**Natmed releases its Annual Survey of Medical Malpractice Judgments of 2018**

Is there a medico-legal litigation "crisis" in South Africa? The Natmed review of the medico-legal handed down in 2018 paints a more nuanced picture. Natmed's annual review of medical malpractice judgments of 2018 is a comprehensive review of all of the South African judgments of 2018 with a summary of facts, findings and commentary. The publication is free to Natmed clients who can obtain a copy by contacting admin@natmed.mobi

Undoubtedly, there is a large amount of litigation in various forms both in the public and private sector which is ongoing and in different stages of progress. Many cases are resolved in one way or another and for different reasons, before being argued in court or before a final judgment.

Notwithstanding that, and despite ongoing reports of the medico-legal litigation melee in South Africa, there were only twenty-two judgments delivered by the South African courts in 2018 nationally dealing with medical malpractice cases. A number of trends appear from those cases, including the fact that just because a patient suffers an adverse health event, that does not automatically mean that the medical practitioners are at fault. There was an alarmingly high prevalence of lost and incomplete medical records, and sadly, most of the cases related to injuries to minor children (babies in fact) due to injuries that occurred during labour and birth. The majority of the cases related to the public healthcare sector.

The Natmed review uncovered another four judgments relating to medical negligence issues in an ancillary way (for example, dealing with legal costs recoverable in a medical malpractice case, and another discussing expert evidence in personal injury cases in general).

**Limited Private Healthcare Sector Judgments**

Of those twenty two medical malpractice cases only three were brought against private hospitals or private practitioners. One related to the duties and negligence of a covering doctor (a dispute between a hospital and a doctor), where it was found that a covering doctor does not have a lesser duty towards the patient as compared to a patient's primary or usual doctor. Another was a dispute about whether the window of opportunity was still open for therapeutic treatment of the patient's stroke when he arrived at the hospital. The judgment

did not deal with the merits of the claim(they are still to be determined) but addressed the question of whether the case should be separated to answer the question of causation (just one aspect of liability) before addressing the remaining issues. The court decided that all the issues of the claim must be dealt with together to avoid piecemeal litigation.

The third was a case related to sciatica, with a claim against the doctor for alleged lack of informed consent and a rush into spinal surgery. The patient argued that the doctor had not allowed for a sufficiently meaningful period of conservative treatment before advising the patient to undergo further surgery. The court noted that all surgery is risky and "spinal surgery carries with it its own set of risks, no matter how routine the procedure and no matter how skilled the surgeon." The doctor had acted reasonably, and the patient's claim failed.

**Birth Injuries**

Of the twenty-two medical malpractice cases fourteen were cases related to birth injuries, that is, claims relating to various injuries to new born babies that allegedly occurred during labour or delivery or shortly after birth. Of those fourteen, at least ten related to claims regarding cerebral palsy. In two of those cases the baby had passed away. These cases are usually launched by mothers in their personal capacity and on behalf of the minor child. Most of the birth injury cases are based on allegations of failure to deliver the child timeously resulting in cerebral palsy as a result of lack of oxygen during labour or prolonged labour. Often the allegations relate to the need to have carried out a caesarean section which was not done at all or not done quickly enough. There was 1 claim for failing to diagnosis jaundice which allegedly led to cerebral palsy. In those matters the mother/patient succeeded in eight of the fourteen cases. Some of those cases failed not on the merits but on the interlocutory issues (that is, technical issues unrelated to the merits of the main claim). For example, two of those judgments related to applications related solely to compelling the production of documents which did not exist. Both failed. In that regard the court held that the defendants could only be compelled to discover or produce documents over which they had control and which they could find. The merits of those claims still need to be determined.

Where the birth injury claims failed the issue was often the inability of the claimant to prove causation (it could not be established when the brain injury occurred). If it occurred immediately before birth it was too late to do anything. If it had occurred days or weeks

before birth nothing could be done by the birthing team. If it occurred during prolonged labour, the patient was generally successful in her claim.

**Lost Medical Records**

A lot of the judgments had to deal with missing or inadequate medical records in some way or the other. In dealing with this the courts sometimes draw an adverse inference but that is not always the case. Eleven of the judgments dealt with records or documents in some way or another. All of those judgments were cases against a Provincial Health authority. In many instances, no acceptable explanation was provided for the absence of the records. In all of the cases the courts found that medical records are crucial and indispensable. Hospital employees have both a Constitutional and statutory obligation to keep appropriate clinical notes. Medical practitioners are further obliged to do so by the various ethical rules and guidelines of their relevant professions.

