

Medicine and Law

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AWACC
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Statistics – Norton Rose Fulbright

Province	No of cases	Contingent Liability
Eastern Cape	1249	R14 724 016 838.46
KwaZulu-Natal	1181	R13 363 851 691.75
Northern Cape	101	R1 478 762 205.42
Free State	242	R2 394 577 739.62
TOTAL	2773	R31 961 208 473.63

Statistics – Section 27

Asat 31/ 03/ 2018	Total medico-legal claimsliabilities	%of annual budget	Incurred in current year	Amount spent on legal services
Eastern Cape	R24 193 619 000	108,6%	R8 412 274 000	R44 452 000
Free State	R1 842 917 000	18,8%	R522 169 000	R10 142 000
Gauteng	R21 701 514 000	51,7%	R3 828 969 000	R314 227 000
KwaZulu-Natal	R16 638 734 000	41,7%	R3 245 617 000	R84 776 000
Limpopo	R4 874 800 000	26,5%	R2 814 373 000	R110 000
Mpumalanga	R0	#DIV/0!	R0	R0
Northern Cape	R0	#DIV/0!	R0	R0
North West	R0	#DIV/0!	R0	R0
Western Cape	R90 350 000	0,4%	R89 600 000	R13 865 000
TOTAL RSA	R69 341 934 000	45,1%	R18 913 002 000	R467 572 000

Top 5 affected KZN districts

Name of District	Total quantum	Number of cases
1. eThekweni Metropolitan	R 4 327 920 885.00	496
2. uMzinyathi District	R 1 963 235 275.00	114
3. King Cetshwayo District	R 1 710 879 925.00	97
4. uMgungundlovu District	R 957 840 643.50	96
5. iLembe District	R 810 367 958.80	62

Top 5 affected KZN hospitals

Name of hospital	Quantum	Number of cases
1. Charles Johnson Memorial Hospital	R 1 379 055 875.00	77
2. Prince Mshiyeni Memorial Hospital	R 1 286 775 963.00	112
3. Eshowe Hospital	R 828 669 500.00	31
4. King Edward VIII Hospital	R 653 556 810.80	73
5. Stanger Hospital	R 464 317 853.00	39

Collaboration and understanding

GOAL:

- Reduce contingent liability facing the hospitals – private and public
- Protect healthcare practitioners
- Improve healthcare service delivery

HOW:

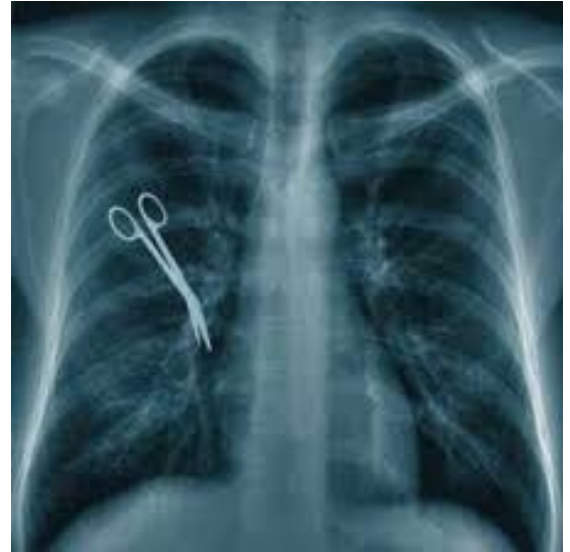
- Understand the pressures under which healthcare practitioners work & environment in which they work
- Understand how a claim is run – how are you at risk and how can you defend yourself?



How do you prove liability ?

Was there **negligence**?

- Res ipsa loquitur : implied negligence
- *“The maxim could rarely, if ever, find application in cases based on alleged medical negligence. The human body and its reaction to surgical intervention is far too complex for it to be said that because there was a complication, the surgeon must have been negligent in some respect.”*
Buthelezi v Ndaba (SCA – 2013)
- Experts used to determine negligence – standard of reasonableness



How do you prove causation?

Did the negligence cause the outcome?

- Negligence does not prove causation – just because there is negligence (eg a failure to monitor the FHR for a certain period during labour) does not mean that it caused the outcome (eg could the injury be caused by poor antenatal care by mother?)
- Factual causation – but for the conduct / omission, would the harm have occurred?
- Legal causation – is the negligence and harm so bad that the law would warrant damages be awarded



Patient record keeping: A health practitioner's window of opportunity



Legislative framework

- Constitution of the Republic of South Africa, 1996
- Various Guidelines by the HPCSA, Sept 2016
- National Health Act, 2003
- Promotion of Access to Information Act, 2000
- Sterilizations Act, 1998
- Choice on Termination of Pregnancy Act, 1996
- Children's Act, 2005
- Protection of Personal Information Act, 2013
- Electronic Communications and Transactions Act, 2002

Medical malpractice claims

- **Infants born with cerebral palsy**
 - Failure to monitor patient's labour in accordance with Maternity Care Guidelines
- **Infants born with Down Syndrome**
 - Failure to properly advise mother of risk of having child born with Down Syndrome
 - Failure to advise of options regarding termination of pregnancy
- **Patient admitted for surgical procedure – quadriplegic – complications**
 - Failure to recognise biochemical markers of inflammation or sepsis and failed to treat CSF leak
 - Wound site not properly cared for resulting in bacterial infection in wound

What are records?

