MEDICINE AND THE LAW

# The leading causes of medicolegal claims and possible solutions

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Medicolegal claims in the South African health sector have markedly increased since about 2007. This is of importance, because money spent on these claims from the public health budget is money that should have been spent on the healthcare priorities identified in the National Department of Health (NDoH) Strategic Plan. We need to understand why these claims have increased so drastically. This article discusses the causes of increased claims, which include clinical errors, maladministration and mismanagement; the legal profession's contribution to the problem; legal developments; patient awareness; and some other additional causes. Possible solutions are also offered, such as those related to the NDoH National Core Standards and Ideal Clinic initiative to improve quality of care standards; improving the healthcare system and quality of care; better distinguishing between valid and invalid or fraudulent claims; the possible role of fit-for-purpose legislation; and a reconsideration of compensation methods.

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Medicolegal claims, normally meaning claims based on instances of medical negligence or malpractice, have markedly increased in the South African (SA) health sector, skyrocketing since about 2007. This is clearly shown by recent figures indicating a growth rate of 30% for contingent liabilities, a loss that may occur in future, and 23% for medicolegal claims in the public sector since 2014. These percentages translated to ZAR99.2 billion and ZAR2 billion, respectively, in the 2018/2019 National Treasury Budget Review reporting period.[1] In 2020/2021, >ZAR6.5 billion was awarded in medicolegal claims.[2]

This increase is significant, because money spent on these claims from the public health budget is money not being spent on healthcare priorities such as those identified in the National Department of Health (NDoH) Strategic Plan, which include raising life expectancy at birth to 70 years; progressive improvement of tuberculosis prevention and care; reducing maternal and child mortality; reducing the prevalence of non-communicable chronic diseases; reducing injuries, accidents and violence; complete health systems reform; universal healthcare coverage; and filling posts with skilled, committed and competent individuals.[3]

It may be noted that the increase in claims is not only an SA issue, but a global one. Regionally, it has been reported that Botswana saw >300 claims instituted from 2015,[4] and in Ghana[5] and Malawi,[6] litigation for medicolegal issues has become so prevalent that this trend has been described as a 'boom industry'.[7]

Also of note is the fact that not only is the number of claims being instituted on the rise, but their size and value have also increased.[8] This escalation may be attributed to medical and technological advances that increase life expectancy. Although these advances are of course beneficial, increased life expectancy may inflate the size of claims, because future maintenance, loss of income, and future healthcare are factored into the calculation of damages. The more future a harmed individual has, the higher are the damages payable.

What has caused the sharp increase in claims and how this may be addressed in SA has been investigated and debated by various scholars and authorities. The leading causes of this growth trend and suggestions for curbing it will be discussed in this article.

## The causes of increased claims

Medicolegal scholars such as Oosthuizen and Carstens,[9] and the South African Law Reform Commission (SALRC),[10] have concluded that no one cause can be singled out, and that the rise in medicolegal claims is due to a range of factors.

### Clinical errors, maladministration and mismanagement

The obvious first cause of the increase in medicolegal claims relates to clinical errors and the quality of healthcare services. Although cerebral palsy-type claims make up around half of medicolegal claims in SA, from case law it seems that the remainder of the causes of action are varied, ranging from negligence in applying proper care[11] to failure to take reasonable steps to prevent stillbirth[12] to misdiagnosis and delayed treatment.[13] This indicates a wide spectrum of negligence. However, issues in the healthcare system reach further than mere individual negligence, and may also include systemic factors and errors.

It is an unfortunate truth that in certain instances negligence is indeed due to clinical errors or a low quality of care, yet healthcare practitioners are still expected to perform their duties according to the degree of care and skill reasonably expected of them. However, this may not always be possible where institutional environmental factors, such as old and ill-maintained equipment, shortages of medications or understaffing, exist that hinder the provision of an optimal quality of care. Administration and management, or rather maladministration and mismanagement, influence the quality of care profoundly, as does the related availability of resources in already strained national and provincial health budgets.

### The legal profession

The legal profession has also been identified as contributing to the rise in medicolegal claims and litigation. Arguments have been made that legal practitioners working in the field of medical negligence and

malpractice are actively marketing to, encouraging and targeting the public to pursue legal recourse in the event of adverse consequences resulting from healthcare.[8,9] Further arguments have been made that the amendments to the Road Accident Fund Act No. 19 of 2005,[14] which limited the financial aspects of Road Accident Fund claims, may have pushed legal practitioners towards new avenues of personal injury law in the form of negligence and malpractice litigation.

The Contingency Fee Act No. 66 of 1997[15] may also contribute, as it provides for a 'no win, no fee' arrangement, allowing persons who would not normally be able to afford litigation to pursue this path. It may also lead to inflated claims, as the bigger the 'win', the bigger the fee. It must, however, be kept in mind that negligence and malpractice lead to negligence and malpractice litigation, legal practitioners are ethically bound to their clients, and it is in the interests of the client to obtain the best possible award or settlement.

