MEDIATION AS AN ALTERNATIVE TO LITIGATION WITH SPECIAL REFERENCE TO MEDICAL NEGLIGENCE CLAIMS

by

Errol Cedric Muller

Student Number: 1995446661

Submitted in fulfilment of the requirements of the degree Doctor Philosophae (PhD) with specialisation in Procedural Law and Law of Evidence in the Department of Public Law at the University of the Free State

Supervisor: Prof. CF Swanepoel

September 2021

Declaration

I, Errol Cedric Muller, declare that the thesis that I herewith submit for the degree *Doctor Philosophae* at the University of the Free State is my own independent work and that I have not previously submitted it as at another higher education institution for a degree.

EC Muller

1995446661

22/09/2021

Acknowledgements

To our Heavenly Father all the honour and glory. *Soli Deo Gloria.*

My wife Henra and son Ihan, thank you for all the support, encouragement, understanding and love. This thesis is dedicated to you.

My supervisor, Prof. Neels Swanepoel: This journey would not have been possible without your invaluable guidance. Your academic mentorship and unwavering friendship means the world to me.

A word of thanks to all my colleagues at the University of the Free State, specifically the staff in the Department of Public Law.

A special word of thanks to Allen Nelson and Jacques Joubert, who initially sparked my interest in mediation.

Thank you to my family and friends for your interest and support.

Table of contents

List of Tables

List of Abbreviations and Acronyms

BATNA	Best alternative to a negotiated agreement
CPA	Consumer Protection Act
CPD	Continuous professional development
CRP	Communication and Resolution Program
HPCSA	Health Professions Council of South Africa
LASA	Legal Aid South Africa
MEC	Member of the executive council
USA	United States of America

Summary

In the recent past, healthcare in South Africa faced, and continues to face, considerable challenges related to an increase in medical negligence claims. The consequences of this increase in claims affect both the public and the private healthcare sectors. Primary healthcare at public hospitals and clinics suffers, because money is spent on legal fees and claim pay-outs, instead of its intended purpose of providing healthcare. Private hospitals and medical professionals are confronted with ever-increasing indemnity insurance premiums, doctors practice defensive medicine to avoid claims, and private healthcare users pay more for private healthcare.

The conventional method of resolving medical negligence disputes is through adversarial court litigation. The parties enter into a trial by battle, they present their evidence and a presiding officer renders a win–lose judgment. Litigation, and the litigation of medical negligence claims, in particular, is expensive, time consuming, complex, and emotionally taxing, and the eventual outcome often fails to satisfy the needs of the litigants. Moreover, attempting to resolve medical negligence issues through adversarial processes does not promote normative constitutional values, such as dignity and equality and, importantly, access to justice. This necessitates legal reform and the adoption of alternative and transformative practices to dispute resolution.

It is argued in this study that mediation offers a viable alternative to litigation generally, and for medical negligence claims, specifically. Mediation, in its barest essence, is third-party (mediator) -facilitated dispute resolution through negotiation. The process is less expensive, less time consuming, and uncomplicated, and party oriented. Mediators assist participants to create their own solution based on their needs and interests, and the mediation process is not aimed at finding a winner or a loser. Medical negligence claims are often traumatic for both the injured patient and the medical professional/s who treated the patient. Having the opportunity to resolve their dispute in a dignified, non-threatening environment, on a level playing field, is something litigation simply cannot provide.

Significantly, the process of mediation enhances the constitutional imperative of access to justice in the context of medical negligence claims on more than one level.

The parties have access to a process that provides them with the opportunity to create their own solution to a dispute, using a process that is party oriented, quick, and less expensive than litigation. The cost and time savings enhance social justice by decongesting court roles, freeing up funds for primary healthcare, reducing the cost of private healthcare and increasing confidence in the rule of law.

The judiciary and the legislature, through various judgements and statutory enactments, have demonstrated their support for the use of mediation as an alternative to litigation. The previous minister of Health and several other commentators, academics and practicing mediators have voiced their support for using mediation. The prevailing adversarial culture amongst legal practitioners and the public, in particular, is an obstacle to the more generalised use of mediation. However, and conversely, transforming adversarial thinking and practices could be the ultimate solution to institutionalising mediation. The main drivers behind an effort to radically change legal culture, away from litigation, towards more facilitative dispute resolution mechanisms, will necessarily have to come from the legal profession. Education is the vehicle for transformation, starting from basic education, and moving on to tertiary education and continued professional education.

Confidence in the mediator and trust in the process are indispensable requirements for parties when they elect to mediate a dispute. A properly trained mediator is, therefore, crucial for facilitating the process, particularly in medical negligence claims. Mediators in medical negligence matters must, in addition to conventional training, receive specialised training in aspects related to facilitating these types of claims.

Keywords: alternative dispute resolution; access to justice; civil procedure, litigation, mediation, medical negligence, education, legal culture, transformation, communication, emotion

CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

In this chapter, the researcher will roadmap the thesis. The chapter will provide the contextual background, aims and reasons for the study, the methodology, and the structure of the thesis. It will elaborate on the key premises, points of departure and notions, such as “access to justice”, “transformative justice” and the changed environment relating to medical negligence claims, as central theme within the broader investigation of alternative dispute resolution. The methodology that will be used is that of an analysis of legislation, case law, and academic literature and commentaries.

1.2 BACKGROUND

South Africa’s constitutional democracy subscribes to the ideal of “access to justice”, as part of social justice for all.[1] Despite state and non-governmental organisations working hard to realise the ideal, it is trite that very few South Africans can afford legal services, particularly legal services in private civil litigation. To be clear, and because Section 34 of the Bill of Rights determines that everyone has the right to have any dispute resolved “in a fair public hearing before a court, or where appropriate, in another independent and impartial tribunal or forum”, by “application of the law”, the access to justice contemplated here encompasses a wider approach than that implied by the ordinary meaning of the notion set out in Section 34. This broader notion of access to justice departs from the premise that justice can conceivably be accessed in other ways than necessarily having an independent court or tribunal adjudicating on the dispute. It is, therefore, from this wider, general normative ideal of access to justice that the investigation departs.

Medico-legal claims in South Africa have reached crisis proportions. This was highlighted and confirmed by, among others,[2] the minister of Health at the time, Dr Aaron Motsoaledi, in his keynote address at a Medico-Legal Summit in Pretoria in

[1] Constitution of the Republic of South Africa sec. 34.

[2] See also Dhai 2015:2; Malherbe 2013:83; South African Law Reform Commission 2017; Ellis 2019; Broughton 2019.

March 2015. For example, the minister elaborated, the Department of Health, *via* the Office of the State Attorney, had paid out R95 531 132,44 in civil litigation claims in 2010/11. In 2013/14 this amount increased to R498 964 916,72.[3] These amounts represent only capital claim amounts, and exclude the taxed costs paid to successful plaintiffs by the state attorney on behalf of the Department of Health. The figures illustrate an alarming increase in medical negligence claims in South Africa over a relatively short period. Even more disconcerting is the realisation that it is money that is, ultimately, footed by the South African taxpayer. Pertinent reasons for the increase in medical negligence claims will be analysed in this thesis in context of the changed environment within which such claims are instituted. This changed environment includes aspects such as legislative intervention, an increased insistence on consumer protection in the field, and systemic challenges facing the healthcare sector. The reasons why this analysis is necessary are, as will be illustrated in more detail later, that the changed environment within which medical negligence claims are instituted implies the need for a reconsideration of alternative dispute resolution mechanisms in the field of medical negligence claims.

