



PAYOUTS AGAINST DOCTORS SPIRALLING UPWARD



Dr John Hickey, Chief Executive of the Medical Protection Society, Professor Dan Ncayiyana, SAMJ Editor, and debate facilitator, Professor David McQuoid-Mason, KwaZulu-Natal University medico-legal and ethics expert.

Over the last decade large claims by patients against doctors in South Africa have risen to where they now equal ten times the country's annual growth rate, with rich claimants 'hoovering up' cash reserves at the expense of an indigent majority.

These large claims double every 26 months and it is time the government looks at legislation to limit payouts, or risk having to ration health care further as litigation costs eat into tight provincial health budgets and private indemnity reserves.

Dr John Hickey, Chief Executive of the Medical Protection Society (MPS), sounded this warning during a one-day conference in Cape Town last month entitled, 'Compensation for clinical negligence; finding an affordable solution'.

The conference, organised by the *South African Medical Journal (SAMJ)* with assistance from the MPS and held at the Vineyard Hotel, was attended by some of the country's top judges, lawyers and doctors.

Runaway negligence payouts

It was prompted by runaway negligence payouts, mainly to those who can afford protracted litigation in an increasing

litigious and adversarial climate in which specialist lawyers 'cherry pick' potentially fruitful cases on a contingency basis.



Professor Dan Ncayiyana, Editor of the SAMJ, chats with heart surgeon Susan Vosloo.

Settlements have soared from R2.09 million for the top 20 claims in 1995 to R35.22 million for the top 20 claims last year, resulting in doctors increasingly practising defensive medicine and some high-risk specialists even reconsidering alternate location and career options.

Hickey stressed that it was not about doctors being (any more) negligent, but about patients increasingly demanding their rights.

In an attempt to generate adequate

reserves to meet the needs of its over 16 000 South African members, the MPS hiked subscription fees by an average of 23% (GPs 12%, obstetricians 44%) in January.

After the conference Hickey told the *SAMJ* that government needed to be made aware of the effects of sky-rocketing compensation awards.

He had heard cabinet ministers in other countries dismissing the issue with 'don't worry, the insurers will pay'.

No 'magic bundle'

'But there is not a magic bundle of money out there – the money comes from the doctors and they get it from their patients – in the public sector it comes directly out of the health budget, so you either increase the budget or cut on health care spending elsewhere,' he said.

Laws were needed that extended access to justice to more patients while limiting the amounts that could be awarded, especially to high earners who were 'hoovering up the reserves'.

Hickey suggested capping awards at three times national average earnings, thus forcing richer people to insure themselves for the difference between what they would have been awarded in loss of future earnings, and the capped amount.

This would ensure that the disadvantaged were not disadvantaged further.

Cape High Court Judge Selwyn Selikowitz said 90% of the damages claims he heard were by poorly educated people who brought last-minute litigation because they could not afford to hire lawyers for any length of time.

Earlier he agreed with Dr Paul Nisselle, a senior advisor in risk management at the Medical Defence Association of Victoria, Australia, that litigation in South Africa was 'about winning rather than about justice'.



Judge Selikowitz added, 'and that's partly because litigation costs are such a big issue – costs are awarded in SA and normally the loser pays the winner's costs'.

Hickey told the conference that the MPS, a not-for-profit, global, member-based society, based its interactions on what was fair for the patient, what the doctor could afford and what society could afford.

Don't 'duck and dive'

The conference featured strong consensus on doctors playing 'open cards' and communicating early on with aggrieved patients, ethical accountability and improved behaviour around informed consent.

Cape Town cardiothoracic surgeon, Dr Susan Vosloo, said the legal processes created the perception among doctors that it was all about conflict, which they wanted to avoid. 'If we can resolve matters by trying to reach resolution through mediation you may find many more medical people become involved,' she suggested.

Discussion facilitator, KwaZulu-Natal University law Professor, David McQuoid-Mason, said some surveys put the figure of patients driven into the arms of lawyers by the famous 'medical wall of silence' as high as 80%.

