**News Release**

# Will NHI worsen SA's medico-legal nightmare?

## *How a medical malpractice public/private partnership can reduce State's medico-legal exposure and improve health care outcomes.*

With the draft NHI bill silent on an estimated R98 billion in state medico-legal claims, public sector doctors are deeply unsettled by a recent warning from the Gauteng Department of Health, that they could be held liable in their personal capacities for damages claimed as a result of patient harm.

This follows several provinces in recent months starting to invoice individual hospitals for the costs of settled legal claims relating to their facilities. Malpractice claims account for nearly half of the Gauteng Health Department's annual budget. The R98 billion national medico-legal bill is under audit by National Department of Health forensic teams currently touring all nine provinces. They're uncovering billions of rands in fraudulent and vexatious claims involving rogue lawyers, often colluding with middle to senior level state healthcare facility staff. One of the more successful contracted forensic consortiums has managed to claw back R1,4 billion of R2 billion in plaintiff claims so far, but this is an unreliable indicator of by how much the R98 billion bill will eventually be trimmed back. Lawyers and specialist medical consultants involved speak of stolen patient files, paid-for tip offs about treatment mishaps, ghost claims and even cases of reprobate plaintiff lawyers working with insiders at the State Attorney's office.

The controversial circular sent out on 7 August 2019, and signed by Gauteng Health Department Head, Professor Matt Lukhele, warns state healthcare facility CEOs and managers that their staff could be held liable if they fail to follow strict state medical protocols. Prof Lukhele says that if an employee acts outside the course or scope of their employment, or deviates from norms and standard procedures, the department will investigate. Should they be found negligent, they'll be held individually accountable. This is a deviation from past practice where the state, or relevant provincial health departments, stood surety for what are generically labelled 'adverse events'. Doctors in high-risk specialties like neurosurgery, obstetrics and gynaecology (the latter incumbents sometimes paying more than R1 million per annum in health risk indemnity insurance premiums in the private sector), stand to be most exposed under an NHI regime. The Gauteng circular has fuelled existing debate over public healthcare system dysfunction and the widespread lack of appropriate and/or sufficient equipment. With an NHI conceivably fully implemented in six years' time, and embracing both healthcare sectors, the fears of doctors are mounting in what appears to be a current indemnity vacuum. Already, when surveyed by their umbrella bodies on the current oppressive medico-legal environment, over half of members in the South African Society of Obstetricians and Gynaecologists, (SASOG), believe they will stop providing obstetric services in the next five years, while a fifth of South African Society of Anesthesiologists, (SASA), members say they are, 'vulnerable to move or leave South Africa'.

**Prospective NHI medico-legal budgeting?**

With an increasing trend towards public/private partnerships in healthcare delivery (such as the Wits Donald Gordan Medical Centre or the UCT Private Hospital), doctors say the deafening silence in the NHI bill on just where medico-legal liability will rest, fuels uncertainty. However, lawyers for private indemnifiers have offered some reassurance, even while several private clinical collectives seek senior counsel's legal advice.

JP Ellis, head of Legal for EthiQal, a disruptive local provider of professional healthcare indemnity cover, says legal recovery action against individual employees of the state would be extremely difficult.

“Vicarious liability is an established principle in law, dependent on the employee/employer relationship. The only recognised exceptions that I know of is where employees go on a ‘frolic of their own’, meaning a deviation in conduct so severe that the employee is pursuing an objective which is different from the employer’s. The conduct would have to be reckless, willful or malicious. Even if the employee disobeys a standing instruction or conventional protocol, but is pursuing the objective of the Department of Health in treating a patient, it can hardly be characterised as a deviation from the interests of the employer. Moreover, it will require an amendment to Regulation 12 of the treasury regulations in relation to the indemnity given to their employees,” he says.

Dr Tony Behrman, consultant to the London-based Medical Protection Society (30 000 members in SA), says of the NHI bill’s silence on medical indemnity, “we’re very interested to hear what the indemnity/insurance arrangements are for NHI-funded patients treated in the private sector, and NHI-funded patients treated by private practitioners in the state sector. We’d also like to know how proposed indemnity arrangements for state healthcare practitioners treating NHI patients (including those previously labelled private or medical scheme patients), will work.”

