Challenging the cost of clinical negligence; the case for reform

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SAMA Conference 2016
Universal Access to Healthcare
Dis ’n kraam-krisis

Dokters weier om babas te vang, want risikos ‘is net te hoog’

Afrikaanse

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Uit die Artikel:

Dokters weier om babas te vang, want risikos ‘is net te hoog’

Else gaan nie minder word nie…

Kampusprotes: Hulle is die voorbokke – 4

Bankslenters: Dit is jôu probleme – 6

Rapport

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23 September 2016

SAMA ANNUAL CONFERENCE 2016 | UNIVERSAL ACCESS TO HEALTHCARE | SANDTON CONVENTION CENTRE | 21-23 OCTOBER 2016
NHS spends £700 insuring each birth against negligence claims as maternity crisis 'puts lives at risk'.
MPS Membership; Average Estimated Actuarial Indemnity Cost per Member; South Africa Medical 2009-2015 with 2009 as base year

Relative Values 2009 = 100
The threat of litigation: Private obstetric care – quo vadis?

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Because of changes in litigation frequency and estimated claims value, indemnity costs for South African obstetricians have increased sharply and may soon become virtually unaffordable. There is the real possibility of very serious public health consequences and it is important that the matter is addressed as a matter of urgency. Resolution is by no means limited to obstetric care, but it is important that obstetricians become actively involved in the debate. While the alternatives suggested may be considered unpalatable they are raised to open and stimulate debate – they are by no means prescriptive. Clearly the debate has to extend beyond the obstetric or indeed the medical community and urgent and serious consideration will have to be given to tort reform.
MEDICINE AND THE LAW

Obstetric risk avoidance: Will anyone be offering obstetrics in private practice by the end of the decade?

G R Howarth

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Obstetric claims inflation is increasing the cost of covering obstetric risk. This is leading to obstetric risk avoidance by those offering insurance and by practitioners who do not perform enough deliveries to cover the cost of obstetric risk indemnity. By the end of the decade indemnifying obstetric risk will probably be too expensive for doctors in private practice. Non-indemnified doctors will be unable or unwilling to do private deliveries, however, women will still fall pregnant and require delivery. These women will inevitably be forced to deliver in provincial facilities, shifting the workload and liability to the state.

"It has never been safer to have a baby and never been more dangerous to be an obstetrician"222

made basis. For a claim on a particular incident to be successful, the insured either has to have been insured at the time of the incident and still be insured by the insurer when the claim is made or at least have

August 2013, Vol. 103, No. 8 SAMJ
Public somnambulism: A general lack of awareness of the consequences of increasing medical negligence litigation

Sandor Kiss, MBBCh, DTM&H, FRCP(Edin), MA, LLM

The recent, belated, and rather haphazard response to the problems posed by cervical myelopathy in the post-operative spinal surgery setting speaks volumes about the extent of the public's ignorance of the potentially serious nature of this common cause of morbidity and mortality. The reality is that the public generally cannot be held to the standards of the medical profession in relation to these matters, and as a result there is a lack of awareness and appreciation of the potential and actual harm that can befall them if they engage in legal action.

The consequences of this lack of awareness extend beyond the limits of the medical profession. The legal profession is no exception, as it is equally unaware of the potential and actual harm that can befall them if they engage in legal action. This lack of awareness extends to the general public as well, as they are generally unaware of the potential and actual harm that can befall them if they engage in legal action.

As a result, there is a lack of awareness and appreciation of the potential and actual harm that can befall them if they engage in legal action. This lack of awareness extends to the general public as well, as they are generally unaware of the potential and actual harm that can befall them if they engage in legal action.

SAMJ November 2014 Vol 104 No 11
Minister Aaron Motsoaledi convenes medico-legal summit, 9 to 10 Mar

5 Mar 2015

Medical negligence claim under the spotlight
Increasing litigation
Increasing subscriptions
Sequentially unaffordable
Prudence and possibly mandatory cover
Less obstetricians but women still falling pregnant
Shift to the only facilities where doctors are available
Shift of patients to state facilities
Shift of risk to state
CHALLENGING THE COST OF CLINICAL NEGLIGENCE
THE CASE FOR REFORM
Challenging the cost of clinical negligence

These are undoubtedly challenging times for healthcare professionals in South Africa, and we understand that increases in the cost of membership subscriptions can be painful and may have a significant impact on some. As the leading provider of professional protection to health professionals in South Africa and 300,000 worldwide, Medical Protection has a unique insight into the nature of clinical negligence claims.

