

Possible MPS eviction ‘an unmitigated disaster’ – patient litigator

One of the country’s top patient litigators and a seasoned opponent of the Medical Protection Society (MPS), Mervyn Joseph, says forcing the MPS out would prove an ‘unmitigated disaster’ for patients and doctors alike.

Joseph, who has over the years received ‘substantial’ compensation from the MPS on behalf of patients, says he would rather litigate against an informed, professional opponent with solid financial reserves than ‘fight tooth and nail against someone bent only on avoiding both the merits of an action and paying justifiable quantum’. Warning that the highly specialised health care indemnity/insurance market could be flooded with unschooled and/or underfunded newcomers, Joseph cited a current defendant whose insurers he is suing to prevent their renegeing on their contractual obligation to cover the doctor in terms of his policy.

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‘I took judgement against the gynaecologist (facing a Down’s syndrome claim with non-MPS cover limited to R20 million (including costs)) when his insurers suddenly repudiated his policy after having defended him.’ By getting the doctor to cede his claim under the policy to his patient (Joseph’s client), Joseph opened the way to protecting both the doctor and his profoundly affected patient. ‘I don’t want to bankrupt the doctor or sequester his estate. This kind of scenario would never emerge with the MPS. When push comes to shove, if they’re obliged to pay liability they will. They always put up a good fight if it is justified. There is good collegiality and we often settle the matter without prejudice or admission of liability. The doctor’s name doesn’t get

dragged through the press. They’re entitled to have their practice remain as unaffected as possible.’

Potential for shabby cover would soar

Joseph says a sudden deluge of 25 000 (the South African MPS membership) health care practitioners onto the market would result in an unseemly scramble, especially with the Road Accident Fund drying up as ready income for lawyers. The net result would be a burden on already overloaded courts, unnecessary legal expenses, doctors facing sequestration when run-off cover dried up and patients’ constitutional rights to equitable compensation being compromised. Short-term insurers with limited reserves would be far more likely to use unseemly or clumsy strategies in stark contrast to the MPS who, whenever a claim was medically and legally justified, put no ceiling on payouts. He re-emphasised the levels of medico-legal knowledge required to prosecute a complaint.

‘It’s very intricate footwork because you need to know the patient, the medicine and the law, the damage suffered and for quantum, the ability to investigate and prognosticate for the rest of that patient’s life. It entails provision for the patient’s future in respect of reasonable medical interventions, including surgery, regular check-ups (via MRIs, or EEGs to monitor epilepsy) or catering for caregivers for the rest of their lives. It could also, for example, provide for architectural changes needed in their environment.’

He said one of the reasons doctors stayed in South Africa was that they could currently practise relatively unhindered in the knowledge that they had appropriate indemnity in place to protect their personal estate.

Another ‘push’ factor?

Joseph, many of whose clients are low-income patients, agrees with what he understands as the intent of the new legislation – that patients are entitled to contract with doctors legally covered against negligence. He said one of the reasons doctors stayed in South Africa was that they could currently practise relatively unhindered in the knowledge that they had appropriate indemnity in place to protect their personal estate. ‘Now you go and take away (proper) indemnification in the event of negligence and expose these guys to bankruptcy. I often call a doctor and say unfortunately this has happened, you’re obliged to give me your records, I am investigating a claim against you, you should get hold of your insurer. The last thing I want is for him not to be appropriately covered.’

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While describing the conceivable edging out of the MPS from South Africa as ‘an unmitigated disaster’, Joseph does not however believe the situation is irretrievable. ‘We need to do everything we can to encourage our professionals to stay. I think if the minister [health minister Dr Aaron Motsoaledi] is approached appropriately, this can be worked out to the benefit of all.’

He said that after studying the new regulations, the controversial clauses ‘looked like afterthoughts’. ‘It is inconceivable that is was the intention of the legislature to expose this country’s medical expertise to bankruptcy due to the exclusion of professional indemnity cover against negligent acts or omissions,’ he added.

Chris Bateman