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MAY 2010

SA's Medical Malpractice Shame: A Symptom of a Sick Healthcare System?

More and more South African healthcare practitioners are finding themselves in the dock for doing the very thing they have pledged not to do: causing harm to their patients.

The increase in medical litigation is having a devastating effect on the country's already troubled health system. It is tarnishing the reputation of the country's medical community, pushing up the cost of indemnity cover for private doctors and exhausting state funds that could have been used to improve the bad state of provincial health services.

In the public sector, unconfirmed figures suggest that the Department of Health is facing claims of more than R2bn while litigation against private doctors is showing a steady increase.

Figures obtained from the Medical Protection Society (MPS) show that there are currently more



than 800 active claims against member doctors in SA and nearly 1000 reported matters that could become claims in the future. Over 18% of these claims are valued in excess of

R1m, an increase of nearly 550% compared to 10 years ago while the number of claims over

R5m has increased by 900% with several topping the R30m mark.

Problem bigger than figures suggest

According to Prof Ed Coetzee from the Department of Obstetrics and Gynaecology at Groote Schuur Hospital, who has been closely involved in drafting proposals to address problems around medical litigation in SA, the MPS figures appear to be only the tip of the iceberg.

"In my experience, there has been a rapid increase in claims in the recent past. I have an idea that there are cases brewing in lawyers' offices

which haven't reached the MPS and that the full number of cases hasn't been added up."

Speaking on behalf of his own specialty, he said the SA Society of Obstetricians and Gynaecologists (SASOG) is absolutely overwhelmed by the size of the problem and the pressures the MPS puts on the society because of the astronomical amounts claimed in cases involving gynaecologists.

Currently, gynaecologists with obstetrics' annual indemnity fee to the MPS amounts to R130 500, R25 000 more than other high-risk specialties such as spinal and neurosurgery.

Furthermore, the provincial health departments' reluctance to supply data on the claims against them is jeopardising efforts to get a true picture of the extent of the problem in the public sector.

"If you ask individual hospitals, the numbers they provide are shocking, indicating that provincial health budgets destined for the improvement

of services are now being spent to cover litigation costs against institutions," said Prof Coetzee.

Three years ago, Prof Coetzee headed an initiative supported by the SA Medical Association (SAMA) aimed at bringing down litigation costs by reducing the involvement of lawyers in less serious cases through the establishment of a medical ombudsman service and an institute for independent expert witnesses.

Due to the many other problems SAMA had to contend with in recent times, the high cost of establishing such services and a change of guard at the SA Law Reform Commission, which was asked to assist in setting up these structures, these plans never materialised.

Are lawyers to blame?

Some doctors are now accusing lawyers of using the chaos and lack of skills and expertise in the state sector to institute frivolous claims in the hope of reaching quick settlements, which can

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NHI Implementation Still Far from a Reality

The government's deafening silence on its much-debated National Health Insurance (NHI) proposals in recent months is not an indication that the plan is slowly being wiped off the agenda. However, the implementation of the plan might take considerably longer than the 'big-bang' approach suggested in the original ANC documents.

This is according to Dr Norman Mabasa, a member of the Ministerial Advisory Committee on NHI and chairperson of the SA Medical Association (SAMA).



Dr Norman Mabasa, SAMA chairperson

Speaking at the Hospital Association of SA's (HASA) annual conference, Dr Mabasa said the fact that government had missed all its initial deadlines to have a discussion document or White Paper on the table shouldn't be interpreted as a sign that it was plotting behind closed doors or reconsidering the plan.

No cover-up

"There is nothing to hide because there is still nothing to tell," Dr Mabasa said, urging role-players in the health sector to stop concentrating on timelines and the costs of implementing such a system.

"The focus should be on how we can contribute and make it work to the benefit of all South Africans. We should stop thinking that it will be too costly to cover all: the aim should be to plan for everybody, remove excesses and waste and look at how we can use that money to plug the gaping holes that prevent access. The debate should be about how we can do something for all instead of doing everything for a few and nothing for many."

The new funding model, Dr Mabasa said, should focus on full cooperation between the private and public sectors, without the one killing the other or the one surviving at the expense of the other. He assured conference delegates that the NHI proposal documents will be published for all

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References: 1. Blode H, Wuttke W, Look W, et al. A 1-year pharmacokinetic investigation of a novel oral contraceptive containing drospirenone in healthy female volunteers. Eur J Contracept Reprod Health Care 2000; 5:256-264. 2. Klipping C, Duijkers I, Trummer D, et al. Suppression of ovarian activity with drospirenone-containing oral contraceptive in a 24/4 regimen. Contraception 2008;78:18-25.

NEWS

SA's Medical Malpractice Shame: A Symptom of a Sick Healthcare System?

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earn them up to 25% of the settlement amount in a malpractice case.

Personal injury lawyers and experts in medical malpractice, Ronald Bobroff and Adele van der Walt, say this perception is not accurate as lawyers work on contingency, meaning that they have to carry all the legal costs until the matter is settled.

