

# Medical malpractice and culpable homicide - the cost of a mistake

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There is overwhelming pride and joy in graduating with a medical degree. There are also many challenges for an aspiring doctor, and one of which is understanding the legal implications of professional negligence.



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When does the negligent death of a patient amount to culpable homicide? To what extent will your professional indemnity (PI) policy cover you for claims and allegations of this nature? These are important questions and concerns for both the established and young medical professional.

While practitioners are made aware of the serious impact and consequence of their work, sometimes atrocities, either based on their professional negligence or beyond their control, do happen. But when does professional negligence that results in death amount to culpable homicide?

In the South African legal framework and our law, there is a clear distinction drawn between murder and culpable homicide. The unlawful, intentional causing of the death of another human being is both recognised and punishable as the crime of murder, while the unlawful negligent killing of another human being is punishable as culpable homicide. In distinguishing between the two, emphasis is placed on both intention and negligence.

When a patient dies on either the operating table, or as a direct result of the medical professional's negligent treatment, culpable homicide is one leg of the legal actions that follow. The patient's family are generally entitled to compensation (in terms of the law of delict).

Prosecutors may investigate criminal charges based on culpable homicide and reports may also be made to the HPCSA (Health Professions Counsel of South Africa) for unprofessional conduct.

Based on the principles of the law of delict, both medical professionals and hospital facilities have a duty of care to exercise reasonable care to prevent harm from ensuing. Should a patient suffer damage or loss as a result of a doctor or hospital's wrongful failure to take such reasonable care, the doctor or hospital may incur liability for negligence.

Importantly and in addition to this, a doctor or hospital that intentionally violates the patient's rights to their physical integrity may also be held liable for assault. A medical professional or hospital facility that intentionally infringes the patient's right to physical integrity and informed refusal may incur liability for injuria.

## **An example in our law**

In more recent judgements, we have seen a gynaecologist found guilty for negligently causing the death of a patient in labour. The doctor was sentenced to five years in prison. While this may have been a first-time offence, the conviction arose as a result of multiple counts of negligence.

When a court pronounces on the reasonableness of an offence, the court takes into account the standard and general levels of skill and diligence that ought to be possessed by similarly qualified professionals.

The court will also have regard for the general level of skill and diligence possessed and exercised by members of that branch of the profession.

In this instance, the High Court found that the gynaecologist's negligence was so severe that he, in fact, had to be convicted of culpable homicide. The facts reveal that the doctor did not attend to the patient even though he had been requested to do so by the hospital at midnight.

After the baby was born, he still did not attend to the patient, despite being made aware of the patient's state of emergency. He instead chose to give instructions over the phone to the nurses. It was found that he did not do everything in his power as a specialist to save the life of his patient.

## **When does a professional indemnity (PI) policy come into play?**

Given the fact that there is an "innocent until proven guilty" principle in law, the policy may respond to advance the defence costs should criminal proceedings be brought against an insured. Where the insured is found guilty, it may be that the insured would have to refund those costs. All of this does depend on the policy wording and the approach of the respective insurers in respect of this extension.

Practitioners have an enormous responsibility placed on them, in terms of the oath that they honorarily take, in terms of the constitutional rights of those they treat and in terms of the duty of care that they owe to patients. However, practitioners also have constitutional rights to a fair trial, the right for their evidence and version of events to be heard and to be treated innocent until proven guilty.

Over the last decade, the size and frequency of compensation awards in medical negligence cases have increased dramatically, making professional indemnity a crucially important risk management tool for every medical professional who sees patients and dispenses advice.

This cover may indemnify you (depending on the policy wording) against your legal liabilities for damages for any bodily

injury, mental injury, mental anguish or shock, illness, disease or death of any patient caused by your alleged negligence, including legal costs and expenses.

## ABOUT THE AUTHOR

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