In ‘Challenging the Cost of Clinical Negligence: The Case for Reform’ we raise ideas to help address some of the factors contributing to this situation.

Read our paper on reform
Challenging the cost of clinical negligence

Healthcare professionals in South Africa (SA) are facing challenging times. As the clinical negligence claims environment in SA deteriorates, the effect is being felt not only by healthcare professionals but also by the wider public, as a result of the strain that costs place on the public purse. We look at the current claims environment, and explain why a debate about reform is so important.

The challenges

There is growing recognition of the need for legal reform in SA, not only to reduce the burden of mounting costs but also to create a system that both ensures reasonable compensation for patients and allows for a fair and robust defence where necessary. An efficient and cost-effective legal system that works for patients and their families, as well as for healthcare professionals, is crucial.

In our experience at the Medical Protection Society (MPS), over the past 6 years there has been a deterioration in the overall claims environment for medical members. Our data indicate that between 2008 and 2013 the probability of claims being brought against doctors has escalated, with claims rising by over 14% on average each year during that period. Our data also indicate that the estimation of the long-term average claim frequency for doctors in 2013 was around 27% higher than in 2008.

Not for profit mutual organisations such as MPS have an obligation to ensure that they collect sufficient subscription income to meet the expected future costs of claims against members, so they can be in a position to defend members’ interests long into the future. If the current clinical negligence claims trend continues, it will result in higher costs for healthcare professionals.

The situation is also of concern to the SA government and has been described as a ‘crisis’ by Health Minister Dr Aaron Motsoaledi. “The nature of the crisis is that our country is experiencing a very sharp increase – actually an explosion in medical malpractice litigation – which is in sharp contrast with generally known trends of negligence or malpractice,” Motsoaledi said at a medical summit in Pretoria in March 2013. “The cost of medical malpractice claims has skyrocketed and the number of claims increased substantially.”

MPS does not believe that the deteriorating claims environment in recent times reflects a deterioration in professional standards. There are potentially a multitude of complex factors, some of the highest fee, that are contributing to the current claims experience, including:

- The lack of a patient-centred and robust complaints system for hearing many patients with litigation as the only viable avenue for redress;
- The lack of an efficient and predictable legal process for handling clinical negligence claims, thus the time to claim increases and delays run out, with no parties benefiting.
- The cost of settling a claim increases over time. A protracted legal process can have a significant impact on the final costs of settling a claim, as it means that legal bills continue to mount and compensation can increase in size.
- Amendments to the provisions of the Road Accident Fund Act potentially result in attorney releasing their area of interest towards personal injury claims; clinical negligence in particular.
- Patients are increasingly aware of their rights under the Constitution and the Consumer Protection Act.
- Patient expectations are increasing, with many patients now expecting greater involvement in, and understanding about, their healthcare.

Alongside concerns about cost, there is a belief that the clinical negligence litigation system does not facilitate the efficient and fair resolution of disputes. Instead, the system is unnecessarily adversarial with frequent trial by ambush. It also lacks transparency and is time consuming and expensive.

While the claims experience may not continue to deteriorate at its current pace, the experience to date merits serious consideration of legal reform.

The debate

The deterioration of the claims environment has a negative effect not only on the healthcare profession but also on wider society. Legal and procedural reforms are required to begin to tackle some of the factors that have led to this claims experience and ensure a fairer and more efficient system for all parties. Added to this, a patient-centred, standardized complaints system should be developed to ensure that patient concerns are addressed, where possible, before they become a claim.

Any proposals to tackle the rising cost of clinical negligence need to be debated and explored at a public policy level because of the current effect of clinical negligence on the public purse. Dr Motsoaledi initiated the debate about reforms, and MPS has contributed to the debate by launching its policy paper ‘Challenging the costs of clinical negligence’. The case for reform in Johannesburg on 10 November 2015. We are only one voice, however, and our reform proposals are not exhaustive.”

The lively and informative debate at the launch event highlighted some of the many interesting ideas for reform that should be considered. These include further thoughts on alternative dispute resolution, and how risk management can be used to prevent claims arising in the first place.