The extent of the increase of medical negligence claims has been widely reported. The Medical Protection Society, an indemnity insurance provider for medical practitioners in the private sector, reports that the number of claims submitted in the two years preceding 2013 had more than doubled. Claims exceeding R1 million had increased by nearly 550% compared to 2003. Claims exceeding R5 million had increased by 900% between 2008 and 2013.[4] It is clear that these statistics reveal an alarming crisis, and one that could adversely affect both the public and private healthcare sectors.

The conventional method of resolving medical negligence claims is by way of civil litigation through a settled civil process. This conventional method of dispute resolution has, in many ways, become unsuited for certain civil claims, due to reasons the

[3] Phalane 2015. The most recent figures indicate that the contingent liability of the state is R 120.3 bn for the 2020/2021 fiscal year. Provincial health departments spent R 1.74bn on medical negligence pay-outs for the financial year ending 31 March 2021. See the report by Linda Ensor in Business Day available at https://bd.pressreader.com/article/281633898619587 (accessed 24 January 2022)

[4] Malherbe 2013:83–84; Dhai 2015:2; Pepper & Slabbert 2011:29.

researcher will elaborate upon in paragraphs 3.2.3 and 4.2.1. It is, however, relevant to mention here that these reasons primarily include the adversarial nature of civil litigation, the legal cost, and duration of the process.

Conventional civil dispute resolution exhibits little appreciation for or consideration of alternative and better-suited dispute resolution techniques and mechanisms. Furthermore, it pays very little heed to theory related to the manner in which disputes arise, or the psychological approaches to dispute resolution. In Chapter 2, the researcher will discuss this matter in more detail. That discussion will, firstly, focus on developing an understanding of the various causes of a dispute/conflict, with reference to personal and interpersonal factors. The effects on the individual, the interpersonal relationship between the parties, and the factors influencing the escalation or de-escalation of the conflict, will also be addressed. Lastly, the conflict management techniques used by individuals in conflict situations will be explored. The purpose of this exploration in the context of the research theme is to understand the various physiological thought processes of the individuals involved in conflict, and to present the importance of such an understanding as a proposed necessary skill for mediators. Secondly, the exorbitant legal costs in civil litigation facilitates in favour of finding alternative dispute resolution mechanisms. This factor impacts substantially on the right to access to justice by everyone, which the South African Constitution expounds as a fundamental right, and as part of a drive to achieve greater social justice. In many instances, civil litigation takes months, even years, to resolve claims through an often overburdened court system. The formal process, furthermore, favours the stronger, and by implication, the wealthier, litigant. The playing fields are unequal. The ordinary citizen in need of relief is either left without any redress, or in an unequal litigating position *vis-à-vis* the opponent. Ultimately, this situation places financial pressure on the delivery of private and public healthcare services, and places a burden on available public financial resources.

In contrast to resolving disputes through formal litigation, the process of mediation is an alternative dispute resolution mechanism. Mediation has been shown to be more affordable and more expedient, and has the added benefit of preserving the

relationship between the doctor and patient.[5] Research has shown that monetary compensation is not always the main motivation for contemplating and initiating civil litigation. Instead, litigation is often the only means to get an explanation of the cause of the injury and to obtain an accompanying apology.[6] A formal court process and court presiding officers in civil litigation do not offer these types of remedies; not because courts are unwilling to do so, but because the legal framework does not provide for it. Lawyers are, furthermore, not trained in the science of human behaviour and the identification of psychological and related knowledge to find more suitable methods of redress. Other forms of alternative dispute resolution include facilitation and negotiation, and it will be shown in Chapter 6, on mediation, that facilitation and negotiation can be viewed as sub-goals and/or required skills for mediation.

Necessarily, the investigation will also allude to other possibilities facilitating medical negligence claims, such as establishing a medical negligence *ombud* and possible statutory interventions. Statutory interventions could include the possibility of capping medical negligence claims, using screening panels, the possibility of compulsory mediation, and an investigation into the possibilities of a medical no-fault liability principle.[7]

1.3 COMPARATIVE JURISDICTION

The largest body of literature and, particularly, empirical research on the successes, failures and resistance of mediation as opposed to litigation, emanates from the United States of America (USA). This research drew on these sources.[8] Similar research in South Africa is virtually non-existent,[9] because mediation in the context of medical negligence claims has only recently gained – limited – recognition as a possible alternative mechanism for resolving disputes.

---

[5] Oosthuizen & Carstens 2015:391; Meruelo 2008:293; Pepper & Slabbert 2011:32; Walters 2014:717.

[6] Robbennolt 2005:1009.

[7] Crous 2009:106.

[8] See, for example, Meruelo 2008:285–306; Lebed & McCauley 2005:911–930; McMullen 1990:1–16, Plumblee 2012:1–14.

[9] Oosthuizen & Carstens 2015:270, with reference to empirical data on medical negligence in South Africa.

In the following sections, the researcher will provide introductory contextual remarks regarding contemporary research into mediation, in the USA primarily, and to a lesser extent, in England, and Australia.

1.3.1 United States of America

The USA experienced a medical malpractice crisis in the early 1970s that led to extensive tort reforms, including legislative changes to promote the use of alternative dispute resolution, which was implemented in the 1980s and 1990s.[10] Mediation, as an alternative form of dispute resolution, gained in both popularity and legitimacy during this time and prompted empirical studies on the topic.[11]

South African commentators hold the opinion that mediation offers a viable option to resolve medical negligence issues.[12] The question is why it is not used more widely in South Africa. The answer to this question is twofold. Firstly, the use of mediation in such disputes is a relatively new concept, but more importantly, almost no research is available to establish concrete proof of the perceptions of stakeholders that may influence its consideration as an alternative option. There is, furthermore, no data available on the success rate of matters that have been mediated. For guidance, one would, by necessity, have to investigate and analyse literature from other jurisdictions where similar research was undertaken. Research in the USA indicates the possible reasons for resistance to alternative dispute resolution and mediation by way of summary, as the following:

- Beliefs about the legal system, for example, that the formal litigation process serves as a deterrent and a method to hold practitioners accountable;
- The perception that the merits of settlement may only be assessed after discovery in a formal litigation process;
- The belief that monetary compensation is the only form of redress in medical negligence claims;

[10] Metzloff *et al.* 1997:107; McMullen 1990:373; Tan 2009:180.

[11] Peeples, Harris & Metzloff 2007:102; Liebman 2011:135.

[12] See, for example, Claassen 2016:8, Botes 2015:28; Walters 2014:718.

