



## The Impact of Medical Malpractice on the Patient's Rights in the Context of South Africa

Khensanni Richard Chauke

Department of Public Administration, University of Limpopo, South Africa

E-mail: richard.chauke@ul.ac.za

<http://dx.doi.org/10.47814/ijssrr.v6i9.1590>

---

### **Abstract**

The vast majority of accidents that take place in clinical settings are the direct consequence of unavoidable mistakes made by individuals operating within the confines of dysfunctional institutions. An increase in patient safety is the result of healthcare professionals' efforts to encourage blameless reporting and organisational learning. The fault-based civil liability law that inhibits more open discussion between physicians and patients about medical conditions is in opposition with this because of the aforementioned reason. When there is no universally accepted definition of the phrase medical error, litigation and, as a consequence, providing fast and sufficient financial compensation to patients may be rendered more difficult. In this aspect, the performance of no-fault systems is much superior. A dual-track liability system for medical malpractice may be the only option that may sufficiently safeguard patient rights. Despite the fact that it is complicated to create and difficult to administer, this system may be the only one. The objective of the study was to investigate the ways in which patients' legal rights might be affected by substandard medical treatment. In this study, a qualitative research approach was adopted, and primary and secondary sources of information were consulted. The most significant conclusions from this study related to the significance of patients' rights being affected by medical malpractice. Patients are the ones who end up being victims of such practises, thus it makes sense that patients would be affected by such practises. It is for this reason that a high-quality health care system is desired, since it will both extend and improve the rights of patients.

**Keywords:** *Medical Malpractice; Malpractice; Patients; Rights; Patients' Rights*

### **Introduction and Background**

According to Maphumulo and Bengu (2019), the South African government has been working towards the goal of universal healthcare ever since the country's first democratic election in 1994. These efforts are intended to enhance the health of all South Africans. Therefore, the government of South Africa has made it a priority to provide services that are easily available and required for the whole population without placing any expensive and costly burdens on the citizens (WHO, 2015; Ataguba,

Mcintyre, Nxumalo, Jikwana, and Chersich, 2016). This is in accordance with the recommendations made by Ataguba et al. According to section 27 of the Constitution of the Republic of South Africa, 1996, which mandates that all people should have access to healthcare services, the Republic of South Africa's 1996 Constitution has established that all citizens should have access to healthcare services. A provision that forces the government to take the necessary steps to ensure that all inhabitants of South Africa have access to sufficient healthcare services was also included in this Constitution. This provision was included so that this Constitution could be ratified by the people. According to WHO (2015), the rising expenses associated with medical malpractice have the potential to impede patients' ability to get access to adequate medical treatment since the government will lack the resources necessary to do so.

According to Heywood (2009), the right to obtain medical healthcare services is a basic human right that is protected by the Constitution and is guaranteed for every citizen. This right also extends to overseas citizens who are visiting these South African facilities. According to the Constitution, Section 27, everyone has the right to receive healthcare services, including reproductive healthcare services, and no one may be refused emergency medical treatment when such a need occurs. Additionally, no one may be denied the right to access healthcare services, including reproductive healthcare services. According to Dhai (2018), both the Constitution and the National Health Act envision a unified health care system for the whole country. According to Forman (2005), South Africa offers both public and private options for medical treatment. The means test is the method that the state use to decide who is eligible for free medical treatment. From time to time, it is the obligation of the Minister of Health to determine who is qualified to receive the essential healthcare services that are available. Women who are either pregnant or breastfeeding, as well as pregnant women who are qualified to get termination of pregnancy services as a result of the Choice of Termination of Pregnancy Act, have the basic right to obtain healthcare. In addition, children have the legal right, as outlined in Section 28 of the Constitution, to receive the most basic medical treatment. The right to healthcare is a right that may be restricted in some circumstances, depending on whether the resources allowed the availability of resources; nonetheless, the request cannot be refused eventually (WHO, 2008; Forman, 2005). The right to healthcare is a right that can be limited in certain circumstances, depending on whether the resources permit the availability of resources. The implications of negligent medical care on the rights of patients are the focus of this essay.

