

# Medical Malpractice in a Digital Health Context

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## What is medical malpractice insurance?



An insurance policy that provides coverage to healthcare entities and professionals for bodily injury caused to patients resulting from their alleged negligent professional acts errors or omissions.

## Who needs medical malpractice insurance?

Any provider of healthcare services that supplies direct or indirect patient care may need medical malpractice insurance; traditionally, this includes both individuals (e.g. allied staff, mid-levels, physicians) and entities (e.g. labs, hospitals, clinics and offices).

The full scope of healthcare services covered within a traditional medical malpractice policy are addressed within the 'professional healthcare services' definition which typically captures those services that are performed to care for patients, often including:

- Medical, surgical, dental, nursing and mental healthcare
- Dispensing of drugs, medical/dental supplies
- Handling of bodies including autopsies
- Peer review/credentialing/formal review board services
- Furnishing of food and beverages
- Good Samaritan services
- Supervision, training, direction of healthcare professionals and physicians
- Research and development

## Transformation under new digital health technologies

New digital health technologies are transforming operational models and redefining what 'healthcare services' are, how they are delivered and by whom.

Some insurance professionals may argue that traditional medical malpractice policies with the standard definitions provide adequate coverage for bodily injury harms (even those that may arise within a digital health context).

Yet, it is unclear how these emerging models and healthcare technologies are:

- Potentially expanding traditional understanding of what the duty of care encompasses
- How that expansion may impact liability
- Whether current policy form definitions encompass these emerging models and expanded duties appropriately

The increasingly digital topography in healthcare demands a re-examination of traditional approaches to medical malpractice insurance coverage.

## What needs to be considered?

Given the substantial changes to the healthcare landscape it is appropriate to consider whether long-standing definitions of 'professional healthcare services' need to be updated to include emerging areas such as:

- Recommending/prescribing use of mHealth applications
- Augmented Intelligence enabled diagnostics
- Technological system security and system quality (including monitoring and maintaining)
- Technology vendor selection (choosing the right system for the task)
- Data mining, (re)use and selling (for what purpose)
- In-house software, applications and other technology development

### Real-world scenario, bodily injury arising from a hack or software/system failure

Consider the recent case of a cyberattack in a German hospital that caused a delay in access to care that was initially thought to have caused the death of a patient. Whilst subsequent investigation found that the patient's underlying condition was so severe that the delay in care was determined not to be the cause of her death (O'Neill, 2020)<sup>1</sup>, the case does highlight the potential impact of technological disruption on patient care and outcomes.

The convergence of healthcare and technology is also resulting in an increasingly wide array of entities that provide healthcare services.

The variation in entity type and service delivery models is likely to result in complex claims with overlapping harms – the coverage for which may be found in multiple different policy forms.

Thus, clients with digital health exposures are grappling with events that involve product liability, medical malpractice, technology liability and/or privacy issues.

In such complex claim situations, a multi-disciplinary coverage approach is critical to avoid inevitable finger pointing and the quagmire of coverage disputes and 'other insurance' clauses.

## A call for change

Consequently, complex digital health exposures demand a multi-line approach to underwriting that breaks down traditional barriers between insurance products.

There is a clear need for integrated coverage solutions that approach the underwriting of medical malpractice with consideration to the blurring of lines between services, entities and coverages.

Dealing with closely related coverages is a challenge that the healthcare liability market has addressed in the past, as evidenced by the combination of general liability (GL) and professional liability (PL) coverages within the same policy form.

However, a truly integrated approach will require insurance carriers to break down individual product line silos – a solution that has historically proven difficult for many carriers.

Currently, there are only two carriers that provide flexibly structured digital health specific products that combine multiple coverage lines, including medical malpractice, into one policy.

As such, most clients must address their coverage needs through multiple insurance policies – a potentially expensive approach that can result in a 'patchwork quilt of insurance coverage' that is prone to gaps.

Therefore, until integrated solutions are more widespread the medical malpractice marketplace may be pushed to consider updating coverage and key definitions to address emerging digital health exposures.



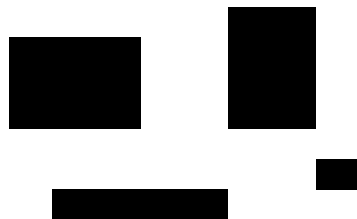
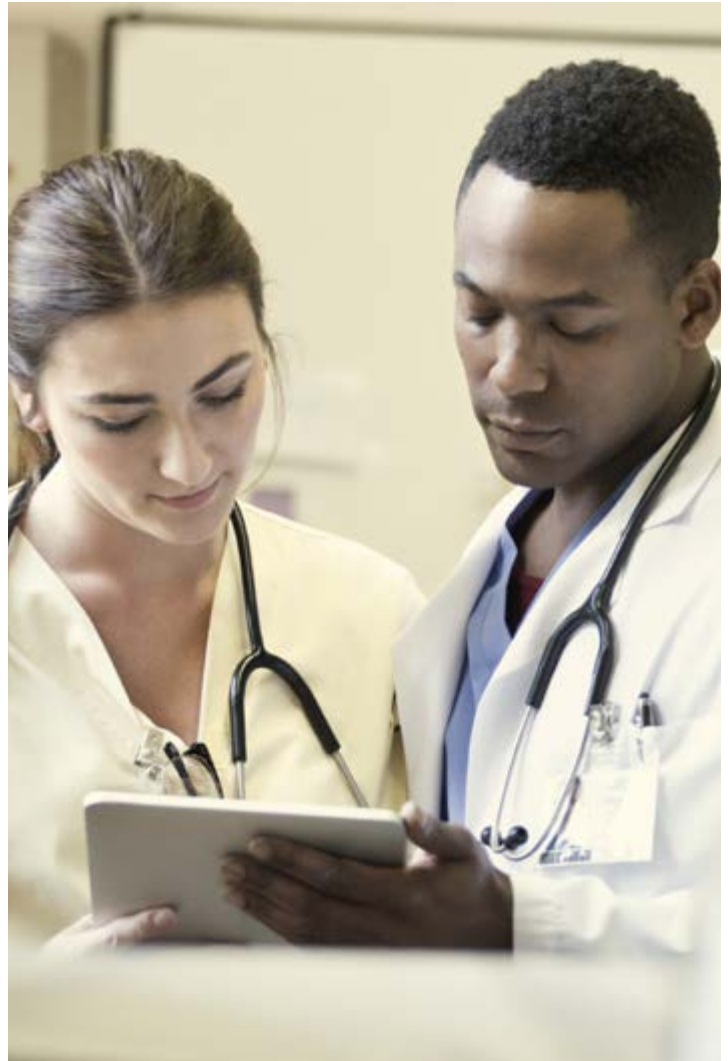
## In summary

New paradigms in healthcare require a different kind of underwriting, new coverage combinations and multi-disciplinary underwriting models.

The insurance industry must recognize that product line profit and loss (P&Ls) boundaries create imaginary lines between coverages that are increasingly irrelevant to our clients.

This presents a challenge for healthcare carriers that requires 'out of your product silo' thinking and creative, client-centric solutions – starting with a re-imagining of what constitutes 'professional health services' within the context of an increasingly digital health landscape.

<sup>1</sup> O'Neill, P. H. Ransomware did not kill a German hospital patient. MIT Technology Review <https://www.technologyreview.com/2020/11/12/1012015/ransomware-did-not-kill-a-german-hospital-patient/> (2020).



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