- Power imbalances between the parties, which can only be properly discounted in the formal court process;
- A lack of understanding of the process of mediation;
- A lack of government funding for alternative dispute resolution; and
- The possible negative impact of routine settlement, as in mediation, on the professional status of physicians. [13]

Hyman and Schecter, Meruelo, Hyman *et al.* and Plumblee[14] undertook empirical studies in both the private and public healthcare sectors of various states of the USA. Broadly, the aim of these studies was to empirically test if mediation is a viable alternative to litigation in medico-legal claims. These studies attempted to test the success rate of mediation and concomitant time and cost savings, and conducted interviews with all stakeholders (patients, insurers, lawyers for the plaintiff and defendant, and medical service providers) to gather their views and experiences of the process. All of these studies revealed a high settlement rate when mediation was used, cost savings for all the parties involved, a time saving in respect of preparation by the legal representatives, and general satisfaction of everyone involved in the process.

The lack of empirical data on the success rate of mediation in South Africa may be the result of the mediation profession not being statutorily regulated, and because confidentiality is one of the core features of mediation. Although it is required that mediators file reports of the outcome of the mediation with the clerk of the court in court-annexed mediation matters,[15] official statistics are not available and, hence, the need for a study that will explore the importance of conducting similar research in the South Africa.[16]

---

[13] Dauer, Marcus & Payne 2000:159–186; Morrison & Robson 2003:20–25; Lebed & McCauly 2005:911–930.

[14] Meruelo 2008:285–306; Hyman & Schechter 2006:1394-1399; Hyman *et al.* 2010:797–828.

[15] Rule 80(2) of the Magistrates Court Rules.

[16] No statistical data is available on the website of the Department of Justice and Correctional Services, or elsewhere.

1.3.2 England

In England, a medical negligence mediation pilot scheme was launched in April 1995 as part of a civil justice reform project.[17] The project lasted three years and only 12 cases were mediated during this period.[18] Some reasons advanced for the lack of participation in the project were that it was poorly funded and administered, and that the British National Health Services Litigation Authority, which is funded by the Department of Health, was unwilling to refer cases for mediation.[19] Research was conducted to understand the impact of the project, which gathered data in interviews with 50 solicitors who opted not to refer cases for mediation, 80 other participants, and 22 solicitors who participated in mediated settlements.[20] The findings of this study in relation to the reasons advanced by the respondents for the lack of participation in and resistance to mediation bear a striking resemblance to reasons reported in similar research in the USA (see paragraph 1.3.1).

The use of mediation in medical negligence cases in South Africa is in its infancy. The results of the study by Mulcahy referred to above emphasise the need for proper education of lawyers regarding the use and advantages of alternative dispute resolution methods, specifically mediation, to ensure that they use the considerable influence they have on the decision of clients to make use of the process.

1.3.3 Australia

Mediation in Australia has, in recent years, become part of the established civil dispute resolution and legal culture by legal practitioners who practise law.[21] A central theme of this thesis is the potential that mediation possesses to promote normative constitutional principles such as access to justice through transformative practices, which drove Australia's law reform. South Africa has not reached that stage yet.

---

[17] Mulcahy 2001:209. The civil justice reforms referred to are, in large part, based on the reports of Lord Woolf on the review of the civil justice system. These reports led to amended civil justice rules aimed at reducing litigation and providing for alternative dispute resolution mechanisms to resolve disputes. See Woolf 1996.

[18] Mulcahy 2001:209.

[19] Mulcahy 2001:209.

[20] Mulcahy 2001:203–224.

[21] Noone & Ojelabi 2017:528.

Advocating for the use of mediation in medical negligence claims, specifically, and civil dispute resolution, generally, demands a culture change amongst all role players in the process. In that context, the practices in Australia may hold valuable lessons for South Africa. The regulation of the mediation profession in Australia is of specific importance in this discussion.[22]

1.4 THEORETICAL UNDERPINNING

The theoretical underpinning of the research is that the formal method of private dispute resolution by litigation, in a South African, resource scarce, and developing constitutional democratic context, has, in many instances, become unsuited and does not represent public aspirations of dispute resolution mechanisms. The societal effects, of limited access to justice through the formal civil process, are far-reaching, and includes the following factors:

- Public distrust in, or lack of hope that the legal system is helpful. This leads to a negation of the constitutional promise of access to justice;[23]
- The perception that the adversarial process is unconducive to accessing justice, due to maximum litigant control, and that it ,therefore, distances the citizen from perceiving and witnessing justice in action;
- The conclusion that adversarial litigation is irresponsive to the fostering of an understanding of and a respect for the rule of law. (The legal system is disrespected because it is perceived to be powerless to provide suitable, including timeous and affordable, relief.) This is particularly true in a transitioning society where, at the start of the democratic enterprise, the law and its agencies are perceived by suspicion by the citizenry.[24] (This perception is due to the inability of the legal system, in the face of repression, to rescue the oppressed.)
- The conclusion that the adversity in private dispute resolution in the South African context is not transformative in nature and does not respond to the

[22] See, for example, the website of the Mediation Standards Board at https://msb.org.au/about-msb for an overview.

[23] Stromseth 2007:252.

[24] Heywood & Hassim 2008:266.

peculiar prevailing circumstances in South Africa, particularly in medical negligence claims.[25]

1.5 AIMS OF THE STUDY

There are two premises fundamental to this research. The first, borne out by the facts, is that medical negligence claims have increased exponentially in South Africa.[26] The second is that mediation as alternative dispute resolution mechanism in medical negligence claims exhibits the potential to be a viable alternative dispute resolution mechanism.[27] Mediation is, therefore, worthy of a fuller exploration. South African constitutional values, such as social justice, evidenced here through access to justice and equal protection by the law, will be used as the normative barometer against which this investigation occurs. In *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*[28]*,* Cameron J (as he then was) notes that, "(T)he law is a scarce resource in South Africa. This case shows that justice is even harder to come by".

Despite legislative changes and theoretical protection of the law post 1994, access to legal services have not made commensurate advances. The concept of access to justice was historically viewed as meaning access to courts or legal services. During the twentieth century this narrow definition developed to include a broader meaning, to also include notions of and aspirations for social justice, and access to the mechanisms that promote and facilitate social inclusion.[29] In South Africa, access to justice is a constitutional imperative and a means to realise the rights listed in the Constitution.[30] It follows that the responsibility to achieve these goals rests with not only the justice system, but also with all spheres of government. The theoretical underpinnings of access to justice and the contextualisation of the concept in South Africa with reference to the role of mediation in achieving it, will be more fully explored in Chapter 3. It was important that the study was undertaken locally; there has been

---

[25] Faris 2015:1.

[26] Pienaar 2016:4

[27] Walters 2014:717–718; Botes 2015:28–32; Claassen 2016:7–10.

[28] *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 SCA.

[29] Langa 2006:355.

[30] Heywood & Hassim 2008:263–280; Hurter 2011:408–427; Nyenti 2013:901–916; De Vos 1993:155–158.

very little research conducted on mediation in South Africa. The aims of the research were, therefore, primarily focused on an accommodation of mediation in the South African context.

1.6 MAIN AND SUBSIDIARY THEMES, RESEARCH QUESTIONS, ARGUMENTS AND INCIDENTAL MATTERS

Summarily stated, the researcher will argue in favour of the following statement: Mediation provides a more suitable dispute resolution mechanism in medical negligence claims than conventional litigation.

