POLICY BRIEF
2025

FINANCIAL AND FISCAL COMMISSION
For an Equitable Sharing of National Revenue

Medico-legal claims and their impact on provincial health budgets and service delivery

Executive Summary

The healthcare sector can be seen as a system comprising institutions, people and resources that are intended to produce health actions and outcomes. Healthcare environments have become increasingly complex and risky over the years, in part because of the use of progressively more sophisticated technologies and because the population's average life span has increased, leading to an ageing population. This places higher demands on healthcare services. While all aspects of life are subject to risks, this is particularly so in a healthcare setting that aims to protect the health and lives of sick and unhealthy individuals. Risks within the health sector are affected by the external environment, which refers to the socio-economic environment and the epidemiological characteristics of the population, as well as the internal environment, which includes available resources and facilities, internal control systems and even the internal culture at a health institution. Most often, those risk factors are both complex and systemic, and are very seldom attributable to the actions of one employee or one technical failure. The public healthcare setting in South Africa is prone to a higher risk environment than the private sector, given the poorer socio-economic characteristics of the population being treated and the shortage of resources.

In recent years, South Africa has witnessed an exponential increase in medical negligence claims. This can be seen in the steady increase in both the number of claims against the state and the value of damages awarded. The scale of the problem, especially in the public sector, has seen the public health sector budget come under further pressure because of an ever-increasing number of claims and the

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consequential enormous financial burden. The net result of medical legal claims, beyond human suffering, is that medical negligence claims divert much-needed resources from providing healthcare, thereby reducing the productivity of available healthcare funding.

The analysis unpacks the growth in medico-legal claim payments and contingent liability, and assesses the impact of medico-legal claims on provincial health budgets. The analysis examines some of the contributing factors to high medico-legal payments, and initiatives being undertaken to respond to the growth in medico-legal claims. It makes recommendations to strengthen responses.

Background

Medico-legal claims refer to a type of claim that ensues because of medical negligence or malpractice by health practitioners (Prinsen, 2003). The South African Law Reform Commission (Law Society of South Africa, 2021) identifies two criteria to establish whether medical malpractice occurred. First, a healthcare provider must have violated a professional standard of care. Second, an injury must have occurred because of a violation of the professional standard of care. In other words, the patient is required to prove that the provision of medical care fell below accepted standards and resulted in an injury.

South Africa's health landscape is characterised by a two-tiered health system, divided along socio-economic lines, resulting in pockets of highly developed infrastructure and highly trained and skilled people, characterised by the most basic primary services provided by the state for free to the indigent to highly specialised high-tech services available in both the public and private sectors. Public healthcare facilities service the majority of South Africans. It is estimated that, nationally, almost 75 per cent of households would first go to public clinics, hospitals or other public institutions, while approximately 25 per cent of the population would first consult a private health facility. South Africa's health sector is characterised by the vast inequality in resources between the public and private healthcare sectors. The Organisation for Economic Cooperation and Development (OECD) and the World Health Organisation (WHO) show that South Africa spends a higher share of its total health expenditure on private voluntary health insurance than any country globally (Colombo et al., 2020).

Research findings

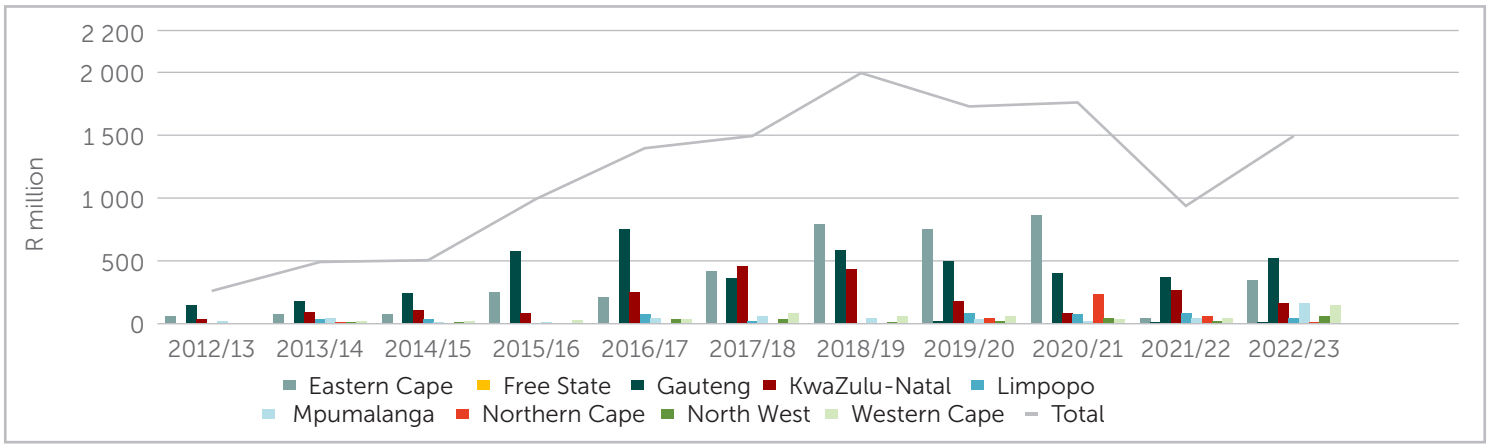
Two key findings emanate from the FFC's analysis.

