THE POTENTIAL OF MEDICAL NEGLIGENCE MEDIATION IN THE PUBLIC SECTOR with an emphasis on the practical skills implemented by mediators to reach a satisfactory solution.

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It is common knowledge that South Africa has experienced an explosion of medical negligence litigation that has grown exponentially over the past decade. Whilst the legal representatives that experienced in such matters celebrate their good fortune, the needs and wants of the patients are more often than not overlooked.

When considering the options available to patients in the public sector who have experienced harm, albeit subjectively, the first option would seem to be litigation. The decision to litigate is often fueled by the advertising campaigns of specialist medical negligence practitioners launched through private advertising in all mediums. A few of these firms also actively promote their services through placement of clients in alternative and more luxurious accommodation than their own whilst awaiting the outcome of the matter and thereby creating a need with unemployed parents and guardians to claim.

At an average cost of R20 000 000 (twenty million rand) per claim with an estimated 40 birth asphyxia claims per year per hospital in the public sector, there is an urgent need for intervention. The most plausible and urgent fix would be for the Department of Health adequately to monitor and enforce the protocols that already exist in maternity and neonatal wards but are not implemented. Staff shortages should not be an excuse for disciplinary action and dismissal against medical personnel who fail to comply with these protocols. In our experience, it is the failure of the nursing staff adequately to monitor mothers during the labour process that fails the system and is the cause of birth asphyxia in most cases.

However, serious consideration should be given to the limited outcome if the claim is successful, namely an award of damages¹. This may very well satisfy the patient and/or the parents of an incapacitated child in the short term, but is not sustainable as the fall out caused will not miraculously disappear and is almost always permanent leaving the plaintiffs bitter and the fiscus bankrupt.

It should be kept in mind that the court can neither force the
The mediator functions as the referee, counsellor and facilitator in challenging circumstances. Showing empathy to both sides, while exhibiting neutrality at the same time, makes for a good mediator. The mediator should be objective and calm regardless of the emotional reactions to which she may be subjected during a questioning session working with high conflict personalities. Exceptional self-control is required at times to avoid displays of genuine annoyance, irritation or fatigue that may cause the mediator to lose the parties’ trust.

Trust and dealing honestly with parties are additional qualities that should be firmly displayed at the mediation table, for the mediation process to succeed. Listening skills and alertness are likewise essential, not only to understand the different viewpoints, but to be sensitive to the underlying moods and motivations to the party’s expressed opinions and feelings. Alertness functions on several levels – the information being provided, how the information is provided (body language, etc.), degree of cooperation of the participants, current mood of the participants and the environment (to ensure her personal security and that of the participants). The mediator must adapt, not only to the various and diverse personalities which she will encounter, but also to all types of settings and operational tempos and environments.

The difference between that of a merely good mediator and a great one, involves perseverance. If the mediator becomes easily discouraged by hostility, transgression or other complications, she will not ardently pursue the matter to a successful conclusion or follow leads, the so called “missing link”, to further valuable information. This will result in pre-mature termination of the mediation and the parties will likely lose faith in the process.

A qualified mediator needs to follow the prescribed process entailing all the essential steps of a successful mediation process, certain practical, “golden rules” should be kept in mind:

“The cost of litigation is a major barrier to accessing courts and fear of being saddled with costs should the judicial view be unfavourable is a tempting incentive to abandon claims which have good prospects.”

modification of working practices and enhance standards nor can it discipline health care professionals and get them to apologise for the harm done which is one of the fundamental aspects of healing. Limiting claims and implementing undertakings for future medical expenses, as is already the case in Road Accident Fund disputes, will only harm the poor and even worse, the already compromised minor.

These objectives might however be in reach if a different approach was followed, namely mediation. A formal mediation process trumps litigation each time in terms of a greater satisfactory outcome and cost, which is infinitely less compared to the alternatives of trial and its preceding processes. Merely one day on trial will cost more than mediation. Trial also takes a much greater emotional toll and is considerably riskier than mediation. It can literally take years to resolve a dispute through litigation whereas mediation can commence in a fraction of the time and provide a speedy resolution.

Mediation follows a more informal process wherein the parties are directly involved and a trusted third party facilitates possible solutions. The process provides confidentiality and allows participants control over the outcome. Participants have the opportunity to vent their feelings and to receive and process what the other party has to say. Additional important benefits that should not be overlooked, is that through mediation, damage to relationships are contained, resulting in no or little impact on the relationship which is especially important in small communities where there may only be one doctor and one clinic. Mediation in medical negligence disputes can offer both parties much desired closure and quicker disbursement when a settlement is reached, as a settlement agreement reached during mediation is a binding agreement and can be made an order of court.

Mediation thus in essence offers a collaborative, flexible, constructive alternative which focuses on the future by seeking creative solutions in a trusting, unthreatening environment. This does not mean that litigation should have no place in the conflict resolution process, yet it should rather be the last resort than the first step when faced with a dispute. Litigation should be the alternative when mediation fails to afford a jointly agreeable resolution to a dispute.

As of late, there has been a drive in South Africa in the direction of mediation where medical negligence disputes are concerned in the public sector. The impetus for mediation in the private sector would have to come from the legal teams who advise the various insurance providers.

Effective mediation is however a complex process and a word of caution would be to utilise mediators that are well trained and well versed in the process. Mediators in the medico-legal field of practice will typically be a professional in the field, either from a legal or medical background or both. Ideal mediators would be professionals that are seasoned experts in their respective field of expertise, backed by appropriate training when covering the processes involved during the mediation. The particular skill set, knowledge and expertise of the mediator will allow her to understand the technicalities unique to medical negligence litigation, as well as the issues which are likely to arise and the chances of success each side has at trial.

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One should never attempt to rush mediation. Patience and time will proof valuable investments in the process of working through issues on the part of the participants and learning all important facts and legal positions on the part of the mediator. The more time and energy that’s invested, the better the chances are of reaching a settlement. However, without commitment from all the parties involved (especially the legal representatives who act as their client’s guide), the process would fail, the mere desire to settle a dispute will not suffice. Successful mediation of a complex medical malpractice case should be a process instead of a one-off event. While it is possible for some cases to settle in one session, a separation of issues may be necessary. In cases where a settlement cannot be reached, the mediation is still a useful tool to narrow the issues and establish the way forward for follow-up sessions.

The goal should remain resolution. To achieve this will require substantial effort towards finding options that will satisfy both parties. A unilateral offer by one side will with certainty draw a reciprocal offer from the other party in return and this will generate a positive cascade towards a compromise.

Creativity and keeping an open mind will go a long way when parties need to think of ways to reconcile their interests. Brainstorming is a good technique to flesh out ideas and the better ideas usually come late in the process when the parties might feel that they have run out of ideas completely. Important points can then be selected and evaluated which might be most advantageous for both parties. Anger is not a sign that the process has failed and an agreement can still be attained, should the parties agree to a solution that satisfies their interests better than having no agreement at all.

To conclude, the words of Abraham Lincoln provide guidance on what our future focus toward medical negligence mediation in South Africa should be: “Discourage litigation. Persuade your neighbour to compromise whenever you can. As a peacemaker, the lawyer has superior opportunity of being a good woman. There will still be business enough”, and advice for the mediator to reach the desired level of excellence: “The probability that we may fail in the struggle ought not to deter us from the support of a cause we believe to be just.”

About the authors
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References