Provisions are an important theme, and defence organisations must continue to play their part to promote safe practice in medicine, with open disclosure being a critical element. When organisations promote open disclosure, it benefits all involved. Above all, it is the ethical thing to do.

Our proposals

1. Complaints process
- The development of a consistent, efficient, aligned and patient-centred complaints process that allows for local resolution.

2. Proximity of claims
- A Certificate of Merit be introduced.
- Further consideration of ways to encourage alternative dispute resolution.

3. Pre-litigation resolution framework
- The introduction of a pre-litigation resolution framework.

4. Procedural changes
- Procedural change to ensure:
  - A greater exchange of factual written statements
  - Early exchange of expert notices and summaries
  - Mandatory early expert meetings.

5. Limiting damage awards (general and special)
- A cap of general damages is crucial to statute
- A limit on general damages
Public somnambulism: A general lack of awareness of the consequences of increasing medical negligence litigation

Audit any meeting of obstetricians, spinal surgeons, neurosurgeons or neurologists, and tell courts to besiege the burgeoning costs of care for negligence claims. Local medical academics and trade journals are increasingly addressing the issue - the why, the consequences, and possible solutions. Although there are regular newspaper headlines and articles on litigation costs, seldom if ever from an article in the lay press address the consequences of increasing medical negligence litigation. In this public, overwhelmingly sleep-walking into a dystopian future with regard to obstetrics, spinal surgery, neurosurgery and neurology.

Claims costs depend on the number of claims, the value of those claims, and legal costs. In South Africa (SA), all have increased in recent years. Improved but expensive and sophisticated care has considerably extended life expectancy for extremely compromised patients. Generally speaking, the worse the injury and the longer the survival, the more the costs of care. Those specialties where patients may be the most severe and survive likely to be the least at risk of extreme high claims. Indemnity costs for the group are therefore the highest. It is not surprising, then, that the costs of liability cover for those offering obstetric, spinal and neurosurgery are high and have been increasing rapidly.

It is a matter that is restricted to obstetricians, spinal surgeons, neurosurgeons or neurologists in private practice, afflicting the incomes of these specialists, or are these bummer fees? While not restricted to these high-risk specialists, there is a tendency for doctors in the current medicare environment to practice defensively in an attempt to diminish their medicare risk. Defensive medicine is not without its problems, including unnecessary increased costs, the risk attenuation, and the sheer anxiety and undue anxiety to some but is.

In serving indemnity costs, some doctors may consider practicing without any cover. However, they would be poorly advised to do so, because although an individual may be at a substantial risk of being claimed against, a single, even successfully defended, may ruin them financially. There is a question about the ethics of being unindemnified, as deserving patients could be inadequately compensated. It is clear that any hospital group would knowingly allow a doctor without adequate indemnity or insurance protection to work, especially at one of its hospitals, as claimant lawyers would undoubtedly try to shift the liability onto the hospital group.

The determination in claims experience and the impact it has on increasing indemnity costs has impacted on corners across the spectrum of high-risk specialties, and concerns have been raised with regard to recruiting new candidates. Recently qualified specialists may be more likely to ask, if a local practitioner is unsustainable and remain in state practice (a positive), or leave the country, exacerbating the difficulty in recruiting new doctors from the limited number of the medical student. Established practitioners may either change their practice patterns, or less haphazardly, sometimes directing their attention to medicare work and aggravating the situation.

A numerically small but extremely important specialty such as neurosurgery is vulnerable to these changes.

Orthopaedics
Doctors who operate as a group are at risk of litigation than those who do not, and orthopaedic surgery is no exception. Indeed, they are at relatively high risk even within the context of surgery. Spinal surgery, however, is more expensive to cover as the complications tend to be severe and expensive to compensate. As performing surgery is not unusual among orthopaedic surgeons, it would be unfair to expect them all to cover all the risk associated with liabilities. An orthopaedic surgeon who performs spinal surgery therefore pays more for cover than one who does not. Initially, the difference was relatively minimal - a small percentage of the overall risk. Over time, the actual difference in indemnity experience, the difference has now increased to such an extent that the difference alone is a multiple of the standard orthopaedic risk.