## ***Literature Review***

South Africa has a great deal of difficulty as a result of its complex historical past. According to Pieterse (2010), the socio-economic standing of a person continues to have a significant impact on both the quality and the kind of services that a person is likely to get in this unequal society. Consequently, this society is still unequal. This is despite the high degree of care that patients in this category need, and the fact that gaining access to services of this kind continues to be difficult. The majority of people in South Africa rely on public healthcare facilities to access their right to healthcare services. On the other hand, only a small number of people are able to afford the cost of private medical care (Gaede & Versteeg, 2011; Kavanagh, 2016). This is because of the socio-economic challenges that exist in South Africa. According to the results of the General Household Survey conducted in 2016 by Statistics South Africa, just 17 out of every 100 people living in South Africa had medical insurance. It was determined that 45 million South Africans, or 82 out of every 100 people, do not qualify for medical assistance and are thus mostly reliant on public healthcare. It was, however, the number of individuals in South Africa who relied on the country's publicly funded health care system. According to Dhai (2018), the number of undocumented persons and foreign nationals who depend largely on the public health system to get healthcare services makes this number very likely to be far higher.

In contrast to the patient's expectations about the services provided by the healthcare provider, to what degree does medical malpractice violate the patient's right to obtain healthcare? To what degree does

the frequency or prevalence of malpractice impact the perspective of patients about access to healthcare? This research will investigate the point at which the awareness of the possibility of medical malpractice compels medical practitioners to adopt a defensive medical practise in order to protect themselves from the risk of being sued as a result and the effect this has on the patient's right to receive medical treatment.

Patients are the ones who benefit from section 27 of the Constitution; nevertheless, when healthcare personnel fail to comply to the norms and procedures that are required of them (Mahlathi & Dlamini, 2015), patients are left vulnerable. According to van Dokkum (1997), the Constitution of South Africa has provisions that protect the right of every individual to the best possible level of both physical and mental health. Every citizen is guaranteed the protection of their life and their personal liberty under the Constitution, specifically in Section 27. The cases that have been heard by the Court have reached the conclusion that the right to live with human dignity, which is established in Article 27, arises from the fundamental principles of the state policy and, as a result, encompasses the protection of the right to the health of patients. It was further concluded that the right to health plays an important role in the right to life and that it is a constitutional requirement for the government to provide the necessary health facilities (Heywood, 2009). In addition, it was held that the right to health plays an integral part in the right to life.

In light of the guarantee outlined in Article 27 of the Constitution, the patient has the expectation that they will have access to medical treatment. However, there is a huge rise in the incidence of medical misconduct at the present time. What should be done or how should it be handled with regard to medical healthcare in order to facilitate access to medical healthcare? To what degree does the risk of being victimised by medical misconduct increase the difficulty of gaining access to necessary medical care? Does the guaranteed right to receive medical health become null and void if medical negligence occurs? To what degree does the financial burden caused by medical malpractice deprive the government of the resources it ought to utilise to resolve disputes related to medical negligence? There are weighty concerns that call for attention and answers, and these needs must be met.

The provision of these protections for access to medical treatment may be found in Article 27 of the Constitution. There is, however, a vacuum in the right of patients to hold medical professionals and the Department of Health civilly accountable for the injury caused by their carelessness, which is not specified in the patient's rights charter (Department of Health, 2023) that was established by the Department of Health (Dhai, 2018). The patient's rights charter was adopted by the Department of Health. Patients have high expectations of receiving excellent treatment because of the guarantee of access to healthcare; yet, the frequency of medical malpractice that results from non-adherence to the standard of care leaves patients vulnerable and makes them victims (van Dokkum, 1997). The effect of negligent medical care on patients' perspectives and behaviours, in comparison to the patients' records of their expectations of receiving quality care.

As a result of the failure of the healthcare service providers, the patients are put in a position where they might get subpar treatment (van Dokkum, 1997). It is a breach of a patient's right to life and access to healthcare when government hospitals fail to give patients with timely medical treatment, which results in the patient's right to life being jeopardised. In addition, it may be deduced that the Supreme Court has validated the state's commitment to continue providing healthcare services. In a few cases, petitions in the public interest have been submitted in accordance with section 27 as a means of responding to infringement of the right to health (Kavanagh, 2016).

