

Comprehensive overview of medical malpractice insurance in SA

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A comprehensive overview of medical malpractice insurance in SA has now been published by Natmed under the title [*Understanding Medical Malpractice Insurance in South Africa*](#). This is the first time there has been such a thorough work published in South Africa.



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The paper discusses the state of medical malpractice in the country and the need for medical malpractice insurance.

Four thousand years ago, negligent physicians may have been subject to amputation when they killed or injured patients. Doctors are no longer subject to corporal punishment for their negligence. Modern-day doctors are, however, not only exposed to significant reputational damage and professional sanction, but civil damages. These damages can run into the tens of millions of rands, depending on the type of medicine and speciality practised by the doctor.

The overview includes a succinct review of South African medical malpractice law. The test for negligence in the medical malpractice context is now tried and tested. A doctor is not expected to bring to bear upon the case entrusted to them the highest possible degree of skill and care, but is bound to employ reasonable possible skill and care and is liable for the consequences if he or she does not. The devil lies in the details, the facts of the particular case, and whether reasonable skill and care were exercised in the circumstances. This may result in a complex enquiry involving many experts – medical and financial - and is often costly and time-consuming.

The report then discusses in some detail medical malpractice insurance and its constituent components. Medical malpractice insurance is a special type of professional indemnity insurance, which indemnifies doctors where they have a legal liability to a third party – normally the patient – for losses proximately caused by them in the conduct of their professional business.

The report considers the difference between occurrence-based and claims-made types of insurance. An occurrence-based policy provides protection from both recognised incidents, which the doctor is aware of, and from events that may give rise to a claim which the doctor is not aware of, and has therefore not been reported to the insurer. A claims-made policy protects only against recognised events. It explores the different policies' pros and cons, and includes the consideration and effect of the 'tail' – which is the time period between the adverse medical event occurring and it being reported and/or a claim made against the doctor.

South African prescription law means that under normal circumstances, a patient has up to three years as a generalisation within which to institute legal proceedings against the doctor. In the case of minor patients, that period extends to 19 years.

The function and application of the retroactive date in a policy is also discussed. Under a claims-made policy, the retroactive date serves to exclude claims for events that are made prior to that date – even if that claim is first made during the policy period. It can also be used to eliminate coverage for events that give rise to claims in the future, and to prevent obsolete claims from arising which relate to events far in the past.

These are all elements which inform the difference in the pricing structure between an occurrence-based and a claims-made policy. When investigating an occurrence-based policy and calculating the premium one has to pay, particular attention should be paid to the effect of the 'tail'. The 'tail' is not inconsequential for the calculation of a claims-made premium, but policy terms and exclusions can be used to limit the claims-made policy insurer's exposure.

This overview serves as an excellent primer for novices to the medical malpractice insurance industry. Doctors will find [*Understanding Medical Malpractice Insurance in South Africa*](#) a useful summary of the topic. End notes provide more detail and particularity to the general discussion and add interest for seasoned liabilities insurance specialists. There is also a useful suggested reading list.

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