1 March 2015 to the date their new policies take effect.

Second, OGSS members insured by MPS will have to purchase tail cover on retirement. In light of the extended limitation period, retiring OGSS members theoretically have to purchase 24 years of tail cover from the date of their last delivery. MPS is apparently offering "extended reporting benefits" in five-year blocks after retirement, estimated to cost up to 1.75 times of the highest premium paid, for the first such five-year block.[14] MPS is silent on how subsequent blocks of premiums will be priced; it would be logical for the premiums to decrease as the risk of claims decreases with the effluxion of time. MPS has also indicated that it is unwilling to "forward sell" tail cover because future risks are unpredictable. This leaves OGSS members facing considerable uncertainty.

Public hospitals have committed to continue covering medical indemnity services so as to "enable obstetricians in the public hospitals to practise without the anxiety of future indemnity cover once they retire".[15] However, only 91 of 311 obstetricians here work in public hospitals.[16] Further, if these obstetricians go into private practice prior to retirement, it is not clear whether they will remain covered in respect of all Relevant Events that occurred while they were in public hospitals, or if coverage will cease once they leave.

In the authors' view, obstetric cases are the bread-and-butter cases in a number of hospitals, and have a domino effect on referrals to other specialties.[17] It is only a matter of time before private hospitals realise this and respond to the change of MPS's coverage from occurrence-based to claims-based; the authors understand that the Parkway

Group has already taken steps to address this issue.
In light of this situation, a survey conducted by OGSS showed that 140 of the 311 registered obstetricians would consider stopping the practice of obstetrics within the next 5 years.[18] This translates to a potential loss of a wealth of experience; and more significantly, to the turning away of high-risk cases. The fear of a potential lawsuit has raised the spectre of defensive obstetrics, and 93% of the doctors in the survey said that they felt pressured to raise patients' fees to keep up with the increasing premiums. It is thus necessary to explore possible solutions to the present situation.

POSSIBLE SOLUTIONS

Insurance Alternatives

There are other players in the Singapore medical indemnity insurance market with which it may be worth exploring options.[19] The authors understand that The MPLC Ltd, a leading underwriter in medical professional liability insurance, will be underwriting claims-based cover to house officers and medical officers in public hospitals.[20] NTUC Income is also in the market, offering so-called "incidence occurrence-based" cover; significantly, this is limited to claims made in the two years following the end of the insurance period.[21] Further, NTUC Income has a S$5 million cap on coverage[22] and is not a specialist in the medical indemnity field.

OGSS is not a big society and its bargaining power may be limited. It is possible – indeed, likely – that MPS will roll out claims coverage for more specialties, such as paediatrics and anaesthesiology. Even then, bargaining power will remain limited as long as each doctor takes out insurance individually. By way of comparison, all of the approximately 4,700 practising lawyers in Singapore must insure under Scheme Insurance arranged by the Council of the Law Society. The Law Society's account is the single largest broked account in the Singapore market[23] and it is thus able to negotiate effectively with its brokers and underwriters. There are more than 7,000 doctors who are members of the Singapore Medical Association (SMA).[24] Historically, SMA has been reactive in trying to arrange coverage and explore options. SMA does not appear to have engaged in arranging the brokering and underwriting of coverage, and the terms of such coverage, for doctors. Were SMA to arrange insurance for all doctors, its bargaining power would be significant. Close to home, Malaysian doctors have a choice of MPS as well as (among others) a local, customized indemnity scheme under the Malaysian Medical Indemnity Insurance Scheme (MMI Scheme).[25]

For that matter, even if OGSS itself were to arrange some measure of insurance for its members, its bargaining power would be more than each individual doctor's. As such, the authors suggest that OGSS explores options itself or with the SMA.[26]

Self-Insurance and Government Intervention

It may be worthwhile to consider some form of self-insurance or government intervention. Various self-insurance schemes exist in the UK which merit consideration.[27] Alternatively, the government could implement a scheme of top-up fund cover, which would have doctors self-insuring up to an "entry level" amount, and the fund stepping in to cover any excess. Such schemes exist in other countries[28] and have been suggested by local commentators.[29] Another possible avenue is government support that subsidises insurance premiums. In Australia, the government subsidises the gross medical indemnity costs of doctors once such costs exceed 7.5% of their gross private medical income.

