

# Medical Malpractice and Allied Health - some thoughts.



## MEDICAL INDEMNITY INSURANCE

- HIGHLY REGULATED RETAIL PRODUCT
- COMPULSORY FEATURES INCLUDE:
  - MIN \$20M ANY ONE AND ANNUAL LIMIT
  - UNDERWRITING “RESPONSES” LIMITED
  - CIVIL LIABILITY COVER
- EXTENSIVE GOVERNMENT SUPPORT:
  - BLUE SKY SCHEME
  - HCCS
  - PSS
  - ROCS
  - INSURER OF LAST RESORT ...

## MEDICAL MALPRACTICE

- WHOLESALE PRODUCT
- TARGETTED AT “ENTITIES” FOR THE MOST PART:
  - MEDICAL CENTRES AND CLINICS
  - MIXED PRACTICES
  - DAY SURGERIES
  - PRIVATE HOSPITALS
- UNREGULATED UNDERWRITING RESPONSES:
  - EXCESSES “NEGOTIABLE”
  - LIMIT NEGOTIABLE
  - COVERAGE FLEXIBLE

## **ALLIED HEALTH IN AUSTRALIA**

**CLINICAL HEALTH CARE PROFESSIONALS APART FROM  
DOCTORS AND NURSES = 60%  
OF TOTAL HEALTH WORKFORCE.**

- **DIAGNOSTIC**
- **TECHNICAL**
- **THERAPEUTIC**
- **DIRECT PATIENT CARE**

## ALLIED HEALTH PROFESSIONALS

- AUDIOLOGISTS
- CHIROPRACTORS
- DIETITIANS
- OPTOMETRISTS
- PHARMACISTS
- PHYSIOTHERAPISTS
- PODIATRISTS
- OSTEOPATHS
- OPTOMETRISTS etc

## ALLIED HEALTH WORKERS

FASTEST GROWING EMPLOYMENT SECTOR  
IN HEALTH IN AUSTRALIA ...

ABS est POPULATION IN 2051 AT 34.2m  
22.3% AGED OVER 65!!

- ACUPUNCTURE
- BOWEN MASSAGE
- COLONIC IRRIGATION
- CRYSTAL THERAPY
- NATUROPATHY
- NUTRITION
- PARAMEDICS and FIRST AID etc
- REIKI
- TRADITIONAL CHINESE MEDICINE

## MEDMAL COVER

- CIVIL LIABILITY:
  - NEGLIGENCE
  - BREACH OF CONSUMER LEGISLATION
  - LIBEL AND SLANDER
  - IP BREACHES
  - CONFIDENTIALITY/PRIVACY
- VICARIOUS LIABILITY iro MEDICAL PRACTITIONERS; LOCUM TENENS
- EMPLOYEE DISHONESTY
- STATUTORY LIABILITY
- ENQUIRY COSTS (LEGAL REPRESENTATION)

## **VICARIOUS LIABILITY**

A STRICT LIABILITY FLOWING FROM NON-DELEGABLE DUTY OF CARE.

EMPLOYER – EMPLOYEE

HOSPITAL – PATIENT

vs DUTY OF CARE

## **PUBLIC LIABILITY WITH TREATMENT RISK**

**Vs**

## **MEDICAL MALPRACTICE INSURANCE**

TREATMENT AND THERAPY EXTENSION ...

*ANY DEMAND MADE BY A THIRD PARTY UPON YOU ... **REPORTED TO US DURING THE PERIOD OF INSURANCE** ARISING OUT OF ANY **NEGLIGENCE ... IN CONNECTION WITH YOUR BUSINESS ACTIVITIES***

...

### ***EXTREMELY NARROW COVER***

- ***NO CIVIL LIABILITY “FEATURES”***
- ***PRIVACY; DEFAMATION; IP INFRINGEMENT; ENQUIRIES ?????***

## THE MARKET ...

| <u>Occupation</u>      | <u>2001</u>   | <u>2006</u>    | <u>Change %</u> |
|------------------------|---------------|----------------|-----------------|
| Doctors                | 51,791        | 57,019         | 10.1            |
| Medical Imaging        | 8,170         | 10,447         | 28.2            |
| Dental workers         | 27,876        | 29,624         | 14.5            |
| Nursing workers        | 193,268       | 222,133        | 14.6            |
| Registered Nurses      | 174,268       | 202,735        | 16.3            |
| <b>Allied Health</b>   | <b>51,046</b> | <b>65,284</b>  | <b>27.9</b>     |
| <b>Comp. therapies</b> | <b>10,964</b> | <b>16,354</b>  | <b>49.2</b>     |
| <b>Other health</b>    | <b>90,267</b> | <b>131,142</b> | <b>45.3</b>     |

## **SOME CLAIMS EXAMPLES ....**

### **Failure to pass on results:**

PATIENT ATTENDED A GP CLINIC FOR CONSULTATION.  
POSSIBLE BCC /SqCC IDENTIFIED DURING EXAMINATION.  
BIOPSY PERFORMED AND RESULTS RETURNED TO CLINIC  
(MELANOMA).

