

The real reason SA's doctors won't deliver your baby

By [Aaron Motsoaledi](#)

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Medico-legal litigation has exploded. As of March 2016, claims against the health department from the previous five years stood at more than R37bn. By October that year, the figure had jumped to R51bn — or a third of the whole public healthcare budget if we had to pay every cent.



Aaron Motsoaledi, SA minister of health. Photo: Delwyn Verasamy, M&G

The medico-legal litigation pandemic threatens not only our health system but also the very existence of our mothers and children.

When some see these figures, their first reaction is to condemn the health department and accuse it of absolute carelessness. Please be careful before drawing such conclusions. Ask yourself first: But what has changed?

It is common knowledge that, over the decades, an overwhelming number of medico-legal litigation cases were lodged against the Road Accident Fund (RAF).

The RAF has since been litigated into a state of near-bankruptcy and is finding it difficult to even pay legitimate claims. The minister of finance has tried to raise the fuel levy to fund the RAF, to no avail.

Lawyers who used to make a living out of the RAF are now focusing on the healthcare system. There is a perception, a

wrong one, that only the public healthcare system is being sued. Let me inform you that lawyers are pursuing both the public and the private healthcare systems. This litigation has grown exponentially.

The relentless pursuit of cases is not necessarily about what is happening currently: most cases are based on incidents that happened 20 to 25 years ago.

It is an inherent problem of any healthcare system that undesirable outcomes such as negligence, malpractice or adverse events could occur. Nowhere in the world does a healthcare system aim for such incidents of “medical harm” to happen. But they do.

Nobody in their right mind would argue that victims of medical harm should be ignored. The problem we are faced with, though, is the ugly shape that medico-legal litigation has taken.

Not all doctors are experiencing litigation to the same extent. Obstetricians and gynaecologists are the prime targets, followed by neurosurgeons, neonatologists and orthopaedic surgeons. Why is this so? They work in areas where adverse events or complications are more likely to happen.

No child deserves to arrive in this world with a condition such as cerebral palsy (brain damage that results in a physical disability that affects movement and posture). We believe that such children deserve compensation.

The health department does not have a problem with the concept of compensation but rather with the way in which it is being conducted.

Some lawyers literally raid schools for the disabled, sniffing for children born with cerebral palsy, in order to litigate against the hospital or the obstetrician who delivered the baby.

[Such claims](#) increase by the day because South Africa’s law system allows lawyers the option to operate on a commission basis instead of charging clients fees. At the conclusion of a case, the lawyer takes a cut of the amount awarded to the victim, also known as a “contingency fee”.

Lawyers are allowed to take up to 25%. In some RAF cases, however, unscrupulous legal practitioners have taken advantage of uninformed patients and family members and awarded themselves up to 80% in contingency fees.

The contingency fee system is an American one and is part of the reason why the United States spends 18% of its gross domestic product on health. It is also leading South Africa to a precipice.

When a snake, in the form of medical harm, enters your house, you do not bomb the whole house with your children inside; you try to find a better way to rescue your children.

In order to practise medicine in the private sector, doctors have to buy indemnity or insurance, which will pay out in legal cases where they are found guilty of negligence. Those in the state sector don’t have to because it is the minister of health who gets sued.

About eight years ago, obstetricians and gynaecologists paid R78,000 a year for insurance. This year, the Medical Protection Society’s insurance costs R800,000 — an increase of 925%.

The South African Society of Obstetricians and Gynaecologists has pleaded with the Medical Protection Society to reduce this amount. But its response was along the lines of: “You’re not being litigated against for what you are doing now or what you may do in the future, but mostly for what you did in the past. We have to charge a high premium if we are going to be able to settle your litigation debt.”

The result? Obstetricians and gynaecologists are closing their practices and leaving the profession. Many of those who are brave enough to continue — or who have no option because they are too old to change professions — refuse to deliver

babies and refer pregnant women to public hospitals. Young doctors are refusing to specialise in obstetrics and gynaecology.

Where will pregnant women go? How is the country going to secure safe pregnancies for mothers and bring healthy babies into this world when doctors who are supposed to perform such functions are being litigated out of existence?

Lawyers argue that litigation is being pursued as a form of social justice for the victims of medical harm, and is done solely in their interest.

The more they litigate, they say, the more pressure there is on doctors to provide better-quality services. The pursuance of social justice sounds noble but why, then, charge such high contingency fees? Is it in the interest of victims that practices are now being closed down?

When your child commits mistakes, do you take a sledgehammer and bludgeon him or her out of existence or do you devise decent and civilised corrective action?

As the health sector, we accept that the best solution for this explosion of litigation is for health workers and systems to reduce incidents that may lead to litigation.

When health workers or hospitals are found guilty of negligence, however victims should be compensated. But our country can no longer continue with a compensation mechanism that allows the health sector to be wiped out.

We are looking at designing a better system, such as the one that Denmark uses, where medical injury claims aren't handled by the courts but by medical and legal experts who review cases at no charge to patients.

The outgoing director general of the World Health Organisation, Margaret Chan, once said to me: "Minister, your country needs a better mechanism of compensation. The contingency fee system is the worst that America ever bequeathed to the world."

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