

Professional indemnity during a pandemic

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The COVID-19 pandemic has created a unique set of circumstances for medical professionals, many of whom would do well to seek clarity from their professional insurers as they are called on to step into unfamiliar terrain.

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Introduction

Medical malpractice insurance usually covers malpractice related to a medical practitioner's scope of practice, which is defined in the policy of insurance. For example, doctors acting outside their usual scope of practice are not generally covered, unless they are providing medical care in a situation of emergency. The Health Professions Council of South Africa (HPCSA) has indicated that healthcare providers may now need to act outside of their scope of practice in order to assist with the pandemic, and the standard of how a reasonable healthcare professional should act will be judged in the light of the current unusual circumstances.

But whether the treatment of a COVID-19 patient can be defined as an emergency situation will depend on the particular circumstances of each case and the severity of the patient's need for treatment (for example, whether they urgently require a ventilator or resuscitation).

Additionally, the wording of a healthcare provider's malpractice policy should be checked to determine what the policy covers, especially in relation to the treatment of COVID-19 patients. In the case of uncertainty, we suggest that healthcare professionals consult with their insurers or insurance brokers to confirm whether cover is provided and what the scope of that cover is.

Doctors should also brush up on their notification obligations, to ensure that they know when and how to notify an insurer of any potential claim.

Heroes of the crisis

Over the past decade South Africa has seen the steady increase in medical malpractice litigation, with claims of

more than R1 million increasing by 550% compared to the previous decade; and claims of over R5-million increasing by as much as 900% over a five-year period. Additionally, health departments face exorbitant medical malpractice claims.

Although healthcare professionals are the heroes of the current COVID-19 crisis, they will be faced with extremely tough situations and decisions as the pandemic worsens and the number of patients who contract COVID-19 increases. These situations and decisions may extend to:

- A range of surgical specialists being required to work in areas such as the ER or ICU.
- Retired healthcare workers being called on to provide support services to frontline workers, such as manning testing stations.
- Medical professionals with pending registration issues being permitted to continue practising.
- Having to weigh up, as just one example, which patient (with reference to young, old, healthy, with comorbidities) gets a ventilator when these become limited.

While the HPCSA says it will consider "the extraordinary circumstances in which practitioners are working and the heavy demands placed on them during this period", Parliament has not issued any form of COVID-19-related indemnity for South African healthcare professionals. What is expected is that standards of reasonableness in patient care in relation to the treatment of COVID-19 patients may differ from the standards usually applied to the provision of general healthcare services.

Courts may be sympathetic towards healthcare practitioners, and it is unlikely that doctors who are seeing hundreds more patients per day due to the pandemic than they normally would, will be held to the same standards to which doctors under normal circumstances must adhere.

However, it is still required that healthcare practitioners consider their ethical and legal duties, and what can reasonably be expected of them during these difficult times. If they have any uncertainty, it would be wise to notify their insurers – especially if a healthcare professional is being asked to provide care outside of their specialty or area of dedicated expertise, and to generally discuss the scope and nature of cover provided over this period.

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