Increasing indemnity costs are already negatively impacting the neurological surgical community. The differential costs of cover across general orthopaedic, with and without spinal cover, has caused many orthopaedic surgeons to reconsider continuing to perform spinal surgery. This trend is mirrored by many resignations of orthopaedic surgeons from the South African spine society, citing this very reason. Traditionally, general orthopaedic surgeons would perform the fusion component of spine surgery while operating with a neurosurgical colleague performing the decompression work. This allowed spinal surgery to function in smaller cities and towns where there may have been no dedicated spine surgeons. Therefore, when the local neurosurgeon is not trained in fusion surgery, with the result that surgery requiring stabilisation in a no longer possible outside large cities. Although some argue that offering this surgery to the larger centres and high-volume spine doctors is not a bad thing, it changes the picture. It frequently presents in smaller towns as a result of high-speed motor vehicle accidents, and there is now paucity of cover. The neurosurgical surgeon is reluctant to access the patient based on the attendant risk historically, neurosurgical surgeons have less to no spine experience. The attendant indemnity cost therefore has a direct impact in terms of reducing patient care.

Neurosurgery
Surgical care from the onset of the early stages of a neurological condition has been recognised as crucial in controlling the spread of infectious diseases. While the majority of a neurosurgeon operates on adult spinal surgery (which is certainly reflected in their medicare experience), neurosurgical procedures also play an important and much broader role in the overall medical community. For example, a neurosurgeon also treats a wide range of conditions, including those that are non-fucrificating conditions such as stroke, tumors, and brain injuries.

Pediatric neurosurgery may be a harbinger of the future. Although society may consider children to be its most precious commodities, this doesn’t mean that we should overlook the importance of the pediatric surgical principles typically being less severe for pediatric patients. Reimbursement for pediatric surgical procedures often lag behind that for adult degenerative conditions. The extent that a private practice limited exclusively to pediatric neurosurgery is unsustainable. Until recently only those full-time pediatric neurosurgeons in our country offered care to a limited number of highly complex cases from the private sector, but the cost of liability cover rendered this unviable.

At present, specific pediatric neurosurgery expertise is only available at Red Cross War Memorial Children’s Hospital in Cape Town, where the unmatch between operative time and overall post-operative hospitalisation accepted of patients from the private sector.

Neonatology
Indemnity costs for paediatricians working with neonates have started to increase. Paediatricians are now being drawn into critical care, where, instead of the near-normal care, they are not libeled as significantly below negligent the outcome would have been better. Any neonatal work already increases the cost of cover for a paediatrician by a multiple of the base paediatric rate. Reimbursement of premature claims is higher than claims, and often involves paediatricians performing neonatal work. In most cases, this may also be increasing. In the cost of covering the complications, who perform neonatal work usually substantially, but this may decline to be inventive in the care of these children.

Obstetrics
Obstetrics is an area where the problem and the consequences are most acute. In the absence of definitive intervention, it is not alarming to ask who will perform private delivery by the end of the decade. Women will continue to fall pregnant and require delivery, but who will deliver those 100 000 plus deliveries every year? If private obstetricians are unwilling to deliver them, or declined from doing so, patients will have to deliver at state facilities. Private practitioners are unlikely to be reimbursed by state hospitals, and the above busy state facilities will be confronted with an increased workload of demanding patients. There is an additional cost burden for the state, as not only will they have to provide the facilities for the extra deliveries, but there will also be a shift of liability burdens for these patients. As a result, these patients will receive lower quality care, as money allocated to the state health budget includes provision for litigation. Every rand lost to litigation is a rand lost to state healthcare - money set aside for the care of patients.

What’s next?
In summary, private practitioners in obstetric care have spread further than these performing delivery services. Advances in obstetric ultrasound have enabled identification of fetal anomalies, some of which may lead to severe disabilities. Making such a case deprives the parents of the opportunity to consider termination of pregnancy. If such a child is delivered and the parents did not have the chance to consider the decision, the child is born healthy, and private practitioners may have no alternative but to provide care for the child. Claims for missed abnormalities are emerging as a group that is potential as severe as liability in general pediatric claims, and this has led to a substantial increase in the cost for obstetric ultrasound. Few non-obstetricians can justify the cost of care for less than 2% of deliveries in these patients, access to such technology, and accurately assess for these patients living outside urban areas.

