Criminalised doctors push back – MPS ‘brainstorm’ –

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Doctors, like firefighters and airline pilots, are at high risk of civil or criminal action and mitigation requires urgent legal reform, proper informed consent, peer review and early open dialogue with patients’ families and professional associations.

Only a combination of these, plus discussions with so far unsympathetic bodies like the National Prosecuting Authority, the SA Police Services and the Health Department, will prevent unwitting doctors from facing the nightmare of prosecution on either culpable homicide or murder charges – as has been happening with increasing frequency of late in South Africa.

A panel of three seasoned anaesthesiologists, a surgeon, paediatrician, and radiologist debated the dilemma faced by well-meaning doctors when arbitrarily arrested by police or sued for damages by angry, grieving relatives. The online seminar, hosted by the Medical Protection Society, (MPS), was facilitated by obstetrician, Dr Graham Howarth MPS Head of Medical Services for Africa, Dr Volker Hitzeroth, a psychiatrist and MPS medico-legal consultant and MPS medico-legal consultant, Dr Blesset Nkambule.

South Africa, unlike New Zealand, Australia, and the England, places a lower burden of proof against prosecuted doctors when it comes to negligence and ‘foreseeable’ adverse outcomes. With a burgeoning population and a dire lack of specialists, this contributes to young doctors shunning the study of higher risk specialties like obstetrics, spinal surgery and neurosurgery, an audience of several hundred doctors from across the country heard.

Howarth said the most pressing question was why doctors, on occasion, were charged with murder when they clearly didn’t intend to kill.

“The problem with South Africa is the concept of ‘dolus eventualis,’ where recklessness can come close to intent. If you reconcile yourself to the risk involved and continue regardless, then this is a form of intent and can lead to a murder conviction,” he said, drawing an analogy with the disabled athlete Oscar Pistorius, (convicted of murder for shooting his girlfriend, model Reeva Steenkamp, whom Pistorius testified, he thought was an intruder.)

“The difference for us is the form of the fault required, so negligence resulting in a person’s death could escalate from mere clinical negligence and become culpable homicide,” he added.

Negligence was established by asking whether a reasonable doctor in similar circumstances would have objectively foreseen the possibility of harm, injury, or death- and would have taken reasonable steps to prevent it.

However, if harm, injury, or death could be subjectively foreseen, then the charge escalated to murder.

Richards Bay surgeon up for murder cited

Citing the murder trial remand on R10 000 bail of Richards Bay surgeon, Dr Avindra Dayanand this week following the death of a 35-year-old woman he operated on in August 2019, Howarth said that while the MPS did not know on what grounds the charges were brought, the State would inevitably argue that the patient’s death was subjectively foreseeable. The murder charge sparked a storm of protest from the SA Private Practitioners Forum, Surgicom, and the Association of Surgeons of South Africa, given that the Health Professions Council of SA’s, (HPCSA), professional conduct inquiry has yet to reach a finding.

In a joint statement, the medical bodies called on the National Prosecuting Authority to withdraw the charge, adding, “murder implies the intentional and premeditated killing of another human being and is not appropriate for the unexpected death of a patient after medical treatment.”

It added, “deaths which occur post-surgical procedures require investigation in accordance with South African law and, if negligence can be proven, healthcare

practitioners should face appropriate sanction," warning that the murder arraignment held dire implications for healthcare.

"Few surgeons in this country will be willing to continue practising if they face the risk of arrest for murder after the unexpected death of a patient."

They organisations stressed that the patient's death was subject to pending civil proceedings before the HPCSA, with no finding yet made. They called for processes at the HPCSA, (a notoriously dysfunctional body), to be urgently completed.

Howarth told his audience: 'so, with a murder charge, dolus eventualis goes around the outcome being subjectively foreseeable. If you realise that you're placing a patient at unreasonable risk and don't take steps, then you run the risk of a charge of murder under this rubric.'

To illustrate he gave an exaggerated theoretical, (unrelated), example of administering an anaesthetic to a sick and sweating, unstable patient.

