

# 論醫療器材標示外使用之侵權責任

A Study on Tort Liability for  
Off-Label Use of Medical Device

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## 摘要

「醫療器材標示外使用」係為通常且重要之醫療實務，而若醫師善盡其醫療之注意義務，為標示外使用之醫療行為，則病人可獲得治療利益，但關於標示外使用之安全性，標示外使用醫療器材之醫師及提供醫療器材流通於市面之醫療器材商，均有其應盡之義務及責任。因此，本文從侵權責任之觀點，醫療器材之標示外使用是否即為醫師注意義務之違反，而應對病患負擔過失侵權之損害賠償責任，並探討醫療器材標示外使用對消保法商品無過失責任有無影響。

Off-label use of medical device is a common and significant part of current medical practice. Under the right circumstances, off-label use of medical device is

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often appropriate, but it also creates special risks that are not present when the use is on-label. Therefore, this Article examines whether medical device off-label use is negligence per se and thus doctors are liable for medical malpractice. Further, it analyzes the product liability of medical device manufacturers under Taiwan Consumer Act for injuries stemming from off-label uses of medical devices. It examines the issues on whether off-label use of medical device affects the determination of manufacturing, design, and warning defects.

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## 壹、前言

依據美國白內障與屈光手術學會（American Society of Cataract and Refractive Surgery）前會長Dr. Doyle Stulting在美國食品藥物管理局（Food and Drug Administration, FDA）所舉辦的關於「醫療器材標示外使用」公聽會上之證言，藥品及醫療器材之標示外使用在醫療臨床上是非常普遍，在伊的行醫日常經常為醫療器材標示外使用行為且醫療器材標示外使用相關文獻亦常出現於醫學教科書<sup>1</sup>。我國醫學及醫療科技往往跟隨著歐美先進國家，尤其是美國，因此「醫療器材標示外使用」於台灣醫療實務應已成普遍存在之現象。醫療實務上，醫療器材標示外使用行為乃因醫師使用醫療器材與主管機關核准之醫療器材標示內容有落差之情形下產生，最常見及最有爭議者乃適應症外使用，惟我國衛生主管機關則認可符合醫學原理

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1 Doyle Stulting, Public Hearing: Manufacturer Communications Regarding Unapproved Uses of Approved or Cleared Medical Products Summary of Testimony, <https://specialtydocs.org/wp-content/uploads/2019/10/FDA-Testimony-Off-Label-Doyle-Oct-26-2016.pdf> (last visited Jan. 14, 2024)