Hickey advised the conference, particularly where a patient had suffered an 'unfortunate outcome due to the natural history of disease', to sit aggrieved or dismayed parties down and 'treat them as if they were one of your own relatives'.

Judge Dennis Davis said some form of effective and transparent mediation or arbitration process would offer complainants the opportunity for a catharsis.

'There's no doubt it's not just about a few bob – it's about loved ones who died, were injured or they feel aggrieved. It would take a lot of sting out of it,' he said.

Dr Johann Erlank, a senior plastic surgeon and ombudsman for plastic and reconstructive surgery in South Africa, said experience had taught him that the very 'worst thing a doctor can do is duck and dive'.

Asked whether he could appoint a panel of relevant medical experts to lessen the current adversarial 'trial by ambush' approach, Judge Selikowitz said this could only be done with the consent of all parties – 'but in practice they won't agree'.

'Hired gun' doctors who served as professional expert witnesses instead of as expert professional witnesses, also came in for strong criticism.

Australia, by contrast, allowed its judges to send a question to a panel of experts.

Procedural court rules could be invoked in South Africa to request a summary of expert evidence 10 days in advance of the hearing.

'But again poor people don't have the resources and that's why there is a terrific amount of last minute litigation,' he reiterated.

Points system for hands-on?

On risk reduction, some delegates suggested creating ongoing risk ratings for technical and difficult surgical procedures with MPS premium reduction rewards for participants.

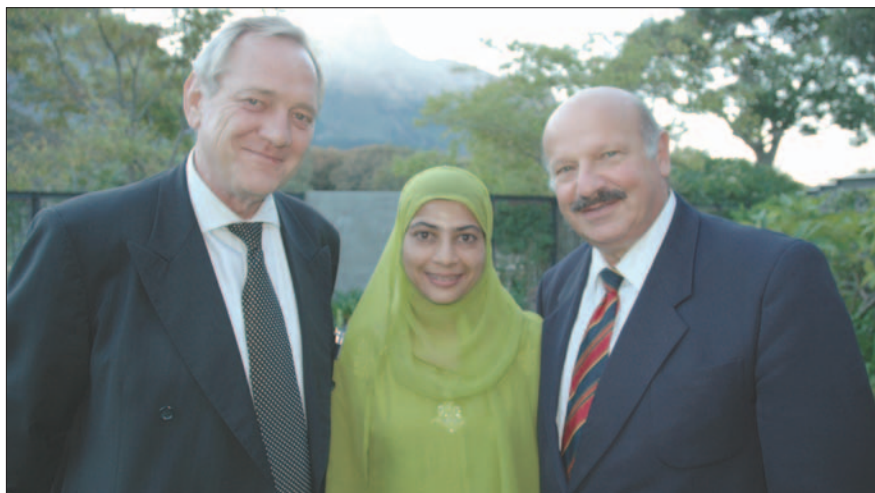
'Hired gun' doctors who served as professional expert witnesses instead of as expert professional witnesses, also came in for strong criticism, with Judge Davis describing it as 'strange and bizarre when they ponder how they might answer a question to the advantage of their client'.

Conference chairman, the former deputy vice-chancellor of the University of Cape Town and editor of the *SAMJ*, Professor Dan Ncayiyana, questioned whether opting for a no-fault compensation system might not undermine the accountability of doctors and their ability to learn from errors.

Health Professions Council of South Africa CEO, Advocate Boyce Mkhize, suggested strengthening quasi-judicial systems by holding peer-review hearings in his council 'so that when you get to court you deal just with quantum'.

'We also need to focus on preventive care so we can enhance competencies and reduce errors,' he added.

Chris Bateman



Dr John Hickey, Chief Executive of the Medical Protection Society, Nusreen Khan, co-ordinator of Rights, Education and Activism for Consumer Health Care (REACH) and Cape High Court Judge Selwyn Selikowitz.