"The anaesthetist then gets a telephone call and leaves the operating theatre for 15 to 20 minutes to discuss buying insurance for his car. He returns to find the patient moribund and undergoing resuscitation. Now that goes beyond simple negligence – no reasonable doctor would have done that under the circumstances," he said.

Volker warned that there were no 'degrees' of clinical negligence in South Africa.

"You're either negligent or not – the degree of negligence may only count in mitigation and/or sentencing or costs. Negligence is not about what you knew and did, but about what you should have /ought to have known, and ought to have done."

Howarth said many MPS members angrily complained of an abuse of police power and/or asked why the MPS did not bring charges of wrongful arrest. However, police could legally prefer changes in writing, a summons, a warrant of arrest or simply arrest a suspect without a warrant.

Understanding culpability and negligence

Hitzeroth said one needed to understand clinical negligence to understand culpable homicide.

The affected patient had to prove there was a duty of care, a breach of a reasonable standard of care, causation (the pivot of most legal arguments), a damages quantum (using guidelines and precedents of what injury equals what quantum), and a process was then decided upon to channel money for reparations.

Howard said that New Zealand, Australian, English, and Welsh law required gross negligence to be proven for a doctor to be found guilty of culpable homicide while mere negligence was required in South Africa.

“We need to bring this to the attention of the authorities and explain why they changed it in other countries,” he said.

Dr Philip Matley, past president of the Vascular Surgery Society of SA challenged this, saying this legal reform took five years in New Zealand. With the situation escalating in South Africa, a shorter-term solution was urgently needed.

Hitzeroth agreed, saying however that penetration of the NPA was needed, ‘to get their buy in to these scenarios.”

“There’s a fair amount of discretion they could use, and it often feels like they don’t. Police follow the taught process and act like they do when going after real skollies. They know about arrests and putting someone in the back of a van – it’s just another murder charge. We need them, (them and the NPA), to agree to practical guidelines,” he said.

Dr Caroline Corbett, President of the South Africa Society of Anesthetists, said SASA collaborated with other societies and had jointly sent at least five memorandums to the departments of health and justice and the NPA, with the most significant silence being from the health department.

“We need to know who is driving this politically. Yes, it’s a multi-facetted approach, but this is a critically threatened health asset. We need to see which department we can ally with to get that distinction between culpable homicide and negligence and what is

prosecutable and what is not. That critically, will determine who is arrested and who is not."

The panel members agreed that contemporaneous note taking, including of patient and family briefings, times of interventions when things went wrong, detailed informed consent (preferably with family present and noting when not), plus empathic early embracing of grieving or angry families were vital to mitigate harm after an adverse event,

Professor Chris Lundgren, an anaesthetist, bioethicist, and lecturer at Wits University, said that besides building relationships with the NPA, the management of a patient's family was crucial, citing an example where two Pretoria surgeons who were recently criminally charged.

"One surgeon wrote very nicely to the NPA, and they dropped charges against him and went for the other – who then died of Covid. Now they're going for the surgeon against whom they initially dropped charges! Why this change? That's just nonsense. So, how do we manage families? There was another (SA) case where there was no honest discussion with the parents of a three-year-old who died. The state pathologist who did the post-mortem put ideas into the parent's head. Not everybody's singing from the same hymn sheet. Had the parents been sat down for an honest discussion, things might have been quite different."

The panel debated 'anonymising," morbidity and mortality meetings, the risk they posed in legal actions (being 'discoverable'), versus their inestimable teaching value, a culture that needed to be nurtured instead of the current punitive, defensive one.

Dr Richard Tuft, Executive Director and past president of the Radiological Society of South Africa said the issue was not about trying to avoid practitioners guilty of gross negligence from going to court, but about how and when this was done – and the 'cascading process' that should happen first.

"There must be assessment by peers through professional societies – without the knee jerk response of criminalisation. The NPA is key. Unintended consequences affect everybody – fire fighters, airline pilots… If the profession is scared that they'll be unfairly prosecuted for doing something that's normal risk, you won't get people going into dangerous, (risky), areas of the profession," he warned.