However, the authors recognise that it is unlikely for the government to step in at this point, since awards for medical negligence to date have been relatively modest (this could change with more foreign patients seeking medical help in Singapore[30]) and there appears to be no lack of obstetricians joining the workforce in the near future.[31]

Liability Cap

Another possible solution that deserves examination, albeit one that would also require legislative support, is the possibility of a cap on medical malpractice liability. More than half of the states in the US have caps on liability.[32] It has been suggested that in the states with the lowest caps (from US$250,000 to US$300,000), medical litigation has decreased and insurance premiums for doctors remain low.[33]

Reform of the Limitation Act

The authors suggest that OGSS should lobby for reform of the Limitation Act. At present, Singapore law has a straightforward (if blunt) "traditional" limitation period of 3 years for physical injury, with an exception (among others) for minority.[34] However, innovative alternative concepts can be found in the statutes governing limitations of actions in Canada and Australia.

First, nine Canadian states[35] and six Australian states[36] have, in some form, an "ultimate limitation period" (ULP). An ULP is a fixed period of time that starts running from the date of the Relevant Event. Singapore has a 15-

year ULP,[37] directed at latent defects. This 15-year limit does not apply to persons under disability. The authors understand that a 10-year limitation period has been mooted in discussions with the Ministry of Health.

Second, four Canadian states[38] and five Australian states[39] have some form of "notice to proceed". This concept allows potential defendants to serve notice to the potential claimant (provided the claimant, if a minor, has a guardian). The notice to proceed starts the limitation period "clock" ticking as though the minor were of age. With this concept in place, a doctor who has delivered a baby and knows he or she may be liable for damage caused may serve a notice to proceed and start the limitation period running, rather than remain at the mercy of a potential lawsuit for the next 24 years.

Third, a more nuanced approach could be explored. In Western Australia, minors under the age of 15 have a limitation period of six years, which runs only when they have a guardian.[40] Also, minors from the age of 15 to 18 must bring claims before they turn 21.[41] Effectively, this puts the onus on parents/guardians to commence an action in a timely fashion, subject to the court's discretion to extend in certain circumstances.

While an ULP could be considered to balance the rights of patients with peace of mind for doctors, the authors are of the view that the political will may not be present to legislatively shorten the extension of the limitation period for minors, especially if the truncation only applies to cases of medical negligence. Nonetheless, any lobbying attempts will serve to bring this issue to public consciousness.

CONCLUSION

Alea iacta est[42]: higher premiums, and increasingly limited insurance coverage, for OGSS members are inevitable. Obstetricians are the first target; it is only a matter of time before other specialties find themselves subjected to similar coverage curtailments. Occurrence-based coverage will likely be phased out entirely. The number of claims and quantum of awards in respect of medical negligence is rising and will continue to rise. The recent UK Supreme Court decision in Montgomery v Lanarkshire Health Board[43] – an obstetrics case – imposes a far higher duty of care on doctors advising patients of risks involved in treatment, beyond Bolam[44] and Sidaway.[45, 46]

As the relevant regulatory and professional bodies continue to engage in discussions with insurers and regulators, seeking possible solutions to the current situation, the authors have suggested a range of possible solutions above that may help to balance the interests of doctors, patients, insurers and the costs involved in providing medical care.

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2. *On 29 April 2002, the UMP Board decided to hand over the running of the company to the Australian government. The UMP Provisional Liquidator was appointed on 3 May 2002, and the UMP ceased cover for Singapore members after 3 May 2002: ibid*

3. *Khalik S. Looming shortage of doctors to deliver babies [Internet]. Singapore: Straits Times; 2015 Feb 20 [cited 2015 Jul 14]. Opinion; [about 3 p.]. Available from:www.straitstimes.com/opinion/looming-shortageof-doctors-to-deliver-babies*

4. *Claims-made protection with MPS [Internet]. London: Medical Protection Society; 2015 [cited 2015 Jul 14]. Membership subscription rates; [about 1 screen]. Available from: www.mpsclaimsmade.org/sgp/about/rates/*

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6. *ibid*

7. *This is evident from the collapse and subsequent termination/curtailment of coverage of UMP: Professional Indemnity Protection for Medical Practitioners. SMA Advisory No. 01/2002.*