### Legal developments and patient awareness

Other developments in legislation and case law may also be contributing to the rise in claims, because of the shift towards the patient. Patient-centeredness is evident in the provisions of the Constitution,[16] the National Health Act No. 61 of 2003 (NHA),[17] the Consumer Protection Act No. 68 of 2008 (CPA)[18] and the Children's Act No. 38 of 2005.[19] Some examples of aspects provided for and protected in these pieces of legislation include autonomy and informed consent, privacy and confidentiality, and the best interests of the child. In addition to these rights, increased patient knowledge and awareness of their rights related to consumer protection, accountability and transparency also contribute to the increase in claims. These rights are provided for by the Constitution, the NHA, the CPA, the Children's Act, the Mental Health Care Act No. 17 of 2002,[20] the Promotion of Access to Information Act No. 2 of 2000 (PAIA)[21] and the Protection of Personal Information Act No. 4 of 2013 (POPIA).[22] In turn, the increase in awareness of rights leads to a more litigious climate, which in conjunction with patient-centred jurisprudence also raises the number of claims being instituted.

In contrast, arguments have been made that lack of patient-centeredness and a vigorous complaints system add to the rise in claims, as disgruntled patients are left with only litigation as an avenue for redress.[8,9] This is despite the facts that the NDoH has published three sets of guidelines for complaints,[23] and that the Health Professions Council of South Africa provides for a complaints procedure. However, these seem to be inadequately applied and enforced, and as such do not currently offer a satisfactory solution.

### Additional causes

Some further causes of the rise in medicolegal claims include:

- Patient expectations. When patients are better informed, they become more involved in their own healthcare and may have unrealistic expectations that can lead to litigation when not understood or fulfilled.
- The doctor-patient relationship. Problems in this area include poor communication regarding possible risks and adverse outcomes inherent to procedures or treatments, perceptions that the doctor is indifferent, or dissatisfaction with the poor management of adverse outcomes.
- Failure to distinguish valid from invalid or even fraudulent claims.

## Possible solutions to the rise in claims

Just as there is no single cause for the rise in claims, there is no single solution. The SALRC recognises that this is a complex matter, and has proposed a three-tiered strategy to reduce medicolegal litigation.

Primary prevention would entail the progressive achievement of the NDoH National Core Standards and Ideal Clinic initiative to improve quality of care standards.[24] These standards encompass a wide range of improvements ranging from clinical standards to the working environment, infrastructure, human resources and technology, to ensure better and safer patient experiences and clinical outcomes. This process will require healthcare facilities to develop quality improvement plans to address the areas where they do not meet these standards, for example staff development.

Secondary prevention relates to management of complaints and the importance of early engagement with harmed individuals, establishing an Independent Health Complaints Committee, strengthening systems in place to monitor adverse outcomes, moving from a culture of blame to one of learning, and receiving feedback from medicolegal claims.

Lasty, tertiary prevention would entail:

- Professional, holistic management of all medicolegal litigation
- Fast-tracking the resolution of low-value claims with minimal expenditure
- Just compensation of bereaved families or injured patients
- Assisting plaintiffs 'in kind', for example by securing school placement of disabled minors, and ensuring continuous access to state medical care when private care is unavailable
- Securing settlement awards in trusts to ensure proper accounting and payment of funds for future medical care
- Return of unexpended funds to the NDoH in the event of premature death
- Challenging false or opportunistic practices that artificially drive up the value of claims
- Ensuring that all public money spent on settlement of valid claims is just and appropriate.

Some further possible solutions may include that the state should publish annual medicolegal claims reports reflecting and analysing relevant data in order to examine trends and determine the efficacy of any attempts at lowering claims. This would speak to risk management as well.

In addition to the strategy discussed above for improving the healthcare system and quality of care, the state could implement its own 2030 Human Resources for Health Strategy, which could ease the understaffing of many healthcare facilities.[25] As mentioned, claims do arise from individual negligence, and where this is the case, the repercussions felt by the healthcare practitioner may have to be reconsidered. This might mean that medical licences should be suspended, or in instances of gross negligence resulting in death, that charges of culpable homicide may even be considered.

Better distinguishing between valid and invalid or fraudulent claims may aid in curbing the rise of claims. In this regard, legal capacity should be strengthened. Additional training for the judges who adjudicate these claims could also be considered, or these judges should perhaps be assisted by expert assessors and panels of experts. Specialist courts may also be considered, or patients could be encouraged to go in the opposite direction, and pursue alternative dispute resolution methods such as mediation.

Furthermore, although legislation alone will not address the causes of the rise in claims, because it cannot solve problems with governance, management, budgeting and procurement, low quality of care, lack of skills, and issues surrounding human resources, training, and maintenance of facilities and equipment, some legal reform and the development of fit-for-purpose legislation that addresses procedure, creates bodies or authorities to manage some of the causes, creates novel interventions, and changes or alters the

method and timing of compensation may be helpful. The amended State Liability Bill is intended to serve before Parliament again this year. It could offer some alleviation to the rise in claims, and may act as a benchmarking exercise in determining whether legislative intervention would be viable and to what extent.

Lastly, compensation methods could also be reassessed, as provided for in the new State Liability Bill, with a move away from lump-sum payments to structured settlements that could consist of payment for harm suffered, periodic payments for future medical or other costs, or even payment in kind such as healthcare services provided by the state.

## Conclusion

Attention must be given to the rise in medicolegal claims, and understanding the causes of these increases is only the starting point of addressing this complex issue. Once these causes have been identified, action needs to be taken, and in a multifaceted and holistic manner. In recognising that various factors contribute to rising medicolegal claims, diverse solutions may be created and the tide perhaps pushed back, allowing for the health budget to be better spent on SA's healthcare priorities.

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