

MIIAA TO HOLD FORUM IN AUGUST 2007

The Medical Indemnity Forum being held on 24 August 2007 is the first industry focused analysis of the impact of both the changes to the delivery of medical indemnity since their introduction in 2003 and ongoing tort reforms.

For the past 5 years, a wide range of government departments and authorities have been playing a role in the medical indemnity industry. As a result, it is impacted like no other type of insurance by state and national legislation and regulations in addition to the challenges of international reinsurance markets.

In order to increase the understanding of those involved in the industry at all levels, the Forum will:

- Inform and educate participants about the complexities of the medical indemnity industry.
- Review the key regulatory planks underpinning medical indemnity insurance.
- Consider current thinking from Government on medical indemnity and tort law reform.
- Share information on trends in medical indemnity.
- Explain the role of reinsurance and provide an overview of the current reinsurance market.
- Educate on the central findings of the MIIAA's medical indemnity database.
- Provide an understanding of the nature of complaints and claims.
- Identify trends in risk management and provide information on risk management practices used by insurers.
- Enable open discussion on medical indemnity issues.



Those who attend will:

- Understand more about the medical indemnity industry.
- Understand the environment in which medical indemnity insurers make decisions.
- Know more about risk management and claims.
- Improve their ability to work with the issues relating to medical indemnity in Australia.

The Forum is being held at the Marquee Hotel in Canberra on 24 August 2007. For further details, and a copy of the brochure contact miiaa@consec.com.au or call the MIIAA offices on 08 8113 5312.

TELLING PATIENTS THE TRUTH

Doctors often want to apologise to their patients following an adverse outcome, both out of a sense of ethical or moral obligation, and also because of the therapeutic effect that an apology can have. However, doctors have long been advised by lawyers not to do so, because of the potential for an apology to be construed as an admission of liability. While most adverse events are not the result of medical negligence, an apology may be interpreted by a patient as accepting ownership of the problem. Hence the importance of never just saying “I’m sorry” but always completing the sentence by adding either “...this happened to you” or “I did this to you”.

Pretending nothing has happened after an adverse event, or telling a patient about it in an incomplete way is lying – says Professor Lucian Leape, from the Harvard School of Public Health. A powerful advocate for patient safety for more than 20 years, he made this point strongly in an address to a recent meeting.

There is also research confirming that after an adverse event patients want, and Professor Leape would say, deserve:

- Information
- An apology
- Reassurance that you’ve taken steps to prevent it happening again.

But what type of apology?

There is a vast difference between an apology of sympathy (“I’m sorry this happened to you”) and an apology of responsibility (“I’m sorry I did this to you”).

If you’re sure something you did caused a problem, like prescribing penicillin to a patient known to be allergic to it, saying “I’m sorry this happened to you” sounds evasive and mealy mouthed.

In his book, “*On Apology*”, Professor Aaron Lazare, professor of psychiatry at the University of Massachusetts Medical School, summarises the steps in the process of apology as:

- Acknowledge the harm
- Take responsibility for it

- Explain what happened
- Show remorse
- Make amends

There are still many who think that any form of apology will be taken by the patient as an admission of liability and used in evidence in a claim for compensation. To the extent there was ever an impediment to dealing honestly with patients, some Australian states legislated to give immunity to apologies as part of the Australia-wide wave of tort law reform three years ago.

The table (page right) summarises Australia’s various apology provisions:

The ACT and NSW have adopted a broad definition, whereby any admission of fault or liability, be it expressed or implied, is included. The ‘apology’ will be inadmissible in any future litigation.

The remaining States have opted for a narrower definition, whereby an ‘apology’ is limited to expressions of “sorrow”, “sympathy”, “regret” or “a general sense of benevolence or compassion”. Notably these States have not included legislative protection for admissions of fault or liability and such admissions are able to be used in establishing liability.

Of the States that have adopted the narrower definition, NT, QLD and SA have gone one step further and have abandoned the term ‘apology’ altogether, preferring the more appropriate term “expression(s) of regret that do not admit liability”.

Confusingly, and somewhat misleadingly, TAS, WA and VIC have stayed with the term ‘apology’, despite the fact that the narrow definition they have adopted does not accord with what most people would consider to be an apology.

Victoria’s *Wrongs Act 1958* was amended to include: “In a civil proceeding where the death or injury of a person is in issue or is relevant to an issue of fact or law, an apology does not constitute ... an admission of liability for the death or injury...”