“Even if a lawyer hopes to scare the defendant into a quick settlement, he/she still has to prove the case. It’s a lengthy and expensive process that often takes years and because lawyers work on contingency they have to carry all the costs until a case is settled. And even if there is a guilty verdict against a state institution or practitioner, there is no guarantee that government will eventually settle these claims,” said Van der Walt.

In the private sector, Bobroff said the odds of winning a case are still firmly stacked in favour of the medical community. Only a minority of claims against practitioners, especially in the private sector, result in a guilty verdict. Bobroff said it can be attributed in part to the MPS’ strong financial position, which enables it to hire only the country’s top legal firms with a wealth of resources to handle claims against its members.

Furthermore, the fees the MPS pays doctors to compile expert reports in defence of their colleagues ensure that practitioners will be more inclined to work with the organisation than with law firms acting on behalf of the plaintiff, Bobroff said.

“Ten years ago, it was a lot easier for me to

find doctors who would feel morally compelled to point a finger if a patient had been hurt by the actions of a colleague. Commitment to the Hippocratic Oath appears not to be what it used to be and more and more we have to get experts from overseas to assist.”

Only a small number of docs negligent: HPCSA

At the Health Professions Council (HPCSA), the number of complaints against practitioners has almost doubled over the past five years. The council’s former registrar, Adv Boyce Mkhize, said patients’ increased awareness of their rights and the implementation of various pieces of legislation aimed at protecting the consumer have contributed to the increased number of complaints.

Of the 3000 complaints received last year, only about 10% went through to the conduct inquiry state. Of these, 70% resulted in convictions mostly related to dishonesty and fraud charges with only a few doctors found guilty of negligence.

“The negligence component is virtually insignificant when compared to the number of complaints and the total number of medical practitioners in the country,” said Mkhize.

Bobroff and Van der Walt don’t agree. They say medical malpractice, particularly in the state sector, is on the increase and the injuries caused to patients are getting worse.

“Patients lose limbs, they are left disabled



Ronald Bobroff,
president of the
SA Association of
Personal Injury
Lawyers

Measures to protect against malpractice claims

- Always get written informed consent from the patient.
- Take time to explain the procedure to the patient: what it entails, the benefits and the risks, and put it in writing.
- Be honest: don’t raise false expectations.
- Answer the patients’ questions as honestly and comprehensively as possible.
- If it is elective surgery, always ask the patient to get a second opinion.
- Make sure that you are properly skilled to do the procedure and informed about the latest developments in the specific field.
- If the patient speaks a different language, ensure that an interpreter is present and that the translation is transcribed, put into writing and given to the patient.
- Communicate, communicate, communicate with the patient.
- Show sympathy when something goes wrong.
- Ensure that instructions to nurses for post-operative care is clearly communicated and put into writing.

or die because of the actions of uncaring, unskilled health practitioners and poorly equipped, badly-managed health institutions,” said Bobroff (a medicolegal specialist and president of the South African Association of Personal Injury Lawyers), who has 38 years experience in medical litigation.

“Mothers who need emergency Caesareans don’t get them because theatres are not functioning, resulting in more babies born with brain damage. In general, state hospitals are not worse equipped than private institutions. The majority of problems are caused by bad care and management,” said Van der Walt.

Bad nursing, more claims

There is a direct correlation between the deterioration in the quality of training at teaching institutions and nursing care and the rise in the number of negligence cases in both the public and private sector. The shrinking pool of health professionals who have to deal with a growing patient load is also upping the risk of errors, the two lawyers said.

In the private sector, Bobroff said claims relating to factors such as poor postoperative care, hospital-acquired infections caused by the failure of hospital staff to adhere to basic infection control protocols, medication errors and injury to patients by nurses and other healthcare workers are becoming more prevalent.

However, in many of these cases, it is the treating doctors who get targeted as private hospitals are increasingly trying to cover their backs by insisting that patients sign contracts exempting the facility from liability in the event of injury.

“Even if the injury was partly caused by the actions of the hospital staff, it will be the doctor’s

conduct that will be scrutinised for evidence of negligence that can be used in order to claim compensation for the patient,” said Bobroff.

He said he was waiting for a suitable case to take to the Constitution Court in a bid to stop private hospitals from coercing patients into signing away their indemnity. “It is an immoral practice that goes against every principle of health care because patients are entrusting their lives to these institutions. Why should only doctors have to bear the brunt of these claims?”

Prevention is better than cure

But Bobroff added that doctors often fail to take the necessary precautions to protect themselves against being implicated in errors they didn’t commit (*see block above*).

Only a minority of doctors are crooks and butchers and in most cases these doctors are serial offenders, said Bobroff. However, getting these practitioners struck from the roll to ensure that they never practise again is a long and comprehensive process. The HPCSA’s conduct committee will only take this route when it has satisfied itself that there has been a ‘trend or a repetitive pattern’, which can take years to prove, resulting in possible damage to more patients, said Van der Walt.

The question is, why do they continue to take on medical malpractice cases if the process is so frustrating and the chances of winning them so bleak? “Even if it is difficult, the positive side of medical litigation is that it forces action to improve and maintain the standards of medicine. Research all over the world has shown that malpractice claims drop as standards and skills improve and practitioners become more accountable,” said Bobroff.

