

Malpractice claims on the rise

There's been an "explosion" of medical malpractice litigation claims in the country over the past few years, with warnings that the compassion-based practice of medicine is being replaced by defensive medicine and mistrust.



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Within the public health sector, already stretched budgets cause provincial health departments to struggle with their obligation to provide healthcare services, while still having to pay out the billions in claims against them. In the private sector, medical specialists are being faced with exorbitant medical protection insurance premiums, causing healthcare costs to rise and impacting on practices.

Last year, it was reported that Gauteng Health Department alone had paid out at least R1bn in lawsuits since January 2015 while the Eastern Cape is facing pay outs of R14bn.

The Medical Protection Society SA (MPS), in 2015 settled a claim of almost R24m on behalf of a member and has reported a 35% increase in the number of claims made against healthcare professionals between 2011 and 2016, with larger claims, in particular, on the rise. MPS further reports that claims over R1m have increased nearly 550% compared to those of 10 years ago and claims of more than R5m increased by 900% from 2008 to 2013.

Causes

Several reasons have been cited for the rise in medical claims, including an increase in public awareness of patient rights coupled with incessant and deliberate marketing by personal injury lawyers eager to capitalise on this awareness, says Justin Malherbe, senior associate at international law firm Norton Rose Fulbright, says that

"Amendments to South African legislation, such as the Road Accident Fund (RAF) legislation are also to blame. Damages claims for personal injury during a motor vehicle accident is now less profitable for lawyers, causing some to turn to other forms of personal injury litigation like medical malpractice," he says.

Legal framework

Professor Sylvester Chima, Associate Professor and Head at the Programme of Bio and Research Ethics and Medical Law at the University of KwaZulu-Natal, believes that the high levels of lawsuits in South Africa are in part due to the legal

framework which both governs and protects patients and healthcare providers.

“A good example of this is the law around termination of pregnancy (TOP) which provides for termination up to 40 weeks of pregnancy for severe congenital abnormalities. This means that if a doctor fails to diagnose a severe abnormality, the parents may sue the doctor for maintenance costs for the child,” says Chima.

Another example is the law which obligates health professionals to obtain signed consent from patients before providing their services, but which many doctors do not adhere to, leaving them vulnerable to malpractice claims.

But while the South African situation is becoming increasingly litigious, the same cannot be said for other parts of Africa where legislation is not as robust and patients don't have as much recourse to compensation.

Costs

In South Africa, it is not only the number of claims which continue to rise but also the size of the claims and pay outs. Malherbe explains that the costs of catastrophic claims, such as those for birth defects and brain injuries, have risen drastically as the cost of caring for patients has increased due to technological advancements which improve life expectancy and quality of life.

Both experts agree, however, that progressive interventions need to be found to stem the litigation tide.

Chima suggests that the current system relies on righting a wrong through the courts, which by its nature is expensive and adversarial. He believes that instead, the system should make provision for compensation without necessarily involving the courts.

Compensation fund

“A compensation fund, similar to the UK's Clinical Negligence Scheme Trust, where cases are mediated and settled would save on expensive legal fees but still compensate those who have been affected by medical negligence,” he says.

Malherbe says that stakeholders in both the private and public health sectors are committed to changing the claims situation by implementing better risk management strategies and renewed interventions, such as defined standards of care; managing patient expectations versus outcomes and improving patient experience through timeous communication and education.

“The shared hope of all stakeholders is that the current effects of the rise in medical malpractice claims can be off-set by timeous intervention and a co-ordinated approach to preserve the stability and ensure the sustainability of healthcare in the future,” he says.

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