8. *Limitation Act, Cap 163, Rev Ed 1996 Sing*

9. *ibid s 24A(2)(a)*

10. *ibid s 24A(2)(b), s 24A(4), s 24A(6). There is a 15-year cap on actions for latent defects: ibid s 24B*

11. *ibid s 2(2)*

12. *The age of majority in Singapore is established by common law, and is supported indirectly by various legislative references e.g. Article 124 of the Singapore Constitution, the heading of which is "Registration of minors", provides for circumstances when the Government may cause a child under the age of 21 years to be registered as a citizen of Singapore: Constitution of the Republic of Singapore, Rev Ed 1999 Sing, art 124.*

13. *Prior to 1 March 2005, NTUC Income provided claims-based coverage as it found that no re-insurer was willing to provide cover for an "occurrence based" type of scheme: Goh LG. The UMP Crisis and Beyond. SMA News. 2002 Jun;34(6):1-2. NTUC Income introduced incidence occurrence cover from 1 March 2005: Yue WM. News from SMA Council. SMA News. 2005 Mar;37(3):8.*

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17. *The Parkway Group's experience with Mount Elizabeth Novena is in point; any absence of or decrease in the number of obstetric cases may lead to a corresponding decrease in cross-referrals to other specialists.*

18. *Khalik S. Looming shortage of doctors to deliver babies [Internet]. Singapore: Straits Times; 2015 Feb 20 [cited 2015 Jul 14]. Opinion; [about 3 p.]. Available from: www.straitstimes.com/opinion/loomingshortage-of-doctors-to-deliver-babies*

19. *Examples are NTUC Income and Howden International Pte Ltd. However, because these providers are not specialized medical indemnity insurers, the support they lend may be inadequate.*

20. *The MPLC Ltd underwrites policies broked by Aon Singapore, which is a registered direct insurance/reinsurance broker under the Insurance Act, Cap 142, Rev Ed 2002 Sing.*

21. *This two-year period may be extended at NTUC's discretion, and any extension may be subject to conditions: Medical Indemnity Insurance [Internet]. Singapore: NTUC Income; 2015 [cited 2015 Jul 14]. Commercial Insurance; [about 2 screens]. Available from:www.income.com.sg/insurance/insurance-forbusinesses/commercial-insurance/medical-indemnity-insurance*

22. *Compare MPS's coverage limit of S$15 million.*

23. *Singapore Associates Support Just Walk Initiative [Internet]. Lockton Inc; 2012 [cited 2015 Jul 14]. Highlights; [about 1 screen]. Available from: lockton-asia.com/Singapore-Associates-Support-Just-Walk-Initiative*

24. *Singapore Medical Association. SMA 55th Annual Report 2014/2015. Singapore: Singapore Medical Association; 2015. 24 p.*

25. *While the MMI Scheme is claims-based, retirement tail cover is free as long as the insured was covered under the MMI Scheme for at least 5 continuous years prior to retirement: Malaysian Medical Indemnity Insurance Scheme (MMI) [Internet]. Malaysia; Aon Insurance Brokers (M) Sdn. Bhd.; [cited 2015 Jul 14]. Medical Indemnity; [about 3 screens]. Available from: affinity.aonapac.com/MMA/Malaysian_Medical_Indemnity.aspx. The MMI Scheme covers approximately 40% of the market.*

26. *It is worth noting that insurance taken out by an organization often allows for greater flexibility and perpetuity; it is possible to arrange coverage for a doctor post-retirement under the organization's plan, as long as the organization remains covered.*

27. *For example, England has the Clinical Negligence Scheme for Trusts, Scotland has the Clinical Negligence and Other Risk Indemnity Scheme, and Wales has the Welsh Risk Pool.*

28. *For example, in Florida, the Patient's Compensation Fund is embodied in Cap 766 of the 2014 Florida Statutes. Ireland, Canada and Australia also have such measures in place.*

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40. *Western Australia Limitation Act 2005 s 30(1), s 32(1)*

41. *ibid s 31(1)*

42. *The die is cast*

43. *[2015] 2 WLR 768*

44. *Bolam v Friern Hospital Management Committee [1957] 1 WLR 582*

45. *Sidaway v Board of Governors of the Bethlem Royal Hospital [1985] AC 871*

46. *The development in Montgomery has not yet been addressed by Singapore courts.*