

## The ethics of professional indemnity and compensation

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Sections of the new National Health Act are generally understood to be aimed at protecting the public and ensuring the acceptability, standards and safety of private health establishments. Its objective is to provide adequate public liability protection to patients, in respect of all such private facilities.

Draft regulations relating to indemnity cover for registered health practitioners published on 2 March 2007 made provision for practising health practitioners to obtain and maintain indemnity cover. Submissions to the Department of Health following the publication of the draft regulations emphasised the need for health practitioners to have a high quality of professional indemnity cover to ensure that health practitioners are afforded the best possible protection. Members of the public must be assured of adequate compensation for damages which may arise from medical negligence.

The Medical Protection Society (MPS) strongly supports the proposed introduction of mandatory professional indemnity for health practitioners. The overwhelming majority of doctors in South Africa routinely deliver excellent care to their patients. However, treatment does not always go as planned, and it is crucial for the welfare of patients that they have a realistic prospect of receiving adequate compensation if they suffer injury from negligent clinical treatment. It is in the interests of health care professionals to indemnify themselves against negligence claims. If they do not have appropriate professional protection in place and are sued for negligence, they could lose everything. Even if they successfully defend a claim, they may still have to find substantial funds to pay for their legal costs. The advantages for patients of registered doctors having mandatory indemnity cover are obvious. No patient who has suffered harm as a result of doctors' negligence should be left uncompensated. Studies around the world suggest that as many as 10% of all patients admitted to hospital suffer some form of adverse event – occasionally with catastrophic consequences.

Doctors do not set out to harm their patients, but system and human error will occur from time to time, no matter how rigorous the efforts at risk management. Therefore, even if health care workers are able to reduce the incidence of adverse events dramatically, there will always be patients left whose lives and ability to support themselves have been seriously affected and who should be compensated for the consequences of substandard care. Here is the paradox of the South African situation – the majority of patients who are uncompensated are the poorest of the poor; these patients who are treated in the public health sector are often uneducated and unaware of how to access and enforce their legal rights. They are ill-equipped to engage with attorneys, experts and courts.

The state provides indemnity for doctors working in state hospitals. This is established under common law doctrine

(MTETWA vs MEC for Health, 1989) as well as in Treasury Regulations, and applies to both criminal and delictual liability.

The situation is such that a number of provincial governments in South Africa are considering legislation to compel publicly employed doctors to purchase professional indemnity cover against claims of criminal negligence. The current position remains that, other than in cases of gross negligence, the hospital must assume vicarious liability for the acts or omissions of its employees, and will indemnify those employees against such claims.

The crises besetting the public health service are manifold and widely publicised; the victims are twofold: medical staff who are reacting by fleeing to greener pastures (and therefore further aggravating the crisis) and patients who have no other option. The vast majority of South Africans do not have access to private health care. The Minister of Health's attempts to redress these inequalities have not achieved success to date.

There is a link between ethical principles, human rights and the law in South Africa. The principles of autonomy, beneficence, non-maleficence and justice are embodied within the Bill of Rights and in both common law and statute.

Autonomy places a duty on doctors to respect the freedom of individual patients and to allow them to make decisions for themselves about their own futures; this is recognised in the Bill of Rights, in Sections 12 and 14 concerning bodily and psychological integrity. Autonomy is also recognised in common law in actions for personal injury and invasion of privacy (a negligent medical procedure may result in an action for personal injury).

Beneficence is the duty of doctors to do good, for their patients. Beneficence is recognised in the Bill of Rights which provides that everyone must be provided with access to health care, including reproductive health care with available resources, and emergency medical treatment.

Non-maleficence is the duty not to harm others, and exists in the Bill of Rights as the right of everyone to dignity and an environment that is not harmful to their health (Sections 10 and 24). Non-maleficence is also recognised in the common-law right to sue for sentimental damages or intentional infringements of dignity.

The fourth principle of justice recognises the duty of doctors to treat patients equally and fairly. Justice is enshrined in the Bill of Rights provisions concerning equality and non-discrimination (Section 9); it is closely linked with dignity and is found in the common law action for intentional infringements of dignity.

The current situation in South Africa is that compensation for clinical negligence is only accessible to a minority of patients. Either the MPS or commercial insurers indemnify private practitioners. Private patients are in a position to

pursue available means to obtain lawful and fair compensation when this is justified. However, the majority of public health patients are unable to obtain justified compensation because of ignorance and poor access to justice.

The time has come for government to consider the ethics of the situation. It is opportune that government and the

Law Reform Commission investigate other initiatives. The authorities should at least be considering alternatives such as no-fault compensation, funded by collective insurance.

If these things are not done, government is failing the people and not correcting the existing inequalities.

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