What's next for the obstetrician? To what extent will the obstetrician have to seek insurance for these new procedures, and with what consequences for their medicare practice? What is the future role of the obstetrician in this context? What is the future role of the obstetrician in the medicare environment? What is the future role of the obstetrician in the medicare environment, and how does this impact on the medicare practice? What is the future role of the obstetrician in the medicare environment, and how does this impact on the medicare practice? What is the future role of the obstetrician in the medicare environment, and how does this impact on the medicare practice?
CHALLENGING THE COST OF CLINICAL NEGLIGENCE
THE CASE FOR REFORM
MAIN PROPOSALS

Complaints process
• MPS proposes the development of a consistent, efficient, aligned and patient-centred complaints process that allows for local resolution

Frequency of claims
• MPS proposes that a Certificate of Merit be introduced
• MPS proposes further consideration of ways to encourage alternative dispute resolution

Pre-litigation resolution framework
• MPS proposes the introduction of a pre-litigation resolution framework

Procedural Changes
• MPS proposes procedural change to ensure:
  - The exchange of factual witness statements
  - Early exchange of expert notices and summaries
  - Mandatory early experts meetings

Limiting damages awards
(general and special)
• MPS proposes that a tariff of general damages is created in statute
• MPS proposes a limit on general damages
• MPS proposes a limit on future care costs
• MPS proposes a limit on claims for loss on future earnings
1. Complaints process

1. COMPLAINTS PROCESS

- MPS proposes the development of a consistent, efficient, aligned and patient-centred complaints process that allows for local resolution.
A good complaints system

Healthcare professionals should accept that mistakes are an inevitable part of clinical practice. Despite what patients may think and many expect doctors to be infallible, the healthcare system is fallible, made so by its very nature. Indeed, according to the late Dr John Yaffe (the first editor of the SAMA Journal), medical malpractice can be ascribed to human error. Even when a healthcare professional is faultless, a patient may still have a complaint. This is one reason why complaints are important. The process of investigating complaints is valuable in improving patient care and the quality of healthcare provision.

Complaints are a positive feedback system, and healthcare providers should view them as an opportunity to learn and improve. A complaint is an indication of a problem that needs to be addressed. By responding to complaints, healthcare providers can learn from their mistakes and prevent similar incidents from occurring in the future.

When a patient makes a complaint, it is important to respond promptly and fairly. The healthcare provider should acknowledge the complaint and undertake a fair and thorough investigation. The patient should be informed of the outcome of the investigation, and any necessary changes to the healthcare system or provider should be implemented.

Complaints can be used as a tool to improve patient care and the quality of healthcare provision. Healthcare providers should view complaints as an opportunity to learn and improve, and to prevent similar incidents from occurring in the future.
2. Frequency of claims

2. FREQUENCY OF CLAIMS

• MPS proposes that a Certificate of Merit be introduced
3. Alternative dispute resolution

3. ALTERNATIVE DISPUTE RESOLUTION

- MPS proposes further consideration of ways to encourage alternative dispute resolution
4. Pre-litigation resolution

4. PRE-LITIGATION RESOLUTION FRAMEWORK

- MPS proposes the introduction of a pre-litigation resolution framework
5. Procedural changes

5. PROCEDURAL CHANGES

- MPS proposes procedural change to ensure:
  - The exchange of factual witness statements
  - Early exchange of expert notices and summaries
  - Mandatory early expert’s meetings
6. LIMITING DAMAGES AWARDS
(GENERAL\(^{14}\) AND SPECIAL\(^{15}\))

GENERAL DAMAGES

- MPS proposes that a tariff of general damages is created in statute.
- MPS proposes a limit on general damages

SPECIAL DAMAGES

- MPS proposes a limit on future care costs
- MPS proposes a limit on claims for loss on future earnings
- MPS proposes that an independent commission establishes specific guidelines for the determination of life expectancy in the South African context
- MPS proposes that an independent group of experts annually considers medical inflation
7. Other recommendations

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<td>MPS proposes a pilot of a specialist clinical negligence court</td>
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<td>MPS proposes that practices of ‘funding companies’ be investigated</td>
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<td>MPS proposes a review into damages paid to patients from abroad</td>
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Challenging the cost of clinical negligence

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