

A tragedy that's indicative of SA's failing health systems

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As Parliament prepares to debate the National Health Insurance (NHI) Bill and as the Department of Health begins work on laying the foundations for the NHI fund, judges from the Supreme Court of Appeal (SCA) have ordered Health Minister Dr Zweli Mkhize to urgently 'address...serious and serial negligence in hospitals falling under the Eastern Cape Health Department'.

Somewhere in the OR Tambo District of the Eastern Cape lives a mother and her soon to be six-year-old child. We don't know their real names. In a recent judgment handed down by the Supreme Court of Appeal, they were known only as AN and EN. But let me tell you a little of their story.

On 2 October 2013 AN arrived at All Saints Hospital in Engcobo to give birth to her first child. Fortunately, her pregnancy had been an uneventful and healthy one. The delivery was expected to be uncomplicated. But her good fortune had run out. AN was admitted to hospital and then left in labour for 12 hours. During the night, nurses ignored her cries for help. The standard guidelines on delivery were ignored. This is how Judge Mahube Molemela, who wrote a dissenting judgment, described what happened (*I quote it at length for reasons that will be understood later*):

"... after her admission to the hospital, she was taken to the labour ward. The nurse who attended to her performed a few vaginal examinations **but did not monitor the foetal heart rate at any stage**. During the night, she experienced **excruciating pain** that rendered her unable to walk, as a result of which **she had to crawl whenever she had to go to the toilet**. As there was no staff member at the nurse's station closest to her ward, she received assistance from fellow patients whenever she had to go to the toilet. According to her evidence, at some point, she requested that a caesarean section be performed, seemingly because of the **severe pain** she was experiencing. The attendant nurse dismissed her request. At 06h00, a vaginal examination was done, after which the appellant was moved to the delivery room. This examination, too, was **not accompanied by the monitoring of the foetal heart rate**.

"According to the appellant, after examining her, the nurse told her that the baby was about to make its arrival and instructed her to start pushing. **The nurse in question then left the ward and never returned**. The appellant was left unattended until a member of the cleaning staff, who happened to be passing by, raised the alarm after noticing that the baby's head was partially out but seemed stuck in the vaginal opening. In response to the cleaning lady's call for help, a nurse came to the scene and delivered the baby."

But it was too late. The damage was done. EN suffered severe brain damage during birth, described as an acute profound hypoxic-ischaemic insult. Today she lives with cerebral palsy. In the following years, AN tried to sue the Eastern Cape Health Department (ECHD) for the damages she and her baby had suffered. Painful though it must have been, she even gave evidence in court herself. But last week was the end of the line. She lost her appeal before the SCA.

The judges said they sympathised with her. The ECHD did not dispute that the nurses had been grossly negligent. But they dismissed her appeal. Four out of five of them ruled against her claim on a matter of legal interpretation – they said they were unable to overcome what is

known in law as the “but-for” principle. Put simply, they could not say with absolute certainty whether medical negligence was the cause of EN’s brain injury.

Sometimes the law fails to deliver justice.

As we learnt from the damages case of little Michael Komape, who drowned in a pit latrine at his school, cruelty and callousness are not enough to found a claim for damages.

Debating the merits of the SCA ruling is a matter for another day. The SCA has been known to get it wrong on matters of fundamental human rights, and – in the case of the late Dudley Lee, who successfully sued the minister of correctional services because he became ill with tuberculosis while awaiting trial at Pollsmoor Prison – this matter of “causation” was the very issue in point.

But, unlike political parties and the public protector, it seems unlikely that AN has the financial resources – or the emotional energy – to take the matter to the Constitutional Court.

Sadly, the ladder of law does have a top and a bottom.

So, today, EN is one of many thousands of children who live with debilitating cerebral palsy. Poor healthcare has robbed them of autonomy, independence and frequently of dignity.

At this moment, wherever they are, EN and AN will be battling with trying to have her medical and special schooling needs met by a school and health system which we know will be as unforgiving and cruel to them in life as it was at birth.

But poverty is a great “anonymiser”. It will hide their stories from public view.

They have been discarded.

In a *Daily Maverick* article last year the president of the Medical Research Council (MRC), Glenda Gray, called people like EN and AN the [“canaries in the coal mine”](#). And there are a lot of canaries.

The National Department of Health has pondered the problem of high levels of perinatal injury and death for nearly 20 years. A National Perinatal Mortality and Morbidity Committee (NaPeMMCo) issues bi-annual reports to the minister, and one of these reports currently sits on his desk.

But it does not appear to keep statistics on the number of babies who suffer these injuries.

Neither does it monitor their progress and quality of life afterwards.

However, what we do know, is that [claims of negligence](#) causing cerebral palsy constitute the overwhelming majority of claims against the Department of Health and there are statistics on these.

In 2018, a study of reports of provincial health departments carried out by Daniel McLaren, the budget analyst at SECTION27, revealed that in the Eastern Cape claims totalled R24.1-billion – followed by Gauteng (R21.7-billion), Limpopo (R4.8-billion) and KZN (R16.6-billion).

Asat 31/ 03/ 2018	Total medico-legal claimsliabilities	%of annual budget	Incurred in year
Eastern Cape	R24 193 619 000	108,6%	R8 412 2
Free State	R1 842 917 000	18,8%	R522 16
Gauteng	R21 701 514 000	51,7%	R3 828 9
KwaZulu-Natal	R16 638 734 000	41,7%	R3 245 6
Limpopo	R4 874 800 000	26,5%	R2 814 3
Mpumalanga	R0	#DIV/0!	R0
Northern Cape	R0	#DIV/0!	R0
North West	R0	#DIV/0!	R0
Western Cape	R90 350 000	0,4%	R89 600
TOTAL RSA	R69 341 934 000	45,1%	R18 913 0



- *Reports were not available for Mpumalanga, the Northern Cape and North West. However, in FY2018/17 their liabilities totalled more than R3-billion.*

An untold amount of pain lies behind these statistics, a pain that demands recognition, empathy and understanding. But, from these figures it might be argued that children with cerebral palsy are as much as a class as mine workers with tuberculosis or silicosis. And thus it was that although the learned judges of the SCA were unable to help EN directly, they were moved enough to depart from their usual practice and end their judgment with an unsolicited appeal directly to the minister.

These were their words:

“Far too often this court is confronted with **serious and serial negligence in hospitals falling under the Eastern Cape Health Department**. Whether or not the negligence can be said to have caused harm in the delictual sense, it is clear that **studied neglect of standards has become pervasive in many such hospitals**. Those reliant upon their services are receiving substandard care. During the hearing, this situation was put to counsel for the Eastern Cape Health Department. The response was that this sad state of affairs and the need for urgent remedial intervention had pertinently been brought to the attention of the relevant authorities. Despite this, such conduct does not appear to have abated significantly, if at all.” They directed that their judgment be forwarded to the Eastern Cape MEC for health and the national minister “in the hope that this situation will be urgently addressed.”

In the midst of the heated NHI debate, EN’s story is a tale about the human costs of the failing health systems that Health Minister Dr Zweli Mkhize says he agrees must be fixed. I doubt whether it has been forwarded to him. These cases are dime a dozen in his department. And he’s a busy man. So, I tell it here to prevent it from being lost