

Time to strike a balance

Action is needed now to tackle rising cost of clinical negligence

June 2019

The problem

The cost of clinical negligence is rising at an alarming rate and is having an impact on access to and the delivery of healthcare.

The state has to divert a significant amount of funding away from front-line patient care towards claims. Estimated payouts for clinical negligence claims by the state have grown at an average rate of 45% since 2012/13 with the value of claims climbing to R1.2billion. These claims have to be paid for at a time when the health services are facing tough financial pressures and the government must make difficult decisions about how it allocates its resources.

These are also challenging times for healthcare practitioners who pay for their own protection against claims. In recent years the cost of clinical negligence has increased significantly. We saw a 29% increase in the number of medical claims between 2009 and 2018. The number of dental claims rose with 61% between 2009 and 2018. The highest value of a current medical claim is estimated to be more than R70million.

Practising in a litigious society is also having a negative impact on the health and wellbeing of healthcare professionals. In an MPS survey, more than 80% of members said they think patients are more likely to complain compared to five years ago, and almost one third are often or constantly concerned about the possibility of receiving a complaint. 40% of members either agree or strongly agree that they have increased stress, anxiety and fear of being sued.

Striking a balance

Under current law, patients who have suffered avoidable harm as a result of poor medical care can bring a clinical negligence claim against the healthcare professional who caused the harm, whether the treatment was provided in a public hospital or by a private healthcare provider. The money sought through a claim may be to compensate the patient for physical or psychological harm, and may also include a claim for the cost of care required as a result of the harm and loss of earnings.

As a society we need to have an honest conversation about the inherent risks involved in healthcare, and discuss what we can reasonably expect – while of course ensuring the consequences of poor care is dealt with effectively. Delivering healthcare is not an exact science and sometimes adverse incidents do occur.

It is important that access to reasonable compensation is available for patients following clinical negligence, but this must be balanced against society's ability to pay. If the balance tips too far, the risk is that the cost becomes unsustainable.

Medical Protection Society (MPS) is keen to propose realistic solutions that could help address this worrying development. We have a proven track record of engagement with government, policy makers and stakeholders internationally on legal reform. We have advocated reform in South Africa in our report

Challenging the Cost of Clinical Negligence, The Case for Reform policy document that we published in 2015¹, and also in our detailed submission to the South Africa Law Reform Commission's (SALRC) Issue Paper 33 (Project 141) on medicolegal claims from 2017.² We would welcome the acknowledgement for legal reform, and the investigation started by the SALRC, and look forward to engaging with them on next steps if and when required. Another SALRC paper (project 142) has been published in March this year, which aims to announce the investigation, initiate and stimulate debate, and seek proposals for reform on legal fees. MPS will actively support the SALRC in its investigation, and is planning to write a comprehensive response.

A real opportunity

We believe that now is the time to introduce solutions. It goes without saying that there must be a clear focus on improving patient safety and the reliability of healthcare, and MPS is a frontrunner in this area. We provide risk management and educational support to members but doing so alone is unlikely to address the problem of rising clinical negligence cost. We believe the clinical negligence environment should be addressed on the basis of a three pronged approach, legal reform being one of them:

- 1) A better understanding of the reasons for and drivers behind clinical negligence claims
- 2) Reduce clinical error and improved patient safety
- 3) Legal reform to help tackle the rising cost of clinical negligence

We welcome the commitment in the ANC 2019 party manifesto to *develop a comprehensive policy and legislative framework to mitigate the risks related to medical litigation*.

Now that a new Government is about to take seats, real progress needs to be made in making these reforms a reality and we are hopeful that change is on the horizon.

As an expert in this field, MPS is determined to help the Government deliver this change.

Legal reform

We recognise progress has been made to help address the issue of escalating clinical negligence claims against the state, such as the introduction of amendments to the State Liability Act. The proposed changes to the Act seek to "provide for structured settlements for the satisfaction of claims against the State as a result of wrongful medical treatment of persons by servants of the State". This would have an impact on patients who claim from the State for clinical negligence in terms of the type of award that they will receive.

Whilst this measure, if implemented, would be a positive step in trying to tackle the costs associated with clinical negligence, it should be noted that it will not completely solve the root cause of the problem. MPS would like to see the implementation of legal reforms that would have a much bigger impact on reducing costs to both the state and for healthcare professionals who pay for their own indemnity.

For many years we have called for legal reform which would help to tackle the rising cost of clinical negligence. Because of our expertise and experience in this area, we are well placed to make

¹ For the full report, please see: <https://www.medicalprotection.org/docs/default-source/sab-docs/5892-striking-a-balance-policy-paper-web.pdf>

² Our full response to the SALRC Issue Paper 33 (Project 141) on medicolegal claims can be found [here](#)

recommendations that could help to address some of the factors contributing to the current claims environment, both to help prevent adverse incidents and claims, and also to better manage the cost of claims when they occur.