There are many different types of medical malpractice, and some of the types of medical negligence that might result in a patient filing a lawsuit include the following: failure to diagnose or incorrect diagnosis; misreading or ignoring laboratory results; unnecessary surgery; surgical errors or wrong-site surgery; incorrect medication or dosage; inadequate follow-up or aftercare; premature

discharge; not taking an appropriate patient history or not taking a history at all; failure to order appropriate testing; and failure to recognise symptoms. How widespread is the problem of medical malpractice in South Africa, and at what point does it become an infringement on the patient's legal rights? A shift towards defensive medicine, which is undertaken by medical practitioners as a response of rises in both the magnitude and the amount of medical malpractice that has been claimed, has occurred as a direct consequence of these increases. They have had severe emotional repercussions on healthcare professionals, which has resulted in patients being on the receiving end because legal practitioners will not give their best but instead guarantee that everything they do does not expose them to being sued. This has led to patients being on the receiving end.

According to Ngwenya (2013), the Constitution of South Africa and the National Health Act include a clause that stipulates no individual may be denied access to emergency medical treatment by any healthcare practitioner, healthcare worker, or health facility. This provision ensures that no individual may be denied access to emergency medical treatment. Any clinic or hospital, regardless of whether it is run by the public or private sector, is included under the umbrella term "health establishment." Access to emergency medical care is not governed by the regulations that govern the categories of hospitals and the locations of hospitals. People who are facing a medical emergency or who need immediate medical attention are entitled to care at either a public or a private hospital (Dhai 2018). This is a requirement that must be met. Patients in this situation will get stabilisation care in private hospitals, and then be transferred to public health facilities for treatment because they do not have private medical insurance. Likewise, a private ambulance should transfer such a person to the nearest hospital, and the medical institution is responsible for stabilising a patient before demanding or asking for payment from the patient. When this occurs, and only then, may a patient who does not have medical assistance insurance be transported to the right institution.

Patients desire access to healthcare services, as envisioned in the Constitution, but medical malpractice dampens this attitude (van Dokkum, 1997). Patients want access to healthcare services, as envisioned in the Constitution. In what ways can negligent medical care impede patients' ability to exercise their constitutionally protected right to get necessary medical treatment? In what way, if any, does the remedies make up for the infringement? The evaluation of these rights is important because it will show to what degree these rights of access to medical healthcare are influenced by medical malpractice. This makes the evaluation of these rights vital.

In spite of the fact that everyone has a constitutionally protected right to medical treatment, there are nevertheless instances when medical malpractice is allegedly committed. This highlights the violation of patients' basic rights, which are protected by the constitutions (Matumba, 2019). Additionally, this casts doubt on the constitutionality of the fundamental rights. The patient is put in jeopardy when the necessary quality of care needed to deal with patients is not maintained, which eventually leads to claims for damages being filed against the state (van Dokkum, 1997; Oyebo, 2013). There is a shortfall of resources that the state needs in order to deliver the promised service (Taylor, 2015; Moor & Slabbert, 2013). This deficit is the outcome of the massive claims of medical malpractice that have been filed against the state.

Other research has been done that focused on errors made by medical professionals. According to Otto (2004), it was indicated that there had been an increase in the number of medical malpractice suits that have been brought against medical practitioners as recorded by the Medical Protection Society (MPS) (Pienaar, 2016; MPS, 2015); they also indicated that there is a growing recognition that there should be legal reform, concerning medical negligence in South Africa, which should assist in the reduction of the mounting cost burden, which is so heavy on the shoulders of South African medical practitioners. In addition, MPS (2015) indicated that there had been a rise in the values of claims made against the medical

practitioners from 2009 to 2015, and that these values had climbed by 14% on average for each year throughout the period (Pienaar, 2016). In addition, it was stated that the number of claims for medical negligence has greatly grown over the years; this has prompted worry from the medical business owing to the influence that it has on the industry (Pienaar, 2016). It was found once again that owing to the fear of these claims, the medical practitioners have become too aware and have begun to adopt a defensive medical practise, with the intention of reducing the probability of the danger of a medical claim being brought against them (van Dokkum, 1997). This was shown to be the case. As a result, one may draw the conclusion that this degree of awareness has an effect on the quality of service that can be offered to patients. This is due to the fact that medical practitioners will only perform the bare minimum necessary to avoid putting themselves in danger (Taylor, 2015).

According to the Democratic Alliance (DA) Member of Provincial Legislature (MPL) Mr. Jack Blom, it was disclosed in the News24 (2020) that the medical negligence claims in Gauteng have increased to R28.9 billion in 2018/2019 from R21.7 billion in 2017/2018, and this translate into an increase of R7.2 billion in just one year. In other words, the increase is equivalent to an increase of R7.2 billion in one year. This is a spectacular growth, and it is the result of medical malpractices that include patients who would have experienced injury or damage at the institution that was intended to offer them sufficient acceptable and accessible healthcare services (Forman, 2005). This is why there has been such a rise in the number of cases of medical malpractice. According to Nevhutalu (2016), this goes against the spirit that was envisioned in the bill of rights, which assures that everyone has the basic right to access to excellent healthcare.