- Part and parcel of treatment process
- Legibility is important and should be taken seriously
- Includes much more than just handwritten notes – including but not limited to text messages, video and audio recordings, photographs, and/or any other type of correspondence between patient and health practitioner or health practitioner and others associated with patient (eg medical aid / family members of patient)



Characteristics of good records

- Personal particulars of patient
- Bio-psychosocial history, allergies, idiosyncrasies
- Date, time and place of consultation
- Assessment details
- Proposed clinical management
- Medication and dosage prescribed
- Referrals
- Reaction to treatment or medication – advice given
- Test results
- Patient booked off work
- Advice, warnings and arrangements for follow-ups



Informed consent

- Written proof of the patient's consent
 - Discussion held with the patient
 - Options of treatment and procedures available to patient explained
 - Risks, benefits and costs associated with each option
 - Patient was provided with opportunity to ask questions
- **ALL** this information to be documented in the patient's records



SANC Rules & Regulations

- Professional and legal duty towards every patient requires:
 - Good note-taking, accurate accounts of treatment and care provided
 - Patient involvement
 - Noting every event that happens – immediately (as soon as possible)
 - Notes made daily and in chronological order
 - Notes comprehensive enough to allow a colleague to carry on where the nurse on duty left off
 - Handover at shift change
 - Full account of assessment and care planned and provided



What should not be included

- Meaningless phrases like “patient slept well last night” (unless the patient was restless and having difficulty sleeping)
- Irrelevant speculation – “patient seems to be in cheerful mood today” (unless this is necessary. Eg patient was previously showing signs of depression)
- Offensive statements



Case example

31/12/17
22:34

16yr, 2nd baby.
Bloody ridiculous!!

Also 3rd degree laceration
Also NO CLUE
to BF

Ⓟ Keep
LONG TIME
Needs serious
counseling

Keep AB +
64 str. B-hs

Baby - Hungry
- Poor latch
- CUSV
Reserv
Some ✓
Newer ✓

Ⓟ rel on ale

How should a judge perceive this doctor's attitude towards this patient?

What could be relevant to social worker? This may help the legal team.

Did the mother take proper care during antenatal period?

Case study 1

- Action by patient against general surgeon – failure to provide information to give informed consent to laparotomy for repair of hernia



- Had discussion with patient and provided her with information regarding options
- Recommended that laparoscopy was better option due to risks. Also advised of benefits of each procedure
- Informed her that laparoscopy could result in bowel injury but laparotomy involved open surgery
- Patient provided him with written informed consent to perform procedure

- Doctor made a decision to perform procedure at initial consultation with her
- Doctor did not consult with radiologist, as undertaken, before performing procedure
- Doctor did not provide her with information regarding options available
- She would have chosen option which was less risk had the doctor provided her with information to make informed decision



Court's decision

- Doctor failed to record discussion with the patient in medical records
- Court found in favour of doctor since evidence was consistent with his version of events
- Doctor wrote a letter to medical aid motivating for the procedure and stating risks and benefits of each procedure – showed that meaningful discussion took place
- All information doctor had in his possession was used in support of his case



Case study 2

- Action by mother on behalf of minor child born diagnosed with cerebral palsy due to asphyxia which occurred during labour and/or birth



- Mother attended at the clinic for birth of her child and was transferred by ambulance to hospital
- Endured several hours of labour during which she was not monitored by the nursing staff and they ignored her for prolonged periods despite her requests
- Caesarean section was required but not performed and child eventually born by normal vaginal delivery

The problem with the records

- No antenatal records available
- Poorly completed maternity case record, that it served little to no evidentiary value – only proved that the patient was admitted to the Hospital and delivered a child with low Apgar scores
- Doctors and nurses failed to clearly and legibly write their names



Court's decision

- The medical records of the patient were indispensable. The patient's recollection of events became the only version before the court
- National Health Act and Constitution imposes a duty to provide proper medical treatment and to create, maintain, keep and store medical records
- Constitutional and statutory obligation to make and keep meticulous clinical and hospital notes and records relating to patient treatment
- HPCSA Guidelines apply to medical doctors and SANC Rules to nurses
- Found in favour of mother and child



Challenges of the defence attorney

- No access to medical records – hospital are antagonistic to lawyers or no medical records in existence
- Illegible entries
- Inconsistent and missing information
- Records of one patient mixed with another
- No name on new pages of records – unsure whether records relate to patient



If you didn't write it down, it didn't happen...

- Take a considered approach when making clinical notes – edited records is evidence of inaccuracy and tampering
- Half the battle is won if good medical records are kept
- Records events as soon as possible and with all relevant detail
- All members of the multi-disciplinary team to keep good records
- Keep abreast of latest developments in the law and how it impacts you – consider training your juniors on this if necessary





**Please come and chat to me at the Norton
Rose Fulbright stand if you have any
questions.**



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