In support of this argument, the following will be shown:

- The unsuitability, in many instances, of conventional litigation, due to a number of reasons;
- The preference for a transformative approach to dispute resolution informed by the need for social justice and the transformation of legal, consumer and related industry cultures; and
- The inevitability of transformation occasioned by the changed environment in which medical negligence claims are instituted in South Africa.

The primary research question is, therefore, whether mediation is a viable alternative dispute resolution mechanism to formal litigation in, specifically, civil claims that arise from medical negligence. That the number of medico-legal claims in South Africa have reached crisis proportions is an undeniable fact. By necessity, this increase calls for an investigation into the manner in which medico-legal disputes are investigated and, ultimately, resolved. It follows that, if the research finds that viable alternative dispute resolution mechanisms exist, the need for law reform must be addressed.[31]

From the main research question, the following sub-questions arose:

- What ought to be the normative framework against which answers to the main research question are sought in South Africa?

[31] Motsoaledi 2015; South African Law Reform Commission 2017.

- What is the nature of “a civil dispute” and what are the fundamental human expectations in addressing restitution of civil wrongs in the course of medical treatment?
- How does mediation include already settled alternative mechanisms of civil dispute resolution with reference to facilitation and negotiation, in particular?
- What are some best practices that could be followed and/or extended in the further institutionalisation/regulation of the mediation practice?

It has, therefore, become timely that comprehensive research in this field in South Africa is undertaken.

1.7 METHODOLOGY

This study involved an analysis of the theoretical underpinnings of the concept, processes and practice of mediation as a form of alternative dispute resolution. On equal footing, the study involved an investigation into the theoretical underpinnings of a dispute, and the conventional adversarial method of solving such disputes. This exposition will be undertaken to illustrate that mediation, due to its nature and characteristics, could be the preferred model to solve medico-legal disputes, as opposed to litigation and other forms of alternative dispute resolution.

A comparative study of the use of mediation in other jurisdictions, in order to ascertain the successes and challenges experienced there, will be utilised. This analysis will be undertaken to seek guidance and possible lessons for the development of mediation in a South African context.

1.8 GENDER DEPICTION IN THIS THESIS

The researcher is sensitive to the need for gender neutrality in writing. Therefore, the gender-neutral generic third-person singular pronoun “they” will be used, except where the gender of the person being referenced is relevant to the context.

1.9 STRUCTURE OF THE STUDY

Chapter 1: Introduction

In Chapter 1, the researcher introduced the context of the research and the main and subsidiary research questions. He elaborated on the reasons for the research and set out the departing themes, arguments, premises, theories and normative ideals in a South African context.

Chapter 2: The anatomy of a private dispute and de-escalation of conflict

This chapter is interdisciplinary in nature and will analyse the nature of a private dispute and consider proposals of experts in the field of conflict management to understand the nature, resolution and, in particular, de-escalation of conflict.

Chapter 3: Conventional dispute resolution in South Africa

In Chapter 3, the researcher will analyse conventional civil litigation in South Africa, with a view to illustrating the reasons why it is mostly unsuitable for medical negligence claims.

Chapter 4: The preference for a constitutionally informed mechanism of dispute resolution: A preferred normative basis for dispute resolution other than formal adversity in conventional litigation

In Chapter 4, the researcher will elaborate on access to justice as part of social justice. A constitutionally informed mechanism of dispute resolution augments the preferred normative framework within which transformative constitutionalism with reference to transformation of culture, in particular, will be discussed.

Chapter 5: The changed environment relating to medical negligence claims in South Africa

In Chapter 5, the researcher will expand on the central point of departure of the thesis, that South-Africa has, in recent years, witnessed an exponential increase in medical negligence claims. An understanding of the reasons for this phenomenon will support the argument that the transformation of dispute resolution mechanisms in the legal and medical industries is inevitable.

Chapter 6: Mediation

In this chapter, the researcher will explore mediation and highlight its features, processes and endeavours, to develop a best-practice guide for medical negligence mediators. In this chapter, the researcher will also investigate the ideal features and qualifications for a medical negligence claims mediator. Reference is made to empirical data from foreign jurisdictions that are related to the success rate of mediation and the challenges experienced with the implementation of mediation practices. This information will be integrated with the data collected in this study, and presented in Chapter 4.

Chapter 7: Conclusions

The chapter will summarise the conclusions in the thesis.

Chapter 8: Recommendations

In the final chapter, the researcher will formulate recommendations for achieving a change of legal culture towards the greater acceptance of mediation; presenting the legal profession as primary driver of such change, and presenting some best practices for the process of mediation within the context of medical negligence claims.

1.10 CONCLUSION

In this chapter, the researcher laid the foundations from which he departed in the thesis. The researcher alluded to the healthcare system in South Africa facing a crisis. In large part, this crisis can be ascribed to the astronomical increase in the number of claims over the past few years, and the amounts of damages claimed for medical negligence. The effect of this crisis is that, amongst other consequences, private healthcare has become unaffordable; the pubic healthcare sector cannot optimally deliver on their mandate to provide primary health services; the judicial system is under pressure to cope with the increased number of claims, and the adversarial system of dispute resolution is not ideal to resolve these types of disputes.[32] The

[32] Pepper & Slabbert 2011:29–35; Oosthuizen & Carstens 2015:380–396; Walters 2014:717–718.

researcher proposes that mediation is a more suitable dispute resolution mechanism to resolve these disputes; this claim, by necessity, requires further investigation.

CHAPTER 2: THE ANATOMY OF A PRIVATE DISPUTE AND DE-ESCALATION OF CONFLICT

2.1 INTRODUCTION

Conflict and disputes arise between humans and, therefore, we seek ways in which to resolve them. Humans experience emotions and, often, these emotions are powerful drivers of the conflict experienced in private disputes. In this chapter, the researcher will argue that human emotions may be harnessed in such a way that they contain, and not escalate, conflict during mediation. Trial lawyers can attest to the reality that, in cross-examination, emotions may often be harnessed negatively to cause confusion, uncertainty, and anger. Such emotional responses by witnesses in the adversarial process may lead to adverse findings by the court on account of the testimony being found to be unreliable and untrustworthy. While in litigation, therefore, negative emotions may often be exploited for the "gains" inherent in the adversarial civil process, it is proposed that the mediation process provides a greater opportunity to gainfully employ and manage emotions to de-escalate, or at least contain, the conflict that caused the dispute.

Conventional legal education and professional training pay little or no attention to the science of human behaviour in dispute resolution. In this chapter, the researcher will, therefore, venture into the field of human behavioural science: an unchartered terrain for lawyers. Although the researcher's arsenal of legal, academic and vocational training excludes any knowledge of this field, he will argue that understanding conflict and managing negative emotions characterising human behaviour during mediation may assist the mediator to manage the process more effectively.

The expectation is to deduce theoretical knowledge from the scientific field of human behavioural science that may be gainfully used by the qualified or aspirant mediator. Throughout the chapter, the researcher will provide early pointers to guide not only mediators, but prospective disputants in responses that may facilitate quicker settlement of disputes during the mediation process. Overall, it is important to have insight into the psychological factors that drive disputes and the techniques used to de-escalate the underlying conflict.