Malpractice in the medical field is an evidence that the patient's rights were violated or compromised in some way. As a result of its research on Access to Healthcare Services and Access to Emergency Medical Services in the Eastern Cape, the South African Health Research Council (SAHRC) (2018) has compiled a list of the obstacles that are encountered while attempting to get access to healthcare services. According to the findings of the SAHRC, public healthcare services are typically under-resourced and occasionally lack resources entirely in the areas of personnel, availability of suitable medication, and infrastructure. These conditions have a negative impact on the capacity and ability to provide adequate care to poor people, particularly those who live in rural areas (South African Lancet National Commission, 2019; Gaede and VERsteeg, 2011). In addition, the SAHRC found that the majority of public healthcare services are under-resourced. The reports noted severe emergency shortages of transport, in the long waiting times, and the overcrowding, and this resulted in compromising the cleanliness of hospitals. In some instances, the hospitals have outdated technology, under-staffing, and the prevalence of discriminatory attitudes towards vulnerable groups as significant concerns (Ngwena, 2013).

It is stipulated in the Constitution that it is the obligation of the State to respect, preserve, promote, and fulfil the rights that are contained in the Bill of Rights. One of these rights is the right to obtain healthcare services. In addition, the Constitution stipulates that the state is obligated to adopt any and all actions required, so long as they are feasible given the resources at its disposal, in order to ensure the gradual realisation of the right to receive healthcare services, which includes the right to reproductive healthcare (Forman, 2005). It is the responsibility of the national Department of Health, in partnership with the health departments of the individual provinces, to provide healthcare services throughout the nation. Clinics at the community level offer vital medical services in an effort to make accessing necessary medical care easier and to alleviate pressure placed on hospitals. The suitable cases are referred from the clinics to the hospitals that are designated to accept patients from the corresponding geographic regions. These hospitals, in turn, are responsible for referring problematic cases to bigger designated hospitals, which have the capacity and equipment to provide a certain kind of specialist services. Despite the arrangements, backlogs, and lengthy waiting lists that are commonplace at the different levels of the referral system, healthcare services are nonetheless required to be delivered in accordance with the



Constitution. It provides a detailed explanation of the laws that regulate the provision of health care at the national, provincial, and municipal levels of government. In addition to regulating the delivery of healthcare services by the various branches of government, the National Health Act of 2003 also identifies and establishes obligations for the delivery of medical treatment in the event of a medical emergency. It is possible that the patient's rights may be violated or somehow affected by this procedure.

When a patient suffers a harm as a result of an act or omission on the part of a healthcare provider (such as a hospital, doctor, or other medical professional), this is a case of medical malpractice. Errors in diagnosis, treatment, and aftercare as well as in health management might have led to the negligent care that was provided. According to the most recent findings of a research that was carried out by the Faculty of Medicines and Health Sciences at Stellenbosch University, there has been an increase in the number of civil claims settlements, many of which have resulted in pay-outs that amount to millions of rand. The findings of the research also shown that the expenses of such claims are borne by the end customers themselves. According to the findings of the research that was performed by the Department of Nursing and Midwifery, the number of legal claims being filed against private hospitals is on the rise, and a scenario quite similar to this can also be seen in public hospitals. According to what she stated, the increased number of settlements resulting from nursing negligence in private hospitals is a concern that is being encountered in South Africa. According to the survey, there has been a decrease in the quality of treatment, which is something that is observed in both public and private hospitals. Because of this, the cost of clinical blunders is simply too great.

According to the findings of the study that was carried out by the SAHRC's 2017 Investigative Hearing on the State of Oncology in KwaZulu Natal Report, there are significant wait times. Denial of oncology services to cancer patients in KwaZulu Natal was observed in some cases. These practises were common across all public health facilities in the province. This situation had serious repercussions for the treatment and prevention of cancer among members of the general public who sought medical help (Ranchod, Adams, Burger, Carvounes, Dreyer, Smith, and van Biljon, 2017). In this respect, the issues and challenges were made worse by the vast numbers of people, with the majority of those affected being individuals going from rural regions, with the majority of those affected being women, children, and the elderly.

