



The 'boom' in medical malpractice claims – patients could be the losers

'A shell for him, a shell for thee, the middle is the lawyer's fee.'
– Benjamin Franklin^[1]



Two sets of circumstances have recently come together in South Africa (SA) to cause an escalation in lawsuits brought by patients against doctors (and an escalation in awards of damages).^[2]

The first is the drying up of earnings by lawyers from the Road Accident Fund, as Malherbe, himself a lawyer, explained in his February editorial: 'Amendments to the Road Accident Fund (RAF) legislation have made damages claims owing to personal injury sustained in motor vehicle accidents a less lucrative source of work for lawyers.'^[3] Payouts are lower and slower.^[4] The Contingency Fees Act of 1997^[5] permits attorneys to offer clients 'free' legal assistance in pursuing a suit against a medical practitioner, if the case is expected to have a good chance of succeeding. Googling 'medical malpractice in South Africa' offers you access to lists of law firms suggesting that you 'Contact Us' on a 'No Win, No Fees Basis' to 'Get The Damages You Deserve Now'. Also, the implementation of the Consumer Protection Act of 2008^[6,7] means that doctors are now liable even for faulty equipment; Pepper and Slabbert^[7] provide the example of a cardiologist who, having implanted a pacemaker, could be sued if the pacemaker were to fail.

The second is the situation that exists in many of our public sector hospitals ... a mix of too many, too sick patients, human resource constraints, lack of equipment, non-functioning equipment and recurring shortages of supplies, added to which is lack of experience on the part of interns and community service medical officers, who are all too often left to function unassisted and unadvised by senior personnel. The Health Professions Council of South Africa reports an increase in complaints from patients and in the number of doctors found guilty of unprofessional conduct: refusing to treat patients, misdiagnosing, practising outside their scope of competence, overcharging, or charging for services not rendered.^[8] There have been large payouts to patients, deserved, it must be said, and 'related to the harm suffered rather than to the degree of negligence',^[2] but the costs have to be met by the state.^[3,4] The lawyers know where to look and are 'focusing on the Eastern Cape health department as a source of massive claims',^[4] this focus probably prompted by such incidents as the deaths of 29 neonates, due to lack of basic infection control measures, at East London's Cecilia Makiwane Hospital.

Patients, for reasons thoroughly explored in the Malherbe editorial,^[3] may well be the losers, particularly in the smaller towns and rural areas. Given that the greatest number of claims, yielding the highest damages paid, are in the domains of obstetrics, neurosurgery and spinal surgery, trauma and orthopaedics, doctors may well decide to steer clear of qualifying in these specialties.^[2,3] Obstetricians,

whose malpractice insurance runs to a quarter of a million rands a year, might decide to abandon private practice altogether. Women would then have to seek antenatal care and delivery in the overburdened public sector – wherein, for example, there has been a return of the entity of retinopathy of prematurity (ROP), due to lack of monitoring of oxygen administered to babies born in facilities that lack the necessary nursing and medical expertise and equipment. SA has recently become part of the so-called 'third epidemic of ROP', with claims for damages on behalf of blinded children.^[9]

Malherbe^[3] and Pepper and Slabbert^[7] warn that we may see the compassion-based practice of medicine replaced by defensive medicine, with an inevitable rise in the cost of healthcare. Doctors will tend to 'focus on a hypothetical court case, which in turn may affect the quality of the care that is delivered.'^[3] There are signs that this may be occurring already: this country has an abnormally high caesarean section rate, ranging from 20% to 30% in the public sector to nearly 60% in the private sector,^[10] and there is a documented increase in pathology costs due to increased utilisation.^[11]

The editorial in this issue^[2] advises doctors in this 'increasingly hostile, pressurised and uncertain' practice climate to ensure that they have insurance or indemnity (see box, p. 460) and that their provider has experience of managing claims in SA.

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1. From 'The benefit of going to law', Benjamin Franklin (1706-1790). http://www.poetry-archive.com/f/the_benefit_of_going_to_law.html (accessed 4 June 2013).
2. Howarth G, Brown S, Whitehouse S. The importance of comprehensive protection in today's healthcare environment. *S Afr Med J* 2013;103(7):453-454. [<http://dx.doi.org/10.7196/SAMJ.7106>]
3. Malherbe J. Counting the cost: The consequences of increased medical malpractice litigation in South Africa. *S Afr Med J* 2013;103(2):83-84. [<http://dx.doi.org/10.7196/SAMJ.6457>]
4. Medical malpractice claims have become a boom industry. <http://www.citypress.co.za/news/doctors-lose-patience-as-suits-spike-20120707/> (accessed 24 May 2013).
5. Contingency Fees Act No. 66 of 1997. http://www.saflii.org/za/legis/num_act/cfa1997170.pdf (accessed 24 May 2013).
6. Consumer Protection Act 68 of 2008. Government Gazette 2009:526(32186). <http://www.info.gov.za/view/DownloadFileAction?id=99961> (accessed 24 May 2013).
7. Pepper MS, Slabbert MN. Is South Africa on the verge of a medical malpractice litigation storm? *South African Journal of Bioethics and Law* 2011;4(1):29-35.
8. Naidoo S. Thousands of doctors 'negligent'. *Times Live*, 6 June 2010. <http://www.timeslive.co.za/sundaytimes/article489475.ece/> (accessed 20 May 2011).
9. Visser L, Singh R, Young M, Lewis H, McKerrow N (ROP Working Group, South Africa). Guideline for the prevention, screening and treatment of retinopathy of prematurity (ROP). *S Afr Med J* 2013;103(2):116-125. [<http://dx.doi.org/10.7196/SAMJ.6305>]
10. Dhai A, Gardner J, Guidozzi Y, Howarth G, Vorster M. Vaginal deliveries – is there a need for documented consent? *S Afr Med J* 2011;103(1):20-22.
11. Lawrie M, Good A. Increasing pathology utilisation lies behind increasing pathology costs. *S Afr Med J* 2013;103(7):451-452. [<http://dx.doi.org/10.7196/SAMJ.7123>]

S Afr Med J 2013;103(7):433. DOI:10.7196/SAMJ.7127