1. Growth in medico-legal payments and contingent liabilities outstrip growth in health budgets

The provision of healthcare is a concurrent function between the national and provincial spheres of government. Funding for healthcare is largely dependent on intergovernmental transfers, comprised of the provincial equitable share (PES) and conditional grants. Provinces are shifting a larger share of their available PES funding to healthcare. However these measures appear insufficient when coupled with rising patient numbers and medical inflation, which outstrips annual increases to health budgets.

The severe funding pressure on health budgets can be seen by the high level and consistent growth in accruals. Accruals refer to the practice whereby departments incur an expense, even though no cash flow has taken place. Over the 14-year period from 2009/10 to 2022/23, the value of accruals for health has increased from R3.376 billion to R18.163 billion. One of the contributing factors to the rapid growth in accruals is that provincial departments fail to budget appropriately. Medico-legal payments is one driver of the growth in accruals. Consequently, when claims become successful, they are paid from operational budgets using funds earmarked for service delivery, thereby eroding available resources for service delivery.

Figure 1: Provincial trends in medico-legal claim payments

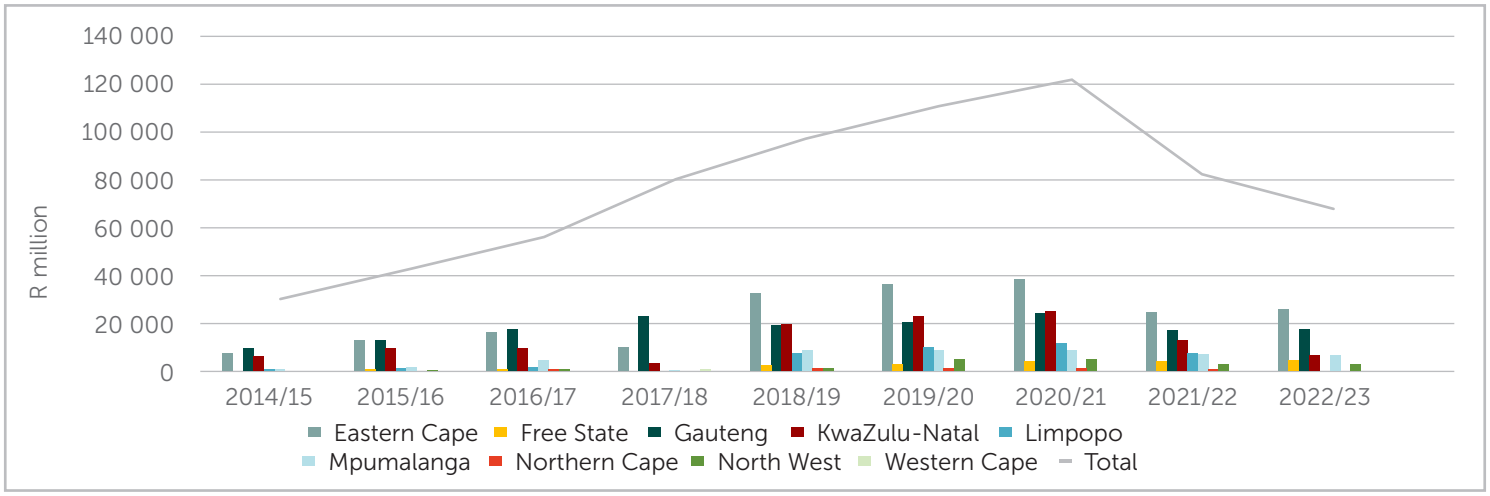


Sources: National Treasury (2021), Auditor-General South Africa (2023).