While in some judgments the court did not draw any adverse inference against the hospital because of the absence of the records it did find that the absence of records played a role in determining whether the evidence of the patient was acceptable and satisfactory in establishing the alleged negligence on the part of the medical staff. Often the absence of records, or incomplete records means that the patient's version of events goes largely uncontested. In one of the cerebral palsy case judgments the defendant MEC argued that the court conflated the failure to keep records with causal negligence and that was incorrect. The court did say that the question whether missing records should bear on a finding of causation and negligence is an important one to be considered and clarified by the Supreme Court of Appeal. The court was careful not to say that it had drawn a negative inference against the MEC due to the missing records, but the court did imply that the missing records bore weight in the judgment. Because of the increasing number of medical negligence cases involving the absence of or incomplete, records the court allowed leave to appeal to the Supreme Court of Appeal.

It will be interesting to see what that SCA does with the question. It is likely that the impact of absent or incomplete medical records will always be dependent on the facts of the particular case and evidence presented. What is clear is that the absence of or incomplete medical records constitutes a significant ongoing problem for public health facilities in particular in the defence of medical malpractice claims.

**Harm Does Not Always Lie Where It Falls**

A number of the judgments also considered whether the mere fact that the injury had occurred should lead to an inference of negligence. The judgments dealt with the principle of *res ipsa loquitor*, (which holds that the mere occurrence of the kind of injury is sufficient to imply negligence) and reiterated that this principle is nothing more than a convenient latin phrase used to describe proof of facts sufficient to support an inference that the defendant was negligent. The courts consistently held that the principle was not a magic formula nor presumption of law. It is merely a permissible inference the court may employ if upon all the facts it appears justified.

All of the judgments emphasised that the onus of proof in medical negligence cases is no different than in any other civil case. The onus is on the plaintiff to prove all the elements of the claim on the balance of probabilities. The judgments consistently held that the courts will not likely assume negligence just because an injury occurred. To the contrary, the courts often refer to earlier judgments cautioning against the natural human tendency when an innocent patient is injured, such as:

> *"… we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong…We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure".*

The courts have also consistently held that if a doctor acts reasonably they cannot be found negligent merely because another doctor also acting reasonably would have done something different.

Of the nineteen judgments against the State, the plaintiff was successful in nine. This indicates a less than 50% success rate despite what one might have intuitively thought would have been a poor record of success by Public Health Facilities in defending claims (although of course not all of those judgments dealt with the merits of the case). Also indicating that provincial health authorities are relatively discerning about the matters which they choose to take to court to defend and when defended to trial, generally a good job is done. Of course, that does not take into account the other thousands of cases that are in various stages of process against the provinces and matters which the provinces are compelled to settle because they are indefensible.

The Gauteng, KwaZulu Natal, Eastern Cape and Western Cape provinces feature more prominently in the reports.

Furthermore, in choosing to litigate there is no quick result. Most of the cases took about seven to eight years to conclude from the date of harm to the date of the judgment. An outlier was one cerebral palsy case that took fifteen years to conclude. Another judgment took eighteen years to conclude but that was a claim which had actually prescribed (expired due to the running of time). The patient had been treated for a gunshot wound by the relevant Hospital in August 1999 but only launched his claim seven years after the injury which was an unreasonably long time period based on the facts of this case. The court found that the patient had knowledge of his treatment and the quality or lack thereof from the first day in hospital and had suffered pain continuously after that. That was the exactly the same information which caused him to ultimately and belatedly seek advice in 2011. There was no reason to deviate from the normal 3 year prescription period.

A few judgments were given about four years after the harm occurred but were interlocutory judgments, for example, dealing with access to documents.

It is clear that litigation did not provide a speedy resolution of the claims and pending judgment the successful patient was without funds for ongoing treatment and would also have had (absent any contingency arrangement) to fund the ongoing litigation. In those circumstances, alternative medical dispute resolution of medical malpractice claims currently much favoured by many of the private practitioner professional bodies, and the National and Provincial Health authorities, including mediation, is to be recommended in appropriate cases.

