

Media Release
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Medical malpractice claims drain SA's public health funding

Research into the magnitude of medical malpractice claims facing the South African public health system has revealed that a number of systemic shortcomings are resulting in court judgments worth millions of Rands against the country's nine provincial Health Departments. The research, commissioned by the Actuarial Society of South Africa (ASSA) as part of its public interest function, lists compromised record keeping at provincial hospitals, a legal system ill-equipped to deal with medical negligence claims and the absence of legislation that regulates legal claims in the medical field amongst the key problem areas.

Lusani Mulaudzi, ASSA Public Interest Actuary, explains that credible research is a prerequisite to finding sustainable solutions for problems that are in the public interest. "We identified medical negligence and the financial burden that this places on the State as one of five key projects where actuaries can partner with government on finding solutions that meet the needs of all stakeholders."

The research into medical malpractice claims was conducted by actuary and damages expert Gregory Whittaker. According to Whittaker, medical negligence has cost the country's nine provincial Health Departments close to R10 billion over the past seven years. Over the six year period from 1 April 2014 to 31 March 2020 medical negligence claims payments amounted to approximately R8 billion, while a further estimated R1.6 billion was paid to claimants between April last year and January this year. Whittaker notes that the Eastern Cape Department of Health was responsible for just over half of the claims paid since April last year, having made payments of around R870 million to successful claimants.

The research also reveals that the majority of claims paid were for medical negligence that resulted in cerebral palsy. Cerebral palsy is caused by damage to an infant's developing brain resulting in neurological disorders that permanently affect body movement and muscle coordination.

Inefficiencies revealed by cerebral palsy claims

Given the high number of successful medical malpractice claims against the country's provincial Health Departments that involve cerebral palsy, Whittaker analysed hundreds of court judgments for common denominators resulting in the high number of successful cerebral palsy claims.

He extracted all court judgments dealing with "health" and "negligence" from the Southern African Legal Information Institute (SAFLII) online repository. Of these 1193 judgments, 206 were selected for further analysis as they could specifically be identified as claims against the provincial Departments of Health. Whittaker found that of the 206 judgments, 81 (39.3%) were for cerebral palsy.

Whittaker points out that for close to a century, the majority of cerebral palsy cases were believed to be caused by oxygen deprivation before or during labour. He adds that this theory was, however, challenged when medical interventions like electronic foetal monitoring and caesarean sections reduced the number of stillbirths and infant deaths, but cerebral palsy prevalence rates remained constant.

Whittaker points out that it is now widely accepted that cerebral palsy is often caused by a number of sequential factors rather than a single cause. Contributing factors can include maternal obesity, maternal alcohol consumption and smoking, maternal infections and birthweight. Yet, according to Whittaker, contributory negligence was not argued in the cerebral palsy matters analysed despite the multitude of risk factors that could have contributed.

He points out that birth weight, for example, presents a significant risk factor in cerebral palsy. Yet, out of 81 cerebral palsy judgments, 59 did not refer to birth weight. He says the lack of consideration of these factors is concerning. "If contributory negligence of 10% can be proven in respect of each plaintiff for example, the State would save hundreds of millions of rand in claims payments."

According to Whittaker, an examination of the placenta within 24 hours of a birth can most accurately reveal the causes of abnormalities in a newborn. He refers to a study conducted in the Western Cape, which found that only 6% of placentas of live births revealed no abnormalities, whereas only 2.2% of placentas of intrauterine death cases had no abnormalities.

Yet, says Whittaker, there are no national guidelines in the South African healthcare system for the post birth examination of placentas. Furthermore, South Africa has a dire shortage of specialised pathologists with experience in placental pathology, with the majority practicing in the private sector.

Whittaker says given the growing number of cerebral palsy claims, there is also a clear need for the National Department of Health to create a centralised database for monitoring cerebral palsy claimants to build up accurate life expectancy data. He explains that this data would more accurately inform future claims values.

"Given that it is impossible to accurately predict the life-span of a single claimant, there is a strong case for fixing life expectancy at, say, 10 years in each matter and then make provision for a top-up clause should the claimant survive beyond 10 years."

Protecting health funding from malpractice claims

According to Whittaker, National Treasury's contingent liability was R111.5 billion at the end of March 2020 for medical legal claims against provincial Departments of Health. This represents almost half of the country's total health budget, but could be reduced if claims registers are assessed and individual case reserves are established.

Whittaker strongly recommends that the National Department of Health establishes a medico-legal unit with the purpose of creating a uniform statistical reporting system for medical malpractice claims.

“The lack of a national data surveillance system for tracking medical malpractice claims is a missed opportunity to improve patient safety and better understand the performance of the medical liability system.”

He also points out that there is currently no legislation in South Africa that regulates legal claims in the medical field. He adds that as a result medical malpractice claims are generally dealt with by way of the common law of delict and of contract.

“The negative impact that medical malpractice claims have on the public purse and on the rendering of health services in the public and private sectors means that urgent attention must be given to regulating the system.”

Whittaker says South Africa has established a number of specialist courts such as the Labour Court, the Competition Appeal Court and Land Claims Court, and should also consider piloting the creation of specialist medical malpractice courts. Using medically trained judges would ensure that judgments are based on sound medical and scientific principles.

He says a regulated medical malpractice system would go a long way in achieving the following:

1. The prevention of medical injuries and the promotion of patient safety, which are paramount goals of health care policy. The prospect of liability in damages should incentivise healthcare professionals to act with reasonable care.
2. Compensation of injured patients should be a core function of the law regarding medical malpractice and medical injuries.
3. Accountability to injured patients in terms of what went wrong, who was responsible for it, and what efforts are being made to prevent future negligence.

Ends

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