Between 2012/13 and 2022/23, expenditure on medico-legal claims increased substantially from R265 million to R1.5 billion, having peaked at almost R2 billion in 2018/19. The Eastern Cape, Gauteng and KwaZulu-Natal accounted for more than 70 per cent of expenditure on medico-legal payments over the period 2012/13 to 2022/23. The Eastern Cape and Gauteng have paid out more than R2.5 billion over the last three years. For 2020/21, the Eastern Cape paid out more than R860 million alone. Medico-legal claims accounted for 1 per cent of the total available health budget in 2018/19, with payments accounting for 3.3 per cent of the available Eastern Cape budget in the same year.

Unresolved medico-legal claims are recorded in the financial statements of government departments as contingent liabilities. A contingent liability refers to the possible obligation that arises from past events (alleged breach of contract). The existence of the obligation will only be confirmed by the occurrence or non-occurrence of uncertain future events (outcome of a claim).

Figure 2: Size of contingent liability across provinces



Source: National Treasury (2024), Auditor-General South Africa (2023).

Contingent liabilities grew from R28 billion in 2014/15 to R121.8 billion in 2020/21 before declining to R68 billion in 2022/23. The Eastern Cape, Gauteng and KwaZulu-Natal accounted for 75 per cent of the contingent liability over this period. Direct comparisons across provinces may be inappropriate as provinces use different approaches to determine and quantify contingent liabilities for medical negligence. Some provincial health departments include all claims as contingent liabilities, as if the state would be required to settle the entire amount claimed, even if the claimed amount is excessive in relation to historical settlement values for that province or for other provinces or is unlikely to succeed based on merit. In other instances, provinces consider the probability of the claim against the state being successful

and adjust for some claims not requiring payment or being settled at lower levels than that which is being claimed. The implementation of the guidelines providing for the accounting treatment of medico-legal claims saw a decline in recognised contingent liabilities from a high of R121.8 billion in 2020/21 to R81.8 billion in 2021/22 and R68 billion in 2022/23 (Auditor-General South Africa, 2023). However, contingent liabilities still represent a significant proportion of provincial health budgets. Overall, for 2019/20, contingent liabilities represent a significant risk to provincial budgets, being equivalent to more than half of the provincial health expenditure. For 2022/23 contingent liabilities declined to 27 per cent of the provincial health budget.

Examining medico-legal claim payments as a share of contingent liabilities indicates the progress made in terms of the exposure of provinces to financial risks in addressing claims against the state. The trends shown in Table 1 indicate that, in spite of provincial efforts to increase medico-legal payments, which grew at an annual average rate of 18.5 per cent for the period 2012/13–2022/23, outstripping the growth in contingent liabilities, which grew at an annual average rate of 11.4 per cent for the period 2024/25–2022/23, medico-legal payments, as a share of contingent liability, remain below 2.5 per cent, on average, for South Africa. With the exception of the Western Cape and isolated periods for the North West and Northern Cape, no other meaningful attempts have been made by provinces to reduce their contingent liability exposure risk.

Table 1: Medico-legal payments as a share of contingent liability

	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22	2022/23
Eastern Cape	0.91%	1.90%	1.24%	1.75%	2.43%	2.08%	2.24%	0.15%	1.33%
Free State	0.04%	0.18%	0.12%	0.02%	0.13%	0.66%	0.01%	0.19%	0.19%
Gauteng	2.39%	4.26%	4.21%	1.65%	2.99%	2.38%	1.60%	2.11%	2.82%
KwaZulu-Natal	1.54%	0.91%	2.44%	2.78%	2.18%	0.77%	0.37%	2.02%	2.22%
Limpopo	2.93%	0.60%	3.54%	0.55%	0.09%	0.81%	0.61%	0.93%	
Mpumalanga	0.52%	0.64%	0.65%	0.91%	0.42%	0.48%	0.20%	0.51%	2.32%
Northern Cape	2.20%	1.41%	0.07%	0.59%	0.17%	2.50%	13.87%	3.91%	2.05%
North West	39.10%	0.75%	2.30%	1.96%	0.73%	0.35%	0.80%	0.52%	1.85%
Western Cape	9.97%	15.42%	28.26%	96.27%	56.18%	181.39%	13.93%	25.54%	
Total	**1.74%**	**2.28%**	**2.47%**	**1.83%**	**2.01%**	**1.54%**	**1.44%**	**1.13%**	**2.14%**

Source: Own calculations based on National Treasury (2021) and Auditor-General South Africa (2023).