2.2 BACKGROUND

In later chapters, the researcher will refer to the findings of this chapter, which makes it necessary to provide brief contextual clarity on a number of issues here. The first is the difference between “conflict” and “dispute”, since we are engaged in this thesis with alternative *dispute* resolution, and the interchangeable use of the terms may lead to confusion.[33] The Australian John W. Burton is credited with recognising the difference between conflicts and disputes. Briefly, Burton suggests that disputes are short-term disagreements, which are relatively easy to resolve. Conflicts are longer-term, deep-rooted problems that are seemingly not negotiable.[34] If a difference between two parties is not negotiable, the inherent interest involved in the matter is set in the human mind, which is difficult and sometimes impossible to change. Generally, it is recognised that, if a dispute is left unattended, it can escalate into a conflict, whilst a conflict rarely reverts to a dispute. A mediator’s worst nightmare is when an initial dispute, instead of being settled, escalates into conflict and becomes impossible to settle.[35] From this distinction, the importance of de-escalation, instead of the escalation of emotions underlying disputes in mediation, becomes apparent.

In the next sections, the researcher will draw on sources relating to both conflict and dispute resolution.[36] In those instances where the disagreement is based on deep-rooted matters of principle, the task of the mediator to find common ground may be more difficult. This difficulty does, however, strengthen the argument that the mediator needs, first, to understand human behaviour to be able to diagnose the causes of the dispute/conflict, and then work to identify possible solutions.

The second issue arises from the need for this chapter to refer to aspects of the mediation process, which is only explored fully in Chapter 6 and necessitates the following preliminary introduction. The mediation process consists of a pre-mediation phase, and a mediation phase. The pre-mediation phase consists of a pre-mediation

---

[33] Spangler & Burgess 2017.

[34] Keator 2011.

[35] Boulle & Rycroft 1997:169.

[36] Keator 2011.

conference, which, if successful, culminates in a signed agreement to mediate.[37] The pre-mediation conference will involve both joint and individual sessions with the disputants. The conference, in some ways, resembles a Rule 37[38] conference in civil litigation, but is, in other ways, quite different. In mediation, it will be exploratory, informative and educational. It may be necessary, as will be proposed, that, in certain instances, further pre-mediation conferences are held. Although this would be the exception, the purpose of these conferences is, amongst other purposes, to give the mediator the opportunity to gather as much information as possible, to ensure productive engagement at the mediation itself.

An informative and invaluable body of research by psychologists and behavioural scientists exists, which will be explored in the next sections. This body of knowledge relates to one of the primary goals of a mediator in mediation, namely to "level the playing field".[39] It is common cause that, in formal litigation, justice or fairness may suffer because the stronger litigant was able to afford more senior and specialised council than the other litigant. Mediators in medical negligence claims must facilitate the process in a way that ensures that the parties negotiate on equal footing. The purpose of mediation is to enable the parties to reach a mutually acceptable settlement.

2.3 LEVELLING THE PLAYING FIELD: IDENTIFIABLE PATTERNS OF BEHAVIOUR AND TACTICS COMMONLY USED BY HUMANS TO MANAGE DISPUTES/CONFLICT

Medical negligence claims often arise in the context of hospitals. It may, therefore, be possible that the hospital manager represents the hospital in mediation. This person may, perceivably, amongst other traits, (a) Have previous alternative dispute resolution experience, as a result of which they have developed tactics and techniques to deal with claims against the hospital; (b) Be acting under powerful financial pressure from shareholders, including doctors; (c) Be privy to hospital records that may be

[37] Similar to the procedure proposed in Rule 78(1)(b) of the Magistrates Court Rules, but with the further aim of identifying and refining the issues in dispute. See also Boulle & Rycroft 1997:89–90.

[38] Uniform Rules of Court.

[39] Boulle & Rycroft 1997:22.

potentially incriminating and which may be intentionally withheld. The other disputant, the patient, may perceive the mediation process with trepidation and awe, in a way similar to a lay person's perception of attending formal court proceedings. The disputant may feel intimidated by the process and have a perception of inequality compared to the medical establishment. It will, therefore, be the goal of the astute mediator to be mindful of the potential unequal playing field in this situation, and the potential negative perceptions of the patient. To remove these perceptions, the mediator must explicitly inform the disputants that the mediation process does not focus on fault-finding (the establishment of liability, as in formal litigation), but is concerned with the accommodation and redress that the disputants, themselves, devise in an accommodative spirit.

In this context, the researcher will, first, discuss the empirical and theoretical observations of scientists regarding (a) The routine behavioural patterns observed in humans and which they employ to manage conflict, and (b) The ideal hallmarks of the type of human behaviour that facilitates settlement. An introductory discussion of conflict management styles will also be presented, as it will provide structure and context for the analysis of the definition, causes and effects of conflict that follows.

The actors involved in managing conflict are the disputants and the mediator. It has been found that an individual may choose to use one or a combination of the methods described below to manage disputes/conflicts interchangeably and as the conflict evolves.[40] Mediators need to be informed about these behavioural patterns (in essence, "tactics"), and to adapt their own style of mediation as the mediation process unfolds.

Studies show that disputants decide to manage and resolve conflicts for various reasons. These reasons often relate to the causes and effects of the conflict, cost considerations, exasperation with and exhaustion caused by the situation, and the changing of goals, as new options arise.[41]

---

[40] Boulle & Rycroft 1997:43.

[41] Blalock 1989:65–67.

Whatever the tactic or pattern of conduct is, the aim is to discover how these patterns can be approached as part of conflict management. A reading of the literature on conflict management strategies employed by individuals reveals two classical responses: The first is prescriptive and involves what disputants ought to do in conflict situations (the ideal). The second is descriptive and relates to empirical observation of what disputants actually do to manage conflict. The basis of the findings in the descriptive retort is the culmination of research conducted by researchers over many decades, and ranges from observations of conflict within families and the workplace, to international conflicts.[42] The discussion starts with the descriptive response, and then proceeds to what scholars describe as the "ideal" way of dealing with conflict.

2.3.1 What disputants actually do when dealing with conflict

Flowing from the prescriptive perspective, the discourse reveals what disputants normally do to manage their conflict. Various approaches are discernible. One is that the conflict is simply endured or "plodded through", by attempting to use one specific approach to solve the issue, until it no longer yields results and then to move on to a next approach.[43] In this approach, the dispute is viewed from differing perspectives and, although moderating the dispute may be one of the goals, it is often combined with aims related to achieving victory, which is then perceived as genuine attempts at equity and fairness.[44] In other words, a thought pattern along the following lines is present: "even though I participated in an alternative form of dispute resolution, I still seek and will regard victory as justice". This idea is a fallacious argument, and reverts to the thinking in the adversarial process of litigation. The disputants must, therefore, be brought to the understanding that mediation shifts away from the adversarial, "me vs. you" paradigm, to an accommodative, "together we will resolve this" approach.

From a South African perspective, the following is useful. Disputants from a culture that advocates harmony might be required to take non-confrontational steps before

[42] Wall & Callister 1995:538.