It was reported once more by the SAHRC 2018 National Investigative Hearing, which dealt with the Status of Mental Health Care in South Africa. They discovered that there is a shortage of skills, training, and resources, all of which have a negative impact on the rights of vulnerable groups, including mentally ill patients. The hearing was held in South Africa. According to Howarth and Carstens (2014), patients who are subjected to substandard care, as well as abuse and neglect, have their rights to obtain health care as well as the right to be treated with dignity violated. This constitutes not just a denial of those patients' rights but also a breach of such rights. The results of poor treatment, abuse, and neglect of patients are a direct result of its surveillance and complaints on the right to obtain health care in practically all of the country's provinces. The South African Health Research Council discovered these throughout the course of its inspections of many hospitals located in a variety of regions, including Gauteng, the Free State, KwaZulu-Natal, the Northern Cape, North West, and Limpopo. According to Forman (2005), the government is required to ensure that all people have access to medical care for themselves and their families. As a result, the right to obtain healthcare in all of its forms may be denied to them due to the possibility of medical misconduct (Forman, 2005). Within the scope of this research, an analysis and investigation will be conducted to determine the degree to which the frequency of patient rights violations caused by medical negligence. The study will also investigate the extent to which the fear of medical malpractice compels medical practitioners to adopt a defensive stance in their medical practises in order to reduce the risk of being sued, and how this posture taken by medical practitioners has

an effect on patients' rights to receive medical care as a consequence of this posturing by medical professionals.

This study aims to provide critical research on the right to have access to healthcare services in order to guide academics, legal practitioners, government organisations, and judicial officers on how to interpret this right in the best way possible, implement it, and enforce it in order to realise the transformative potential of the South African Constitution (Ebi, 2016).

An activity involving the acquisition of data is connected to a variety of ethical concerns. This section will provide an overview of the following ethical principles that will be adhered to during this research:

The meaning and substance of the right to have access to healthcare services will thus be discussed in this research in relation to the Constitution, case law, and other applicable international human rights treaties.

The research will also explore if the substance of the right to have access to healthcare services may have a horizontal application in the context in South Africa to boost the likelihood of realising this right and accomplish the transformational objective of the Constitution. This will be done in order to realise the Constitution's purpose of transforming South Africa. The study will check the progress made in the realisation of the right to have access to healthcare services by investigating some of the measures that have so far been put in place by the government during the period under review and the impact of these measures, particularly on the groups that were marginalised and excluded from healthcare services under the system of apartheid. The study will check the progress made in the realisation of the right to have access to healthcare services by look In doing so, the research will also highlight some of the inadequacies of the measures put in place by the government and will further identify contemporary obstacles in the fulfilment of the right to have access to healthcare services and the reaction of the government to these issues. In addition, the study will highlight some of the flaws of the measures put in place by the government. In addition, the purpose of this investigation is to explore the many methods by which section 27(1)(a) of the Constitution may be properly implemented in order to fully achieve the potentials associated with the right to have access to healthcare services in South Africa. As a result of this, the investigation will provide recommendations about a substantive strategy that should be used in South Africa's jurisprudence regarding the right to have access to healthcare services (Matumba, 2019).

It is widely believed that the amount of growth in the number of claims has been caused by a degradation in both the medical profession as a whole and the necessary quality of care that is expected of medical practitioners. Medical professionals have a responsibility to ensure that they provide patients with treatment that meets the criteria established for their specific subspecialty of the medical profession. The unhappiness of patients is likely to be another key component as well as a vital aspect. In many cases, the patient's choice to sue a healthcare practitioner is preceded by the patient's perception that the practitioner did not care about them and that there was a breakdown in communication between the two parties.

Regarding case law, as in the cases this covers case heard in the Eastern Cape, Western Cape, and Limpopo as such would be revealed to the patients (*Goliath v MEC of Health Eastern Cape*, 2015), the advancements in legislation and case law towards patient autonomy have had a key influence. According to Willams (2018), Oosthuizen and Carstens claimed that a number of variables contribute to the precarious situation of healthcare in South Africa, and Willams studied these aspects as well. The issues that have been going on with the management and the lack of responsibility have not been resolved. At the same time, the severe limitations on human resources that are the result of poor policy and budget decisions have led to increased workloads, which in turn have resulted in many medical interventions

being carried out by medical practitioners who lack experience without being monitored or supervised by those with experience. The infrastructures and equipment of the hospitals are also in a terrible state of disrepair, and the regular shortages of supplies and drugs result in a diminished quality of medical service.

