Aon Asia Healthcare Update: Medical Malpractice Insurance

Welcome to the first Asia Healthcare Update. Each month, we will prepare a note on an issue affecting our Healthcare clients in Asia. In this edition, we review the issue of hospital vicarious liability for the actions of independent consultant doctors.

Spinal Surgery at Penang Adventist Hospital in Malaysia

On 2 June, 2008 a 12 year old patient was admitted to the Penang Adventist Hospital in Malaysia for spinal surgery. Due to alleged negligence in the care provided prior to, during, and after the surgery the patient was rendered quadriplegic. The parents brought legal action against the hospital and three independent consulting doctors.

On 14 July, 2015 the Malaysian High Court issued its judgment. As well as awarding a record MYR6,023,802 (approximately USD1,500,000) the judgment is notable for the fact that the court held Penang Adventist Hospital to be vicariously liable for the actions of the doctors despite the fact that the doctors were independent consultants and therefore not hospital employees.

The potential for hospitals to be held vicariously liable for the actions of independent consultants has always existed. The UK case of Roe v Minister of Health (1954) is often cited, where the court held that even if independent consultants are not servants of the hospital they are its agents and therefore the hospital is liable for their action.

From a Medical Malpractice Insurance perspective, the issue is that most policies specifically exclude claims to the extent that they arise from the acts or omissions of independent practitioners. Moreover, most policies specify that independent practitioners must maintain their own insurance or indemnity protection. Such policy conditions cause no problems where there is a clear separation between the liability of the hospital and of the doctor. However, where a court assigns vicarious liability to a hospital, it is possible that the insurers of the doctors may decline to contribute to the settlement. As the hospital’s Medical Malpractice Insurance does not cover losses arising the actions of independent consultants, the hospital will potentially be forced to pay a substantial proportion of the court award from its own funds.

For hospitals operating on the independent consultant model, the issue of vicariously liable has important implications for the choice of limit of indemnity under Medical Malpractice Insurance. It is also important that hospitals tailor their policies to address the uninsured exposures that arise from a finding of vicarious liability.

It is possible to structure a Medical Malpractice Insurance policy so that it provides cover for claims arising from findings of vicarious liability. Please contact your local Aon representative for further details.

We understand that the Penang Adventist Hospital is planning to appeal this decision to the Malaysian Federal Court, and will provide further details in future editions of this Update.