[43] Pinkley 1990:117–131; Pinkley & Northcraft 1994:193–205.

[44] Pinkley & Northcraft 1994:193–205.

proceeding to extreme measures in dispute resolution.[45] In this regard, African cultural practices can assist the quest to sway disputants from adversary to accommodation.[46] Pointing out this cultural inclination/practice to disputants in a South African context may well contribute to disputants perceiving the process of mediation as uniquely "African" and, thus, enabling disputants to "own" the process. Below some of the main findings in behavioural patterns from which the mediator may gain insight, are described.

It is evident from the literature on conflict management styles that five techniques for managing interpersonal conflict is evidenced by normal responses to conflict. These styles are, forcing, avoiding, compromising, problem solving and accommodation.[47]

The parties may employ a strategy or strategies subconsciously as a reaction to the cause of the conflict, such as anger or other emotions, or consciously, as a deliberate attempt to achieve a strategic advantage. To provide context for this statement, empirical studies have found that men are prone to use forcing as a style, whilst women generally opt for less aggressive styles.[48]

When dealing with *variables in the relationship* between the disputants, it was found that, in a workplace setting, superiors tend to lean towards forcing, and subordinates towards avoidance or compromise.[49]

In relation to the *effect of the behaviour of the opponent*, the indicators are that parties tend to mirror the style of their opponents – in other words, a "tit for tat" type of pattern. It makes sense, therefore, that if disputants can be swayed to exhibit accommodative responses (particularly in the first joint session), the tone of the whole process may be more accommodative.[50]

---

[45] Kriesberg 1992:471–491.

[46] Faris 2015; opening address and paper delivered at the Lawyers as Peacemakers Conference held on 14–15 October 2015, Pretoria.

[47] Van Der Vliert & Prein 1989:51–63.

[48] Rahim 1983:368.

[49] Morley & Shockley-Zalabak 1986:387; Putnam & Wilson 1982:629.

[50] Cosier & Rubie 1981:816.

With reference to *the context within which the conflict takes place* and the conflict issue, it is indicated that, on substantive issues, disputants tend to prefer a confrontational approach, but for disputes related to more menial issues, such as personal habits, compromise was the preferred approach. From the mediation perspective, the early classification of the dispute by the mediator into these categories is important during the stage of mediation when mutually acceptable remedies or relief to the dispute are considered.

2.3.2 What disputants ought to do when dealing with conflict

From the prescriptive perspective and in the sense that disputants ought to know what they should do when confronted with conflict, Deutsch postulates, in a normative vein, that disputants ought to be aware of the causes and effects of conflict and the alternatives available to these causes and effects. The disputants should then consider how to deal with each cause and effect by, for example, differentiating between a *position* and their *interest,* or attempting to understand the position of the opponent.[51] Along similar lines, various other scholars propose the following as ideal patterns of conduct that disputants ought to exhibit if a genuine desire for settlement exists:

- Reasonableness in expressing their disagreements;
- Open-mindedness about the dispute and the process to resolve it;
- Avoidance of shifting blame onto others;
- Benevolence in their approach to the dispute by considering the adversary's position; and
- Approaching the dispute with a give-and-take attitude that necessarily includes considering making concessions.[52]

As indicated, comprehensive discussion of the mediation process follows in later chapters, and it is important to note at this early stage that the best way for disputants to deal with conflict coincides materially with what an astute mediator attempts to

[51] Deutsch 1990:237–263.

[52] Tsjoveld, Dann & Wong 1992:1035–1054; Eiseman 1978:133–150; Gray 1985:911–936.

achieve during a mediation session. In summary, the mediator attempts to facilitate an open and frank discussion of the dispute, with the aim of achieving a mutually satisfactory resolution. The need for constructive communication emphasises why it is crucially important for the mediator to be educated in the techniques/behaviour patterns exhibited by disputants, whether subconsciously or reactively to a conflict situation, or consciously as part of their negotiation strategy to level the playing field.

In Paragraph 2.4 a discussion of the anatomy of a dispute/conflict, fused with an attempt to link theory with mediation practice throughout, follows.

2.4 GENERAL OVERVIEW AND DEFINITION OF CONFLICT

Conflict is an inherent and unavoidable part of our daily existence.[53] According to the Collins Dictionary,[54] conflict "is a serious disagreement and argument about something important. If two people or groups are in conflict, they have had a serious disagreement or argument and have not yet reached agreement". Conflict exists on five different levels: personal, interpersonal, intergroup, inter-organisational and international.[55] Conflict as a social process, irrespective of the level it occurs at, shares a common cycle: causes that trigger the conflict, followed by the conflict behaviour (actions and reactions) of the parties, which, in turn, has results that feed back to the causes, with numerous repetitions occurring within the specific context.[56] The core process refers to the interpersonal behaviour of the disputing parties, based on the realisation by one that the other is opposing their position. This is, in essence, action based on the causes of the conflict and the resulting reaction of the opponent.[57]

Social conflict can be defined as follows:

> *Conflict exists in a relationship when parties believe that their aspirations cannot be achieved simultaneously, or perceive a divergence in their values, needs or interest and purposefully employ their power in an effort to*

[53] Boulle & Rycroft 1997:4.

[54] https://www.collinsdictionary.com/dictionary/english/conflict (accessed on 29 November 2019).

[55] Deutsch 1990:237–263.

[56] Wall & Callister 1995:516.

[57] Wall & Callister 1995:523.

eliminate, defeat, neutralise or change each other to protect or further their interests in the interaction.[58]

In a similar vein as the previous definition, Ury, Brett and Goldberg hold the view that "a dispute begins when one person (or organisation) makes a claim to another who rejects it".[59] Based on this view, four key elements of social conflict appears:

(1) Relational conflict, excluding internal conflict that occurs within the mind of an individual;
(2) Divergent-belief-dependent conflict;
(3) The situation where beliefs or perceptions are related to the same thing; and
(4) The stage where beliefs and perceptions intersect.[60]

From the cursory description above, it is clear that conflict involves deliberate strategic behaviour by the parties in a specified social construct, with the aim of removing obstacles and achieving their goals.[61]

This definition is applicable in a medico-legal sense where the patient seeks redress for harm allegedly suffered at the hands of a medical practitioner or service provider who, for whatever reason, rejects the claim. Simply put, the parties (patient and medical practitioner or service provider) have different beliefs about the cause of the harm allegedly suffered by the patient, based on the specific incident at hand. This means that a dispute exists that needs to be resolved.

The patient now has two options. They can simply choose to put the matter to rest, or pursue it further. Should they choose the latter option and the parties cannot resolve the matter themselves, third-party intervention is required. In context, the obvious decision would be to seek legal advice. If the lawyers who are consulted believe that the facts suggest there is merit to proceed and/or defend the case, litigation will follow. The method chosen to resolve the dispute may have, apart from financial and other

---

[58] Anstey 2006:5–6, summarising the definitions provided by Coser, Himes, Kriesberg, Pruit and Robin. See also Boulle & Rycroft 1997:4.

[59] Ury, Brett & Goldberg 1995:4.