While the development of certain medical incidents is completely unavoidable, the occurrence of others takes place as a direct consequence of a need and a desire for treatment. The medical accidents that are attributable to systemic errors or methods of providing healthcare that equate cost-cutting with efficiency, which result in overworked personnel, inadequate safety measures, and where there is an emphasis on producing quantity rather than the quality of healthcare provision, should be scrutinised, so that reliable data can be acquired concerning the number of medical malpractice claims that are instituted, the causes for the escalation of such claims, and so that improvements can be made to the current system.

### ***Theoretical Underpinnings***

The theoretical framework compliment and infuses the study arguments and give the base within which the study unfolds. Eversole (2003) argues that a theoretical framework is the structure that can hold or support a theory of research study. Its purpose is to support the researcher's philosophical, epistemological, and analytical approach to the investigation (Eversole, 2003). This study's critical theoretical perspective navigated the Servant Leadership theory (Greenleaf, 1998). This study aims to look into the role of leadership in delivering service and challenges citizen's encounter because of inefficient and ineffective leadership on service provision in the South African. Leadership theory have a critical influence in the development of an organization. Leadership theory are commonly viewed as visionaries and change agents (Burn, 1978). The paper is grounded on Servant, theory. Be that as it may, Servant Leadership is the central theme or main theoretical point of departure, as emphasized in the above discussion.

The paper is epistemologically grounded in the Servant Leadership theory in which leaders have a desire to serve, followed by intent to lead and develop others, to ultimately achieve a higher purpose objective to the benefit of individuals, organisation and society. Servant Leadership guarantees that other high priority needs are being served; it is the willingness, obligation and desire to serve the interests of other citizens (Greenleaf, 1998). Due to its emphasis on providing services to people, the Servant Leadership theory is most applicable to public institutions such as hospitals. The reason for adopting Servant Leadership is simple because both policy makers and administrators need to apply this theory to enhance the delivery of services in South Africa.

### ***Research Methodology***

In this study, a qualitative research methodology will be used because the study will enthusiastically and meticulously analyse literature relating to the rights conferred on patients and the obligations of a constitutional nature imposed on the medical fraternity, in terms of access to healthcare. This research will also take into account the importance of balancing patient rights with the constitutional obligations of the medical fraternity. The research strategy that was chosen for this inquiry includes doing a review and an analysis of primary and secondary sources of information that are pertinent to the topic that is the focus of this investigation. An analysis and examination of primary sources of literature are carried out as part of the research. These primary sources of literature include international and South African case law, international law, Acts of Parliament legislation, Bills, policy papers, regional human right instruments, and international human right instruments. In addition to that, this research is comprised of a literature review as well as an examination of secondary sources. The research is literature-based, and as a result, a significant amount of reliance is placed on additional materials such as textbooks, journals, and papers relating to the right to have access to health care services, as well as other



academic materials in connection with socio-economic rights in general (Gaede & Versteeg, 2011). In order to address the research questions, the conclusion that was reached via the process of examining and interpreting the material that was gathered from the aforementioned sources was used.

