

CHALLENGING THE COST OF CLINICAL NEGLIGENCE

THE CASE FOR REFORM

As the leading provider of professional protection to more than 30,000 health professionals in South Africa and 300,000 worldwide, MPS has a unique insight into the nature of clinical negligence claims.

These are undoubtedly challenging times for healthcare professionals, and we understand that increases in the cost of membership subscriptions can be painful and may have a significant impact on some. 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.

MPS recognises the important role we must play. We will continue to support you and promote safe practice in medicine and dentistry by helping to avert problems in the first place. Crucially, we advocate open disclosure. When organisations embrace open disclosure it benefits all involved. Above all, it is the ethical thing to do.

MPS CONCERNS

There is growing recognition of the need for legal reform in South Africa. Not only to reduce mounting costs that are becoming a burden for the public purse, but also to create a system that both ensures reasonable compensation for patients and allows for a fair and robust defence where necessary.

Our data indicates that between 2009 and 2015, there has been an escalation in the likely value of claims being brought against doctors, with claim sizes increasing by over 14% on average, each year, during that period. The average likely increase of claim size for dentists per year during this period was similar at just under 14%. Our data also indicates that the estimation of the long-term average claim frequency for doctors in 2015 is around 27% higher than in 2009.

As a responsible, not-for-profit organisation owned by you, our members, we have an obligation to ensure that we collect sufficient subscription income to meet the expected future costs of claims against members so we can be in a position to defend your interests long into the future.

Our concerns were echoed by Health Minister Aaron Motsoaledi at the Summit in March 2015 where he is understood to have expressed similar concerns about the public sector's clinical negligence experience.

We do 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 them positive, that are contributing to the current claims experience including:

- The lack of a patient-centered and robust complaints system is leaving 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 allows the size of claims to increase and makes delays endemic, with no parties benefitting;
- The cost of settling a claim increases as time goes on. A protracted legal process can have a significant impact on the final costs of settling a claim, as it means legal bills continue to mount and compensation can increase in size;
- Amendments to the provisions of the Road Accident Fund Act potentially has resulted in attorneys refocusing their area of interest towards personal injury claims, and in particular, clinical negligence;
- Increased patient awareness of their rights under the Constitution as well as the Consumer Protection Act;
- Increasing patient expectations with many patients now expecting greater involvement in – and understanding about – their healthcare.

Alongside our concerns about cost, we believe 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.

Whilst the deterioration in the claims experience may not continue at its current pace, the experience to date merits deep consideration of legal reform.

MPS PROPOSALS

In this paper we propose reform that could begin to tackle some of the problems that have contributed to the current claims environment. These proposals should be debated and explored at a public policy level. We recognise that we are only one voice and our reform proposals are not exhaustive. We hope that this paper will be one contribution among many to support future reform. MPS applauds the Minister of Health, and institutions such as the South Africa Law Reform Commission for their recognition of this priority and for progress made so far.

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