

## The importance of comprehensive protection in today's healthcare environment



Doctors today have to practise medicine in an increasingly hostile, pressurised and uncertain healthcare environment. The cost of clinical negligence continues to rise in South Africa (SA) with increases in both the number and value of claims; increases so significant that some specialties have been left questioning whether they should even continue to practise.<sup>[1]</sup> Others have adopted a more defensive approach to try to safeguard themselves against the risk of claims.

Practitioners are aware of increasing costs to protect themselves against an increase in litigation. The concern is that this trend will continue, with increasing claim sizes forcing insurance and indemnity providers to increase their rates, reducing the affordability for certain specialties. Such a trend would clearly prove unsustainable in the long term.

Unsurprisingly, healthcare professionals may feel as if they can't control all the risks they are exposed to; but what they can do is ensure that they have full protection in place to respond to their potential liabilities. Appropriate professional indemnity or insurance is essential: it protects both healthcare professionals and the patients they treat.

More than ever, medicine has to be practised in SA against a backdrop of change. There is uncertainty around National Health Insurance, relationships with private medical schemes are increasingly trying, resources are being stretched, and the gap between patient expectations and the reality of what can be delivered continues to widen.<sup>[2]</sup>

Change is happening in doctor-patient relationship terms too. In the past, an unwritten contract existed between doctor and patient: doctors were altruistic, acting in the best interest of their patient, and were, generally speaking, not to be challenged or sued. Now, there is an increased awareness amongst patients of their rights, and an encouragement to exercise them.<sup>[3]</sup> This is partly due to the Health Professions Council of South Africa (HPCSA)'s launch of a national campaign last year to raise awareness of patients' rights.<sup>[4]</sup> Nobody could disagree with the need for patients to be better educated about their rights and responsibilities. But what can be challenged – as Dr Kgosi Letlape, former acting head of the HPCSA said – is an assumption that an increase in complaints and claims is the direct result of a decline in professionalism.<sup>[5]</sup> The increase in the cost of clinical negligence claims stems from heightened patient awareness, as a direct result of the HPCSA's national campaign, and claimant lawyer attention, rather than a deterioration in the quality of patient care provided by doctors. The level of compensation awarded relates to the harm suffered, rather than to the degree of negligence. The cost of patient care packages is also increasing as technology improves, which is affecting the size of clinical negligence awards.

Action needs to be taken to address the costs and causes of clinical negligence. To kick-start the campaign for change, the Department of Health has met with a number of organisations including insurers and indemnifiers to discuss working together to control these rising costs. Change won't be immediate, however. In the meantime, it is important for all healthcare professionals to ensure that their indemnity or insurance arrangements are both robust enough to accommodate escalating costs and flexible enough to adjust to the new and unusual demands they are currently faced with.

All healthcare professionals should check carefully the terms and conditions of their indemnity or insurance agreements, making sure they practise inside the boundaries of their cover, as well as within the limits of individual competency.

Whatever type of cover a doctor chooses, it is important to ensure that the provider has the right experience of managing claims in SA to provide long-term security and peace of mind. This is especially true in a period of rising clinical negligence costs. Recently, there have been instances of some professional indemnity or insurance providers seeking to escape liability, arguing that cover only extends to acts, not to omissions.<sup>[6]</sup> Some less financially stable providers are leaving the medical malpractice market, particularly those involved in providing cover for high-risk groups, such as obstetricians and neurosurgeons. Sometimes, cover is removed at short notice, leaving a busy clinician with the responsibility to make alternative arrangements or to suspend their practice.

As well as ensuring that their own individual indemnity or insurance arrangements are robust, healthcare professionals should ensure that adequate arrangements are in place to protect themselves for the acts and omissions of any employed staff. This is known as vicarious liability. An employer is liable in law for claims arising from the acts or omissions of their employed staff, including nurses, receptionists and locums. It is important that all doctors understand and make appropriate arrangements for these liabilities.

Most often, professional indemnity or insurance is personal to the individual member and does not extend to the vicarious liability a doctor may have for their employed staff with high levels of clinical autonomy, such as an employed locum. If a healthcare professional does employ staff, they should check as a term of the contract of employment that the prospective employee has sufficient individual cover arrangements in place. This applies even for short-term periods of employment, for example if a doctor employs a locum to cover for them for a period of annual leave. Some indemnity providers may extend indemnity to members' vicarious liability for staff in administrative roles with no or limited autonomy.

Owners of healthcare establishments such as private clinics or other premises should ensure that they have cover in place to cover their public liability for 'slips and falls' on the premises for which they are responsible. This is not usually covered by professional indemnity or insurance, but can be purchased separately and is relatively inexpensive; a small price to pay to safeguard one's practice against the potential for public liability claims, as well as claims for clinical negligence.

The increase in the cost of clinical negligence claims in SA, while marked, is not unique; the cost of claims is rising worldwide. Steps are being taken to address the increases in both the number and value of clinical negligence claims before some healthcare professions are priced out of the market. A balance needs to be made between ensuring that no patient goes without fair compensation following an adverse incident, and ensuring that the cost of clinical negligence claims does not continue to rise at such an exponential rate, putting even more pressure on healthcare professionals and the healthcare system.

In the current climate of change in healthcare, it is more important than ever for each healthcare professional to ensure that they have sufficient and appropriate cover in place to be able to respond to a claim for clinical negligence, giving peace of mind.

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