An apology is defined as “an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault”. Frankly, this is just window-dressing. An apology of sympathy was never an admission of liability.

An apology of responsibility (“I’m sorry I did this to you”) was and still is an admission of liability – at least in Victoria.

The equivalent legislation in NSW, the *Civil Liability Act 2002*, gives better effect to the desire to encourage apologies. The act says an “apology means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter”.

That does seem to give greater protection than the Victorian wording. But that legal protection is somewhat beside the point.

Ethically, we have a duty not to lie to patients. Professor Leape put it even more succinctly: “Apologise when you make a mistake and accept the consequences. If we did it more, they would be fewer.”

**By Dr Paul Nisselle – Avant and Allan Tattersall
– MDA National**

State/ Territory	Relevant Legislation	Definition	Extends to Admissions of Fault	Admissible
ACT	Civil Law (Wrongs) Act 2002 (s13)	“ apology means an oral or written expression of sympathy or regret, or of a general sense of benevolence or compassion, in relation to an incident, whether or not the expression admits or implies fault or liability in relation to the incident.”	Yes	No
NSW	Civil Liability Act 2002 (s68)	“ apology means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.”	Yes	No
NT	Personal Injuries (Liabilities and Damages) Act 2003 (s12)	“An expression of regret is an oral or written statement by a person – a. that expresses regret for an incident that is alleged to have caused a personal injury; and b. that does not contain an acknowledgement of fault by that person.”	No	No
QLD	Civil Liability Act 2003 (s71)	“An expression of regret made by an individual in relation to an incident alleged to give rise to an action for damages is any oral or written statement expressing regret for the incident to the extent that it does not contain an admission of liability on the part of the individual or someone else.”	No	No
SA	Civil Liability Act 1936 (s75)	“ Expressions of regret : In proceedings in which damages are claimed for a tort, no admission of liability or fault is to be inferred from the fact that the defendant or a person for whose tort the defendant is liable expressed regret for the incident out of which the cause of action arose.”	No	Not addressed
TAS	Civil Liability Act 2002 (s7(3))	“ apology ” means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter, which does not contain an admission of fault in connection with the matter.”	No	No
WA	Civil Liability Act 2002 (s5AF)	“ apology ” means an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person.”	No	No
VIC	Wrongs Act 1958 (s14I)	“ apology ” means an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault”	No	Admissible regarding “a fact in issue or tending to establish a fact in issue”

INDEMNITY FOR SPECIALIST TRAINEES AND SUPERVISORS

The MIAA was recently approached by the Department of Health and Ageing to provide some advice on indemnity issues in light of more specialist training being conducted in the private sector.

The MIAA developed a guide for the Department to use to assist trainees and supervisors to understand their own indemnity arrangements and options.

In general terms, the MIAA believes that indemnity issues should not stop any trainee or supervisor from participating in training in private settings.

All medical indemnity insurers operating in Australia provide cover to specialist trainees and their supervisors.

Because indemnity arrangements for specialist trainees in hospitals across Australia are not uniform it is important for the indemnity cover to be clarified by the hospital. The advice to Health provides a series of questions which doctors can ask their employer, including:

- Do you provide me with indemnity for exposures arising from my medical practice as a supervisor / trainee?
- If so, how is this indemnity provided? That is, is the indemnity contractual or discretionary?
- Is the indemnity specified in my contract of employment?
- If not, can I have confirmation in writing?
- Are there any areas or aspects of training where this indemnity will not apply?
- Does this indemnity extend to cover legal representation for Coronial inquiries, investigations, disciplinary hearings and such like?



Ordinarily, medical practitioners obtain their own cover (through a medical indemnity insurer) for the coverage of legal costs and representation for inquiries, investigations, disciplinary actions and hearings.

If indemnity is not provided by the hospital / employer for training or supervisory activities, the practitioner will likely be required or expected to provide their own indemnity.

All medical indemnity insurers operating in Australia provide cover to specialist trainees and their supervisors.

If the doctor is a member of, or insured by, a medical indemnity insurer they should advise them of their new activities and importantly, that they are required to arrange your own indemnity for this work.

The full details of the advice provided to the Department of Health will be included on their website www.health.gov.au.

By Luke Thomson – MDA National and Allan Hunter – Avant.