The total number of claims against provincial departments of Health as at 31 March 2022 are shown in Table 2. The uninsured population is calculated by taking the total provincial population and subtracting from it the proportion of people who belong to a medical aid or insurance in that province. The uninsured population is used as a proxy for the population using public healthcare facilities at the provincial level. Table 2 shows that the Eastern Cape experiences the highest number of claims at 74.44 per 100 000 of the uninsured population, significantly above the average of 29.69 for South Africa. The Western Cape and Northern Cape report figures of less than 10 claims per 100 000 of the uninsured population.

Table 2: Number of claims per 100 000 of the uninsured population per province

Province	Uninsured population	Number of claims as at 31 March 2022	Number of claims per 100 000 as at 31 March 2022
Eastern Cape	5 968 961	4 443	74.44
Free State	2 497 977	410	16.41
Gauteng	12 524 688	3 783	30.20
KwaZulu-Natal	10 257 570	2 915	28.42
Limpopo	5 412 650	1 617	29.87
Mpumalanga	4 239 006	991	23.38
Northern Cape	1 103 262	99	8.97
North West	3 617 554	518	14.32
Western Cape	5 394 682	372	6.90
Total	**51 016 354**	**15 148**	**29.69**

Source: Own calculations based on Auditor General South Africa (2023) (96 per cent of the claims are attributed to medico-legal claims).

For the period 2012/13 to 2025/26, the total provincial health budget grew at an annual average rate of 6 per cent compared to the growth in payment trends on medico-legal claims, as well as contingent liabilities, which grew at an annual average rate of 18.5 per cent and 11.4 per cent, respectively, indicating that health budgets remain under significant pressure with payments for medical negligence outstripping growth in available funding within the health sector.

2. Strategies to address the rapid growth in medico-legal claims

The rapid growth in medico-legal claims has been identified as a risk facing the health sector, resulting in fewer resources for service delivery and undermining the productivity in health expenditure. A range of strategies have been developed at both the national and provincial level and are at various stages of implementation. Primary interventions are focused on improving clinical standards, infrastructure, additional human resources, training and technology to ensure a better and safer patient experience and clinical outcomes. Secondary interventions are focused on the speedy management of complaints and early engagement with harmed individuals. Root cause analysis must be done, and ways devised to prevent the occurrence of similar episodes in future. Tertiary interventions involve the professional and comprehensive management of all medico-legal litigation. One of the key challenges is the absence of specific legislation to regulate the litigation of medico-legal claims, with the result that patients are, in most instances, awarded large once-off settlements. The use of state facilities, where feasible, to offer rehabilitation and other care service instead of paying large once-off settlements would enable such expenditure to remain within the public health setting for the improvement of healthcare services for the broad population (South African Law Reform Commission, 2021).

Consideration should be given to the introduction of mandatory malpractice indemnity cover for all healthcare professionals, including those in the public sector. Requiring all public healthcare practioners to have mandatory malpractice indemnity cover would enable the sharing of the risk of medico-legal costs between healthcare practitioners, provincial departments of Health and insurers. The contracting-in of healthcare services as part of the National Health Insurance presents an opportunity to look at international experience requiring mandatory malpractice indemnity cover.

Conclusion

The Commission made the following recommendations:

1. The Minister of Health should prioritise the development of an integrated national information reporting system. Such an information system should include patient and doctor registries with real-time data. The standardisation of reporting fields will enable the creation of a uniform database to strengthen government's ability to monitor and evaluate.
2. The utilisation of a uniform statistical reporting system, which enables the enhanced collection and analysis of data-related medical negligence claims that capture the reasons for the claim, underlying clinical and treatment failures, and settlement values.
3. Provincial departments of Health should budget for medico-legal litigation (projected legal costs) and compensation payments in accordance with normal budgeting practices, and budget forecasts should be based on actual expenditure settlement trends.
4. The Minister of Health should commission an actuarial study into the viability of introducing mandatory professional indemnity cover for all healthcare practitioners, including those in the public sector.

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Enquiries:

Claire Horton
Claire@ffc.co.za

Financial and Fiscal Commission
11th Floor, 33 on Heerengracht
Heerengracht Street Foreshore, Cape Town
www.ffc.co.za