A tabulated review these medical malpractice judgments from 2018 appears below which details the type of case, whether a public or private practitioner was involved, the outcome, period to conclusion and the case names (copies of the judgments are also available by contacting admin@natmed.mobi)

**Summary Table**

| | TYPE OF CASE | PUBLIC / PRIVATE | PATIENT OUTCOME | YEARS TO JUDGMENT | CASE NAME |
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| 1 | Birth injury resulting in cerebral palsy (CP) | Public | Succeeded | 8 years | M obo M v MEC for Health of the Gauteng Provincial Government (Gauteng HC) |
| 2 | Birth injury | Public | Failed (The case dealt with discovery of documents, not merits) | | Dube v Member of Executive Council (Gauteng HC) |

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| 3 | Birth injury | Public | Failed (The case dealt with discovery of documents, not merits) | 8 years | M v MEC for Health of the Gauteng Provincial Government (Gauteng HC) |
| 4 | Birth injury CP | Public | Failed | 13 years | Mthombeni v MEC for the Department of Health (Mafikeng HC) |
| 5 | Birth injury CP | Public | Succeeded | 6 years | HN v MEC for Health, KZN (KZN HC) |
| 6 | Birth injury CP | Public | Failed (patient initially succeeded, but this was the application for leave to appeal - the appeal by the MEC was allowed) | | MEC: Health and Social Development, Gauteng Province v M obo M (Gauteng High Court) |
| 7 | Not medical malpractice but the court did comment on medical records | Public | Need for better medical records systems | | State Information Technology Agency (Pty) Ltd v Premier, Eastern Cape Provincial Government and Others (Eastern Cape High Court) |
| 8 | Gallbladder injury | Public | Failed | 6 years | Clarke v MEC for Health Western Cape and Another (Western Cape High Court) |
| 9 | Birth injury, baby subsequently died | Public | Succeeded | 5 years | K v MEC for Health, Eastern Cape (Eastern Cape High Court) |
| 10 | Minor child with tuberculosis and paraplegia | Public | Failed | 7 years | AZ v Member of the Executive Council for Health, Eastern Cape (Eastern Cape High Court) |
| 11 | Minor child with tetraplegia from head injury | Public | Failed | 7 years | M and Another v MEC for Health, Western Cape (Western Cape High Court) |
| 12 | Birth injury CP | Public | Failed | 7 years | MEC for Health, Western Cape v Q (Supreme Court of Appeal) |
| 13 | Birth injury CP | Public | Failed | 8 years | AM obo KM v MEC for Health, Eastern Cape (Supreme Court of Appeal) |
| 14 | Birth injury CP | Public | Succeeded | 12 years | M obo M v MEC for Health and Social Development of the Gauteng Provincial Department (South Gauteng High Court) |
| 15 | Sciatica from back surgery | PRIVATE | Failed | 7 years | Batohi v Roux (KZN High Court) |

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| 16 | Birth injury CP from jaundice | Public | Succeeded | 9 years | Mbola obo M v MEC For Health, Eastern Cape (Eastern Cape High Court) |
| 17 | Gunshot wound | Public | Failed (prescribed) | 18 years | Loni v MEC, Department of Health, Eastern Cape, Bhisho (CC) |
| 18 | Ectopic pregnancy | Public | Succeeded (condonation) | 4 years | Ntobo v The MEC For Health for the Free State Province (Free State High Court) |
| 19 | Gunshot wound | Public | Succeeded (condonation) | 4 years | R v MEC for Health, Free State (Free State High Court) |
| 20 | Birth injury CP | Public | Succeeded (quantum increased) | 10 years | NK obo ZK v MEC for Health of the Gauteng Provincial Government (Supreme Court of Appeal) |
| 21 | Birth injury baby subsequently died | Public | Succeeded | 3 years | Siwayi v MEC For Health, Eastern Cape Province (Eastern Cape High Court) |
| 22 | Not a medical malpractice case but the court commented on damages for personal injury | | Made a comment about quantum of damages in personal injury cases | | L and Another v Minister of Police and Others (KZN High Court) |
| 23 | Costs in a medical malpractice case | | What can be recovered re legal fees and expenses | | Naidoo v MEC for Health, KwaZulu-Natal, et al (KZN High Court) |
| 24 | Stroke / Separation of issues | PRIVATE | Failed | 10 years | C v Greeff (Western Cape High Court) |
| 25 | Birth injury CP covering doctor | PRIVATE | Succeeded (Hospital got contribution) | 10 years | Life Healthcare Group (Pty) Ltd v Suliman (Supreme Court of Appeal) |
| 26 | Not a medical malpractice case but court discussed expert evidence | | How expert evidence is assessed | | Mahachi v Road Accident Fund (North Gauteng High Court) |

**Natmed's clients can obtain a copy of the annual survey, at no charge, by contacting admin@natmed.mobi**

Donald Dinnie and Aneesa Bodiat
Natmed Medical Defence (Pty) Ltd
www.medicaldefence.mobi
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