[60] Brand *et al.* 1997:4–5.

[61] Anstey 2006:5.

implications, detrimental psychological implications for the parties if they choose to proceed with litigation.[62]

Paragraph 2.5 will provide an evaluation of the causes of conflict and factors that may have an influence on it.

2.5 CAUSES OF CONFLICT

It is important to understand the causes of conflict from which disputes between individuals arise.[63] A better understanding of the causes of conflict may lead the mediator to develop a better understanding of and formulating ways in which to respond to conflict. Because a dispute involves two parties, it logically follows that the individual characteristics of each will, to a greater or lesser extent, contribute to the cause(s) of the conflict.[64]

Mediators ought to recognise these characteristics; recognition will enable the mediator to initiate and conduct the mediation in a way that conveys to the disputants that the mediator genuinely recognises and identifies with the issues at hand. In return, the disputant will recognise the mediator as involved and not distanced from the dispute. Emotions are often communicated nonverbally, and mediators should be especially attentive to these indicators and changes during mediation. If not, the conflict may escalate and the probability of an *impasse* may increase. A simple observation by the mediator, such as, *"I see that you are greatly upset by the last remark of [name]",* shows that the mediator is involved in the process and alert to the emotions of the parties involved. At the same time, however, mediators must also realise that parties often value the opportunity to vent their emotions. Ideally, these emotions ought to be balanced by the mediator during mediation.[65] A simple question by the mediator, such as, *"Have you considered what exactly in the remark by [name] is so unsettling?*" may bring some balance. When people are forced to think rationally, their emotional reactions are often de-escalated.

---

[62] Jones 1994:42–43.

[63] Boulle & Rycroft 1997:144.

[64] Wall & Callister 1995:519.

[65] Boulle & Rycroft 1997:145–147.

The following are the major causes of conflict and factors that influence its resolution.

2.5.1 Personality type

The characteristics of an individual involved in a dispute may have an influence on the reason why the dispute came about and the manner in which the dispute is resolved, or is not resolved.[66] Thompson, however, considers personality type to be a minor cause of conflict[67] and she warns against generalisations pertaining to personality types. Her conclusions are based on empirical studies of selected groups of people and the methods of assessment used in her study, though it cannot account for *all* human variables of personality type, due to limitations in the sample group.[68]

Wall and Callister deduce that an individual with a personality type that is more prone to impatience and irritability would be more likely to get involved in a conflict situation than someone who is by nature more relaxed and tolerant of others.[69] The fact remains that one cannot discount the personality types of the parties as an element that causes conflict and one cannot ignore the possibility that it may influence the mediation process.[70]

Mediators with a general idea of the personality types of the persons they are dealing with will, therefore, be careful in individual sessions, and, when the other party's responses are conveyed, formulate responses in a way that facilitates progress towards settlement. For example, *"B has asked me to convey to you that he thought your responses were irrational and immature",* could, instead, be conveyed as *"B has asked that you reconsider your responses to his conduct, so that it may work towards a settlement"*. In this scenario, the mediator encourages the person to think and reconsider their responses; and in doing so, "work towards a settlement".

Mediators must be prepared to deal with different personality types of participants during a mediation session, particularly "difficult" personalities. Mediators could use

---

[66] Wall & Callister 1995:519.

[67] Thompson 1990:520–521.

[68] Thompson 1990:520–521.

[69] Wall & Callister 1995:519.

[70] Hoffman & Wolman 2013:779.

the pre-mediation process to identify the personality types of the participants. At this stage, it is established mediation practice to gather and exchange information and convene a preliminary meeting with participants to clarify the facts and delineate matters in dispute, and for the mediator to get to know the parties.[71] During the exchange of information and preliminary meeting, the mediator could include questions to achieve this goal. These questions could request a party to describe their own personality, by choosing from various options offered how they would approach a conflict situation. For example, would they be confrontational, or rather avoid the situation; does confrontation anger them, or does it make them feel anxious? The answers to these questions serve various purposes. They assist the mediator to get to know the parties, and to prepare strategies to deal with the parties during the mediation, it creates rapport between the mediator and the parties, and establishes trust between them, and may even lead to resolving the dispute.[72]

In certain instances, mediators will have to deal with a party that, due to their personality, and despite the best efforts of the mediator to understand and manage the party's expectations, remains intractable.[73] Hoffman and Wolman suggest that, in these circumstances, co-mediating with, or having a mental healthcare professional available for consultation, may assist to diagnose and handle expectations.[74]

2.5.2 Different cultural and personal values

Different cultural and personal values of parties may be a major factor that influences mediation. It is important for a mediator to be fully aware of the cultural and personal values of the disputing parties. Such knowledge may assist by suggesting the manner in which the mediator approaches the role of facilitator and the manner in which the negotiation between the parties is "steered".[75]

---

[71] Boulle & Rycroft 1997:88–89.

[72] Boulle & Rycroft 1997:90.

[73] Hoffman & Wolman 2013:780.

[74] Hoffman & Wolman 2013:780.

[75] Boulle & Rycroft 1997:152.

Research shows that cultural differences and personal values seem to have a profound effect on the causes of conflict. Individuals who follow a Western culture, for example, value conflict differently than those from the East.[76] Western culture perceives conflict to be part of life, while Eastern culture perceives conflict as something to be avoided, which suggests that some people may be more prone to conflict than others.[77]

East Asian cultures value the collective, and tend to seek compromise and focus on group relationships and, thus, seek to avoid conflict, whilst Westerners are more focussed on logic and the individual and, therefore, engage in conflict more readily.[78]

A study aimed at discovering how responses to interpersonal conflict differed across Ghana, Turkey and the northern United States, found results similar to those described above.[79] Ghanaians choose to avoid conflict to prevent personal harm, because of obligatory interpersonal relationships that avoid making enemies. Turkish culture places a high value on honour, and individuals tend to engage in conflict to defend their honour, though they will generally choose to avoid conflict to avoid societal disharmony and promote societal interdependence. It was found that North American individuals considered themselves less socially interdependent, and they were more likely to engage in competitive and confrontational behaviour.[80]

The African method of dispute resolution is based on harmony, and the assumption is that, because of human interconnectedness, a dispute disturbs the social harmony, which needs to be restored.[81] Mediators are, for example, taught to keep eye contact with parties, and that it is indicative of respect, showing interest and active listening. In many non-Western cultures, the exact opposite may be the case, especially when speaking to a person of "higher status".[82] Although cultural differences play a role in

---

[76] Wall & Callister 1995:519; Ausberger 1992.

[77] Wall & Callister 1995:519.

[78] Kim & Markram 2013:798–799.

[79] Günsoy *et al.* 2015:1081.

[80] Günsoy *et al.* 2015:1099.

[81] Faris 2015:5.

[82] Boulle & Rycroft 1997:59.

conflict creation and its ultimate resolution, it remains a challenge to accommodate all cultural differences within a culturally diverse society such as South Africa. At best, the mediator may, during the pre-mediation preparation, ask the parties to list cultural practices and personal values that they regard as important and that they wish the mediator, to the best of their ability, to take cognisance of. The mediator may gainfully offer a list of options to the disputants, who could be asked to select those most likely to be applicable to them.

