

South African doctors are bound by many rules: Criminal charges for mistakes may have unintended consequences

April 12 2023, by Larisse Prinsen



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Claims for financial compensation for medical mistakes in South Africa have been on the rise since 2007. Recently, however, criminal charges for medical errors have also become more prevalent. One such case is that of [Dr. Danie van der Walt](#), who was ultimately acquitted on a charge

of negligently causing the death of a child. Another example is the case of [Dr. Peter Beale](#), who was charged with, but not yet tried of, causing the death of a 10-year-old. Yet another is the ongoing case and charge of murder brought against [Dr. Avindra Dayanand](#) for the death of a 35-year-old patient.

These cases have raised questions about how the [medical profession](#) is regulated in South Africa. Is the regulation effective in preventing harm? How are [medical practitioners](#) held accountable for harm suffered? What are the consequences of the regulatory environment? The Conversation Africa's Ina Skosana spoke to Larisse Prinsen, a medical law specialist, about what's in place.

How is the medical profession in South Africa regulated?

South Africa has a comprehensive framework for the regulation of the healthcare environment.

Healthcare in South Africa is overseen by the [National Department of Health](#) along with its provincial departments. The medical profession is regulated by numerous authorities and pieces of legislation.

Practitioners, depending on their branch of medical practice, are regulated by certain bodies that have been created by legislation. These statutory authorities provide field-specific regulation.

They include the [Health Professional Council of South Africa](#), which is perhaps the primary regulator of the medical profession. The council has professional boards which are responsible for various aspects of the profession. For example, the boards determine standards of education and training for practitioners, and set and maintain standards of ethical

professional practice as empowered by the [Health Professions Act of 1974](#). The professional boards, such as the Professional Board for Emergency Care Practitioners, also license practitioners and keep registers of them.

Health products are regulated by the [South African Health Products Regulatory Authority](#). And medical research is overseen by the [Medical Research Council](#).

These statutory bodies and professional boards also have the power to establish disciplinary committees and disciplinary appeals committees.

Which laws are in place?

Healthcare in South Africa is also regulated by the [Constitution](#), medico-legal codes of conduct, the common law and precedents set by case law.

In addition, numerous acts of parliament exist which represent binding regulatory instruments. The [Allied Health Professions Act](#) of 1982, [Dental Technicians Act](#) of 1979, Health Professions Act, [Medicines and Related Substances Act](#) of 1965 and its 2002 amendment, [Nursing Act](#) of 2005, [Pharmacy Act](#) 53 of 1974 and [South African Medical Research Council Act](#) of 1991 regulate medicine and the medical profession.

Some of the most prominent pieces of legislation regulating the practice of medicine are the [Choice on Termination of Pregnancy Act](#) of 1996, [Inquests Act](#) of 1959, [International Health Regulations Act](#) of 1974, [Mental Health Care Act](#) of 2002 and its 2014 amendment, [National Health Act](#) of 2003 and the 2013 amendment and [Traditional Health Practitioners Act](#) of 2004.

In theory, South Africa has a sound healthcare regulatory framework. However, as is often the case, its efficacy can be undermined by [human](#)

[factors](#). These may include ignorance of the law, poor implementation, lack of resources, breaking of the law or even the wrongful assumption of being above the law. All these factors may contribute to the rise in [criminal charges](#) now being brought against medical practitioners, as well as the shock and pushback this has generated in the medical profession.

This is not only a South African trend but an [international one](#). For example, in the UK [Dr. Bawa-Garba](#) was convicted of culpable homicide over the death of a six-year-old patient. However, countries such as New Zealand, Australia and England require [gross negligence](#) when prosecuting doctors in negligence cases.

How are medical practitioners held accountable?

Healthcare practitioners may be held accountable through internal disciplinary action, civil claims or criminal charges.

The Health Professions Council of South Africa, and other bodies and professional boards, have the power to establish [disciplinary committees](#). These committees most often deal with instances of "unprofessional conduct" or conduct which is "improper or disgraceful or dishonorable or untrustworthy".

An example of this type of conduct would be persuading patients to invest in a distressed company of which the medical practitioner is a director. These were the facts of a case involving [Dr. David Grieve](#). The doctor tried and failed to appeal a decision by the health professions council.

This means that medical practitioners may be held accountable by way of internal procedures. These may lead to fines, suspensions or the loss of their licenses. The precise number of instances where doctors have

been struck off is unknown since the majority of these matters are dealt with behind closed doors.

Civil or criminal processes may be based on malpractice or negligence. For a civil claim of negligence, it [must be shown](#) that the healthcare [practitioner](#) owed a duty of care to the patient, that this duty of care was breached, and that the breach was responsible for the harm suffered. If this is shown on the balance of probabilities, the patient is entitled to compensation. The test applied here asks if a [reasonable medical practitioner](#) in the same position would have foreseen the possibility of harm and have taken steps to guard against it. If so, negligence is shown.

For criminal cases of negligently causing the death of another person—culpable homicide—the same requirements are used. But it must be proven beyond reasonable doubt. This is a [higher burden of proof](#).

Criminal charges should be carefully considered. Medical practitioners should not be held liable for mere [errors in judgment](#). In South African law, you are either negligent or you are not. There are no degrees of negligence. The distinction between acceptable errors in judgment or punishable negligence will have to be decided case by case, taking all the facts into consideration.

Criminalization of medical judgment may interfere with [appropriate medical decision making](#). It may discourage doctors from specializing in higher risk, yet much needed, fields already suffering from skills shortages—such as obstetrics or neurosurgery. It may also lead to the practice of [defensive medicine](#)—recommending diagnostic testing or treatment paths which are not necessarily the best available option but primarily serve to protect doctors against potential litigation or criminal charges.

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