The currently-stalled State Liability Bill, borne of two medico-legal summits and brainstorming among stakeholders dating back to January 2015, plus recommendations by the State Law Reform Commission, strives to limit the amount of compensation a claimant can derive from the state when successfully claiming negligence. However, it’s unclear just where responsibility for indemnity would lie. This is crucial to both healthcare practitioners and patients and thus a bone of contention, given the backdrop of a seriously overstretched public healthcare system and fast-rising legal claims.

**Reduce preventable clinical error**

Dr David Bass, senior legal advisor to the Western Cape Health Department, arguably in the healthiest medico-legal position among provinces, stresses, “the only effective way to cap medical malpractice litigation and its financial implications, is to reduce preventable clinical error at service level. This, in turn, requires rehabilitation of distressed services and the highest possible level of accountability at all levels of management and clinical oversight throughout. Compared with this priority, all legal strategies, which too often occupy centre-stage, effectively amount to damage control, nothing more.”

Director General of the National Health Department, Precious Matsotso, says patient safety, proper record-keeping, patient communication, mediation and introducing periodic or staggered payments are being prioritised as urgent legal reform continues. She and Health Minister, Dr Zweli Mkhize, are being advised by a high-level medico-legal panel of former judges, lawyers, academics, specialists and private sector experts.

The Davis Tax Commission report recommended a financial bill parallel to the NHI bill, outlining exactly where funding will come from and taking account of the widening gap between economic growth realities and the ambitious NHI economic growth modelling assumptions. The Office of Healthcare Standards Compliance is due to introduce an early warning system where all adverse events are reported within 24 hours, and is looking into creating a public protector to probe alleged medical negligence and protect patients suffering damage during the delay between an adverse event and a litigated payout. The South African Medico-Legal Association recommends an independent, multi-disciplinary medico-legal regulatory authority with codes of professional conduct and disciplinary procedures.

Volker von Widdern, CEO of Constantia, says he intends proposing to the Director General of Health, Precious Matsotso, a multi-level service provider model to help National Treasury and her department more efficiently review their portfolio of medical negligence claims. Mr von Widdern also noted that it's feasible to insure the liability of state medical practitioners when interventions to address preventable clinical errors, and related risk management protocols, are applied. This includes the difficulty of state medical practitioners being held personally liable for out-of-scope clinical work, albeit performed under emergency service situations.

Dr Bettina Taylor, head of Clinical Risk at EthiQal, says there are creative solutions to protect both doctors and patients, but currently, liability was poorly defined and increasingly blurred by the incoming NHI.

"We want to create certainty for our doctors and protect them, no matter what the financing and employment model looks like," she said, adding that doctors were a national asset which the country could ill-afford to lose to other countries or professions, given how critical they were to any system facilitating universal health coverage. She said the threshold to discontinue practice was being lowered by the rising uncertainty.

**NHI bill a pure health financing system**

Dr Angelique Coetzee, Chairperson of the SA Medical Association, SAMA, concurs with Dr Bass; "The NHI bill won't build the delivery infrastructure – it's a health financing system. I don't think the timeline is reasonable for us to get the primary healthcare infrastructure right. We have to hold the National Department of Health accountable for delivering primary healthcare – ordinary doctors in both sectors can help them do that. They must not wait to be told what to do. Once we get the trust right in seeing the Department of Health coming to the party, and we see money being used properly, things will improve drastically."

She revealed that SAMA was working with the Steve Biko Centre for BioEthics at the University of the Witwatersrand in setting up a medico-legal mediation vehicle for the public sector.

Dr Coetzee said that, while the widespread medico-legal fraud needed addressing, doctors should ensure they take proper medical notes, keep administration systems up to date, and take full responsibility for delivering high quality medical care. The Presidential Compact on Primary Healthcare Delivery, started under former Health Minister, Dr Aaron Motsoaledi, and its 'NHI war room', run by former Health Director General and advisor on health to President Cyril Ramaphosa, Dr Olive Shisana, was where challenges around correct support for, and servicing of, doctors were being thrashed out.

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**About EthiQal**

EthiQal provides professional, affordable medical indemnity insurance that protects doctors against allegations of wrongful practices and when preventable errors have occurred. EthiQal is a pioneer of fair dispute resolution, offering the only real occurrence-based cover protected by SA laws and regulations. EthiQal is a division of Constantia Insurance Company Limited, which has over 60 years of experience in the insurance industry.

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