## ***Findings***

They were raising the patient's knowledge of their rights to receive medical treatment, as well as their rights to be safeguarded from medical malpractice and to know what to do in the event that such a thing occurred. These rights go hand in hand with the patient's right to obtain medical care. According to the findings of the research, it has helped to ensure that access to healthcare is seen as a key problem regarding human rights in South Africa. It was also demonstrated that this study's assessment of the extent to which medical care malpractice affected the quality of life of several victims and in some cases, and also spelt out wherein patients may be left with disabilities, the study will empower them to know what to do and recommend for the publishing of any medical claim settlement that they may have reached. This was demonstrated as another benefit of reading this study. The research elaborated on the factors that may contribute to instances of negligent medical care. Additionally, it was discovered that it is of the utmost importance to educate patients about the concept of professional medical negligence, as this will serve as the foundation for legal action. The research also came to the conclusion that negligence can be explained in general as a scenario in which the defendant failed to foresee the possibility of the possible harm, whether it be injury or death occurring in circumstances where a reasonable person in the defendant's position would have foreseen or expected to foresee the harm, and would have taken steps to prevent or avoid it. This was one of the other findings from the study. According to the findings of the research, there is a significant amount of interference with the patient's rights. The research helps medical professionals recognise their degree of risk and the effect that their behaviour has on patients' rights to get medical treatment, which is another important contribution it makes. Despite the fact that there is a well-established standard for determining medical negligence in the legal system, the question of how this legal standard might be used in medical practise is often discussed. When meeting with patients, healthcare practitioners often lack a comprehensive understanding of what is necessary to fulfil the requirements of the legal standard and avoid legal responsibility (van Dokkum, 1997). Even though the waiver effectively authorises the medical practitioner in whose favour it has been made to act unconstitutionally, the court in the case of *Afrox Healthcare Bpk v. Strydom* affirmed that a service provider might contract out of delictual liability by employing the waiver or the exemption clause in the contract signed by the patient (Matumba, 2019). This was done in the case of *Afrox Healthcare Bpk v. Strydom*. This unsatisfactory situation has since been dealt with and handled in the Consumer Protection Act (2008), which provides that a consumer may not be asked to waive any responsibility of the provider in cases where such action may be unfair, unjust, or unreasonable (Pepper, 2011). This unsatisfactory position has now been dealt with and addressed in the Consumer Protection Act (2008).

## ***Conclusion***

It is reasonable to conclude that once the Constitution and section 27 of the Constitution were enacted in South Africa, the rules pertaining to access to healthcare were changed. This is especially true for the standards that need to be fulfilled with in regard to access to medical treatment and emergencies. All health care professionals are required to do their work in a manner that is in accordance with the provisions of Section 27 and patients' rights. There is a correlation between the right to obtain healthcare and the lack of medical malpractices, and this correlation is a good one. There is an inverse correlation between having the legal right to obtain medical care and the risk of receiving substandard treatment. Access to healthcare and medical misconduct have been shown to have a strong and inversely proportional link. The mentality of patients has been shown to have a major bearing on the incidence of

medical errors. Patient rights and access to medical treatment are intertwined in a way that benefits both parties. There is a large and positive association between the high cost of medical malpractice and the performance of medical practitioners. This relationship contributes significantly to the overall quality of patient care.

### References

- Afrox Healthcare Bpk v Strydom (172/2001) [2002] ZASCA 73.
- Baker T and Lytton TD.2010. Allowing patients to waive the right to sue for medical malpractice: A response to Thaler and Sunstein. Faculty Scholarship at Penn Law. Vol.104 No.1. 254.
- Choice of Pregnancy Act 92 of 1996.
- Constitution of the Republic of South Africa 1996.
- Consumer Protection Act 68 of 2008.
- Department of Health. Patient rights charter. Available at <http://www.doh.gov.za/docs/legislation/patientright/chartere.html>.
- Department of Health. Patients' Rights Charter. Available at <http://www.doh.gov.za/docs/legislation/patientright/chartere.html>.
- Dhai A. 2018. Health in crisis: A shameful disrespect of our Constitution. Vol.11 No.1 SAJBL 8.
- Ebi EAO. 2016. Enforcing the right of access to healthcare services in South Africa. LLM unpublished. University of South.
- Forman L. 2005. Ensuring reasonable health: Health right, the judiciary and South African HIV/AIDS policy. Journal of Law, Medicine and Ethics. Legislating and Litigating Health care rights around the world 711.
- Gaede B and Versteeg M.2011. The State of the Right to Health in Rural South Africa. South African Human Rights Commission 99.
- Goliath v MEC for Health, Eastern Cape 2015 (2) SA 97 (SCA);
- H v Fetal Assessment Centre 2015 (2) SA 193 (CC).
- Harris B, Goudge JA, Ataguba JE, McIntyre D, Nxumalo N, Jikwana S and Chersich M. 2016. Inequities in access to health care in South Africa. Vol.32. No1. Journal of Public Health Policy 102.
- Heywood M.2009. South Africa's Treatment Action Campaign: Combining Law and Social Mobilisation to Realise the Right to Health. Vol.1 No.1. Journal of Human Rights Practice. Oxford University Press 14.
- Howarth G and Carstens P. 2014. Can private obstetric care be saved in South Africa?Vol.14 No.2. SAJBL 69.
- Howarth G.2019. Avoiding malpractice litigation and defending claims of negligence. De Novo Medica.
- Kavanagh MM. 2016. The Right to Health: Institutional Effects of Constitutional provisions of Health outcomes. St Comp Int Dev 328.
- Links v MEC Department of Health, Northern Province 2016 (4) SA 414 (CC); H v Fetal Assessment Centre 2015 (2) SA 193 (CC).
- Links v MEC Department of Health, Northern Province 2016 (4) SA 414 (CC);
- Mahlathi P and Dlamini J. 2015. Minimum Data Sets for Human Resources for Health and the Surgical workforce in South Africa Health System: A rapid analysis of stock and Migration. African Institute for Health and Leadership Development.
- Maphumulo WT and Bhengu BR. 2019. Challenges of quality improvement in the healthcare of South Africa Post-Apartheid: A critical review. Open Access. Oasis 1.
- Matumba RM. 2019. Medical Negligence as a Novus actus interveniens: An analysis of South African delictual jurisprudence unpublished LLM dissertation.
- Moore W and Slabbert MN.2013. Medical Information Therapy and Medical Malpractice litigation in South Africa. Vol.6 No.2 SAJBL60.
- MPS.2015). this is in line with challenging the cost that emanates from clinical negligence: The case of reform. 10 March 2015.