We are calling for important reforms that would achieve the following:

- **Improve legal procedures:**
 - The introduction of a *Certificate of Merit* to reduce the number of claims without merit being brought
 - The introduction of financial penalties to discourage the prolonged pursuit and continued defence of claims without merit by attorneys. Such financial penalties could be awarded against the attorneys who bring the claim, rather than the patient
 - The introduction of factual witness statements that will give both parties the opportunity to review each other's factual evidence at an early stage in order to more accurately assess the legitimacy of their respective cases and limit the issues that are being disputed
 - Early exchange of expert summaries to improve transparency and allow for cases to be settled earlier to everyone's benefit
 - Review of both accreditation and compensation of medico-legal experts
 - address risks and conflicts related to practices where experts are compensated on the basis of contingency fees rather than fixed fee for service
 - accreditation of experts to ensure impartial, expert opinions are founded on practise currency and relevance within the specific practise area
 - Stricter case management that will ensure:
 - early and full disclosure of medical records from all relevant sources
 - the introduction and exchange of factual witness statements
 - early exchange of expert summaries
 - earlier and mandatory joint expert meetings

The changes advocated above will help to resolve claims more swiftly and efficiently, using experts who have the requisite experience and are accredited by the Judiciary, thereby standardising the quality expected from experts input and reducing the legal costs associated with claims.

However, there is still work to be done to tackle the rising compensation awards and value of the claim itself. MPS supports a system where patients are fairly compensated, with more consistency around the compensation awarded.

It is important that there is reasonable compensation for patients following clinical negligence, but the cost must be balanced against what society can afford.

We therefore propose the following reforms in this area:

- **Reform how damages are calculated and paid out:**
 - The establishment of an independent review body to define a care package that provides an appropriate standard of care for all patients with a particular injury, regardless of the cause, and set an ultimate limit
 - Placing a limit on future earnings and earning capacity to lower the cost in the system and to introduce greater parity in the size of awards plaintiffs receive. There is a significant issue of fairness here. In many cases, the costs associated with an expensive clinical negligence system are felt by society. Yet some plaintiffs receive significantly higher special damages awards than others – purely because they are very high earners, or because they are able to persuade a judge that they might have been a high earner in the future
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- The creation of a tariff of general damages (set in statute) with a limit on general damages in order to achieve greater predictability and control costs. The unpredictability and uncertainty in the way that general damages are calculated can be problematic when it comes to settling cases quickly. It also increases the chances of over-settlement, which in the long-term drives up costs. It is not just the awards in high value catastrophic injury cases where this is a concern, but also the increasing number of cases that should attract a more modest award and the cumulative impact of these.
 - **Tackle disproportionate legal costs:**
 - The introduction of a fixed recoverable costs scheme, or tariff for clinical negligence claims, as this approach will help tackle disproportionate legal costs
 - A review of contingency fees. The principles as set out in the Contingency Fees Act 66 of 1997 are outdated and should be reviewed. There is currently good access to justice, but we see that the system may incentivise abuse by plaintiff attorneys who have a financial interest to delay cases which could have settled at an earlier stage. This can drive up the costs significantly and for the wrong reasons. The SALRC issue paper (project 142) is welcomed in this context.

The way that disputes are settled is often inefficient and adversarial. A lot can be done to ensure cases are resolved earlier and to create a more consistent, efficient and patient-centred complaints process. We believe that this can be achieved through:

- a pre-litigation framework (or pre-action protocol) to ensure disputes have to be investigated, pursued and responded to before recourse to expensive and protracted litigation
- a mandatory requirement for the parties to consider alternative dispute resolution, such as mediation, at an appropriate stage in the claim, as an alternative to litigating to the door of court

We acknowledge and applaud the 2018 extension of Court Annexed Mediation to the Regional courts of four provinces in South Africa, and hope that this will be rolled out to the remaining five provinces in the near future.

Ultimately, the primary goal for our members, as well as healthcare professionals practising in state facilities, is to deliver the best possible healthcare in an environment that is financially viable and sustainable. It is in the interest of society as a whole to make healthcare more sustainable, accessible and affordable for all citizens.

For these reasons, we strongly urge the new Government, in close cooperation with the Law Reform Commission and other stakeholders, to seriously assess which legal reform can be implemented in the short, medium and long-term.

Our role

We recognise that we also have a part to play. With 60 years of experience in risks and claims trends, we understand the clinical negligence environment and how it evolves better than anyone else. We are keen to play our part by analysing where we see common problems occur and will continue to do so in order to help our members with risk management.

We want to be in a position to provide relevant insights and information that does not compromise member confidentiality, but does enable identification of root causes (controllable and uncontrollable) in order to determine how members' practice might need to be informed/adapted. We are keen to continue to do so at societies and individual level, so we can give more practical support for our members in their day to day working life.

Our members also benefit from our unique protection package which includes general 24/7 support, as well as our educational programmes, all designed to help prevent errors from happening in the first place. We will keep improving these resources so that members can make the most out of their membership with us.

About MPS

MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 300,000 members around the world, and are proud to be supporting around 30,000 doctors and dentists in South Africa since the 1960s.

Membership provides access to expert advice and support together with the right to request indemnity for any complaints or claims arising from professional practice.

Our highly qualified, in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This includes clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

Our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place. We do this by promoting risk management through our workshops, e-learning, clinical risk assessments, publications, conferences, lectures and presentations.