DUE TO AN ADMIN ERROR THE RESULTS WERE NOT RELAYED  
TO THE PATIENT FOR SIX MONTHS ...

LOSS OF OPPORTUNITY CLAIM FOLLOWED.

## **Breach of privacy/confidentiality**

GP CLINIC. STAFF MEMBER WAS ALLEGED TO HAVE PROVIDED DETAILS OF PATIENT INJURY OVER THE PHONE TO A TP.

PATIENT COMPLAINED AND ALLEGED BREACH OF CONFIDENTIALITY AND BREACH OF NATIONAL PRIVACY PRINCIPLES AND SOUGHT PAYMENT OF DAMAGES.

THE MATTER PROCEEDED TO VCAT WHERE A DECISION IN FAVOUR OF THE PRACTICE WAS MADE, BUT THE COSTS OF LEGAL REP WERE CIRCA \$20,000 A SUM MET BY THE INSURER.

## Yoga instructor – manipulation

CLAIMANT REGULARLY ATTENDED YOGA CLASSES.

ALLEGED THAT SHE SUFFERED INJURY WHEN THE INSTRUCTOR PERFORMED A SPINAL ADJUSTMENT AT HER REQUEST, WHICH DAMAGED THE CERVICAL SPINE AND RESULTED IN MEDICAL EXPENSES OF SOME \$100,000.

INSTRUCTOR DEFENDED POSITION BY ASSERTING PATIENT ALWAYS ASKED FOR ADJUSTMENTS EVEN IF EXPERIENCING PAIN, DESPITE BEING TOLD NOT TO DO SO AND MANIPULATION FOLLOWED ESTABLISHED INDUSTRY STANDARDS etc.

MATTER WAS COMPROMISED AT \$50,000 DUE TO LITIGATION RISK.

## Beauty therapists – some common themes:

- *COSMETIC TATOOING:*

FULL LIP TATOOING. SUBSEQUENTLY PATIENT DEVELOPED COLD SORE OUTBREAK. PATIENT ASSERTED THERAPIST FAILED TO PERFORM THE PROCEDURE PROPERLY.

THERAPIST DEFENDED SAYING SHE PROVIDED ALL APPROPRIATE WARNINGS, INCLUDING PROVISION OF A BROCHURE AND PATIENT SIGNED INDEMNITY FORM ...

RESOLVED IN FAVOUR OF THERAPIST.

- *LASER HAIR REMOVAL - BURNS*
- *SKIN PEELS – BURNS AND BLOTCHES*
- *IPL – BURNS AND BLOTCHES*

## **Psychologist:**

COMPLAINT FROM PATIENT TO PSYCHOLOGISTS  
REGISTRATION BOARD REGARDING TREATMENT.

BOARD DECIDED TO INVESTIGATE AND LEGAL  
REPRESENTATION WAS PROVIDED FOR THE PSYCHOLOGIST.

MATTER WAS DEFENDED BUT AT A COST!

## **Nurse – coronial enquiry**

NURSE WORKING IN OUTBACK HOSPITAL. CHILD PRESENTED 3 TIMES OVER 4 DAY PERIOD WITH FLU-LIKE SYMPTOMS. MOTHER WANTED TO SEE THE DOCTOR BUT WAS TOLD HE WAS AVAILABLE ONLY IN EMERGENCY SITUATIONS.

CHILD PRESENTED A FOURTH TIME WITH RAPID BREATHING AND FEVER. WAS ADMITTED AND DOCTOR EXAMINED HER AND JUDGED HER CONDITION TO BE STABLE. REMAINED OVERNIGHT AND TRANSFER WAS ARRANGED FOR THE FOLLOWING DAY TO ANOTHER HOSPITAL FOR FURTHER TESTS, BUT THE CHILD DIED.

CORONIAL ENQUIRY NECESSITATED LEGAL REP FOR THE NURSE, AGAINST WHOM NO ADVERSE FINDING WAS MADE. COSTS ABOVE \$60,000!

## **Mixed health care clinic:**

PATIENT PRESENTED TO RECEPTION COMPLAINING OF CHEST PAIN. WAS ASKED TO WAIT UNTIL A DOCTOR WAS FREE.

“FORGOTTEN” FOR 30 MINUTES AND SUFFERED CVA AND SIGNIFICANT SEQUELLAE.

ENTITY WAS SUED BY PATIENT AND DEPENDENTS - HELD TO BE LIABLE. STAFF OUGHT TO HAVE RECOGNIZED SERIOUSNESS AND HAD HIM LOOKED AT BY A DOCTOR “IMMEDIATELY”.

DAMAGES AWARD WAS SIGNIFICANT!