- MPS.2015. Challenging the cost of clinical negligence: The case for reform. 1 Health 24. SA's shocking medical malpractice crisis1.  
National Health Act 61 of 2003.
- Nevhotalu HK. 2016. Patient's right in South Africa public health system: Moral-critical perspective. PhD unpublished dissertation. University of Stellenbosch (2016).
- News 24, 10 February 2020. available at <https://www.news24/southafrica/news/medical-negligence-claims-in-gauteng-have-increased-to-r29bn-da-20200210>.
- News24 "Medical negligence claims in Gauteng have increased to R29bn - DA".
- Ngwenya C. 2013. Scope and Limits of Judicialisation of the Constitutional Rights to Health in South Africa: An appraisal of key cases with particular reference to justiciability. Vol.14 No.2 R. Dir. Sanit Sao Paulo 43.
- Opel v Department of Health, Western Cape 2016 (1) SA 325;.
- Otto SF.2004. Medical Negligence Review Article. South African Journal of Radiology.
- Oyebode F. 2013.Clinical errors and medical negligence. Medical principles and practice. Review. Karger Open access 323.
- Patel B. 2008. Medical Negligence and res ipsa loquitur in South Africa. Vol.1 No.1 SAJBL 57.
- Pepper MS and Slabbert MN. 2011. Is South Africa on the verge of medical malpractice litigation storm. Vol.4. No.1. SAJBL 29.
- Pienaar CE.2011. An analysis of evidence –based medicine in the context of medical negligence. LLM unpublished dissertation University of Pretoria.
- Pienaar, L. 2016. Investigates the reasons behind the increase in medical negligence claims. PERS/PELJ 2016 (19).
- Pieterse M. 2010. Legislative and executive translation of right to have access to health services. Law, Democracy and Development.Vol.14.
- Ranchod S, Adams C; Burger R, Carvounes A, Dreyer K, Smith A, Steward J and van.
- Biljon C. 2017. South Africa's hospital sector: old divisions and new developments. South African Human Rights Commission. 20th Anniversary Edition.
- South Africa Lancet National Commission.2019. Confronting the right to ethical and accountable quality health care in South Africa: A consensus report. National Department of Health. Pretoria.
- South African Human Rights Commission. Access to health-care. 2018. The SAHRC 2018 national investigative hearing status of mental health care in South Africa report. SAHRC. Braamfontein. South Africa.
- South African Lancet National Commission. 2019.Confronting the right to ethical and accountable quality healthcare in South Africa: A Consensus report. National Department of Health. Pretoria.
- Taylor DW. 2015. Assessment and Plan for medical malpractice: Quality improvement through mediation. Spring Symposium DePaul Journal of Health Care Law. Vol.6 No.2. 343.
- van Dokkum N. 1997. The evolution of medical malpractice law in South Africa. (1997) Vol.41 No. 2. Journal of African Law 175.
- WHO. The right to health. 2008. Fact sheet No 31. World Health Organisation. United Nations. Geneva.
- Williams A. 2018. Investigation into the factors contributing to malpractice litigation in nursing practice within the private healthcare sector of Gauteng. Master of Nursing Science unpublished dissertation. University of Stellenbosch.
- World Health Organisation (WHO). 2015. A Rapid Analysis of Stock and Migration. African Institute for Health and Leadership Development.

### Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal. This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).