2.5.3 Different goals

Various aspects related to an individual's goals may influence the propensity of that individual to engage in conflict.[83] Firstly, if the goal of the person is to engage in conflict with another, then a dispute is likely to ensue.[84] High and even moderate aspirations, such as personal or previous peer accomplishments, norms in society or perceived power, increase the likelihood of conflict.[85] Interdependence between parties for achieving their goals also influences the likelihood of conflict, because neither can achieve their objective without the cooperation of the other.[86] This may be illustrated by way of an employer/employee relationship. The goal of the employer is reduced production cost and increased profit, whilst the employee seeks to maximise return on their labour. Although they have divergent interests, neither can afford to end the relationship.

Related to this is the tendency that, the more committed a person is to achieving a goal, the more likely conflict is to occur, because of the unwillingness of the party to deviate from their position.[87] In a situation involving a physician and an aggrieved patient in medical negligence claims, the goal factor is likely to be of significant importance. The goal of the physician is professional survival and keeping their reputation intact, whilst the patient wants to hold the physician accountable for a perceived wrong, or wishes to establish the reason for something going wrong. In

---

[83] Wall & Callister 1995:519.

[84] Wong, Tsjosvold & Lee 1992:302–321.

[85] Wall & Callister 1995:519; Kaplowitz 1984:373–409.

[86] Anstey 2006:26.

[87] Wall & Callister 1995:519.

practical terms, it may well be useful to spell out these goals to disputants in mediation in a forthright manner, so that, as difficult it may be to do, disputants are encouraged to understand the opponent's position. It is proposed that a mediator in these circumstances should ask the disputants to explain the reasons why they hold a specific position or under which circumstances that position could shift to facilitate a settlement. If the parties and the mediator understand the positions, it could assist in steering the discussion towards finding common ground.

2.5.4 Emotion

As will be described in more detail in paragraph 6.5.1.2, parties in conflict who wish to submit to mediation enter into a mediation agreement. When considering the influence of emotion in conflict, it may be of importance for mediators to alert conflicting parties to the role their emotions can play in the process to follow.[88]

Emotions such as anger and stress can cause conflict. Jones suggests that conflict does not exist in the absence of emotion.[89] Because negative emotions are directly linked to a perceived threat to an individual achieving their goal, or as a threat to realising an expectation, it follows that emotion may lead to conflict.[90] These factors have an influence on the way a person perceives their options to deal with the conflict. Emotion also plays a significant role in the ability to make decisions, and mediators should note that supressing emotion is impossible, and could prove to be counterproductive.[91] If, during mediation, the mediator notices that a disputant is overly emotional, it is advisable to afford the disputant a moment to recover – even allow a short break in the session – to enable them to regain their composure.

2.5.4.1 Intensity level

The intensity level of emotion influences how people interact and determines the course that the conflict takes. Emotion in conflict is a constant variable; it is always

---

[88] Boulle & Rycroft 1997:145–147.

[89] Jones 2000:81.

[90] Bodtker & Jameson 2001:261.

[91] Hoffman & Wolman 2013:771.

there, but the intensity levels fluctuate during the course of the dispute, and the respective parties experience emotions at different intensity levels.[92] People express emotion differently and the way they express it is not necessarily an indication of what the person actually feels. Emotion is also often expressed strategically, for example, it could be feigned or exaggerated in an attempt to gain some kind of advantage.[93] This means that a mediator may need to trigger emotion in order to encourage a party to engage in a discussion, or decrease the intensity of the emotion by taking a break during a joint session to prevent a party from becoming so emotional that they cannot process information clearly.[94]

2.5.4.2 Moral standing

Emotional experiences are sometimes evaluative in nature and perceiving an incident as fair or unfair invokes a moral stance. Doing so, in turn, affects the perception of what a just outcome would mean. A mediator needs to be attuned to these value-based judgements. That "value" may be the disputant's perception of justice and what achieving that particular "justice" involves. A way for a mediator to establish what a party may consider to be "justice" is to ask them to explain what they consider to be "fair". It is surmised that, often, it may happen that, when a disputant is confronted with this question, and has to place themself in the shoes of another, positive movements towards attaining settlement may be attained. The value-based judgment could indicate that the "cure" for the dispute might be a simple apology. One party believes they were morally offended by the actions of the other, who may be unaware of unintentionally saying something that offended the other.[95] When questioning disputants during the mediation process, the astute mediator will be quick to utilise the identification of the "offensive" conduct by explaining to the "offending party" how their conduct was perceived by the other. Guided to this stage, the offending party may often have no qualms about expressing remorse.

---

[92] Hoffman & Wolman 2013:771.

[93] Bodtker & Jameson 2001:264.

[94] Hoffman & Wolman 2013:775.

[95] Bodtker & Jameson 2001:264.

2.5.4.3 Identity-based issues

Conflict relates to identity in the sense that something personal is at stake for a party; and this personal issue has the potential to cause intractable positions, because the party perceives that they need to "save face".[96] In the context of mediation, a party may consider the outcome to be a reflection of who they are, and sound offers could be rejected due to a wounded ego.[97] Psychoanalytical theory suggests that the development of a healthy "sense of self" includes the ability to objectively merge valid personal claims with concern for the other party.

The function of the mediator is to remind the parties that the outcome of mediation is aimed at finding common ground and achieving settlement, and in no way connotes weakness.[98] The ability to recognise and contend with issues of identity related to the parties requires the mediator to understand their own reactions to, for example, anger, and the nature of the mediator's own projections on others, for example, where one party may become an idealised version of their father. Awareness of these projections enables the mediator to deal with disputants' reactions to "biased emotions" due to identity better and to remain neutral.[99] Because discussions during mediation develop quickly, mediators must be aware of their own emotional experiences from moment to moment, to prevent reactivity and in order to be regarded as objective by the parties.[100]

2.5.4.4 Relational issues

Conflict is relational in the sense that expressing emotions creates social meaning that influences conflict.[101] The perception by a party that their power and social status is being challenged causes anger that triggers conflict.[102] Power struggles have the potential to be destructive, and mediators must carefully manage attempts by a

---

[96] De Dreu & Van Knippenberg 2005:355.

[97] Bader 2010:183, 185.

[98] Fonagy *et al.* 2004:62.

[99] Bader 2010:201.

[100] Bader 2010:204.

[101] Bodtker & Jameson 2001:265.

[102] Bodtker & Jameson 2001:265.

participant to disempower the other. Practically, this could involve refocusing the parties on their needs, or holding a side session with a party to remind them that the purpose of the mediation is not a power contest; while this happens, the other party has the opportunity to cool down.[103] It is important to keep the unequal bargaining powers of the parties in mind. Such inequality may be experienced when, for instance, a hospital is represented by a skilled negotiator. It is possible that this negotiation is not the representative's first, and they possess knowledge of what they have settled for in the past, information that is not available to an unrepresented injured party.[104] A judicious and skilled mediator will be cognisant of attempts to "sell" unreasonable offers to the opponent. When this happens, the mediator should ask such a representative to explain why they consider the offer fair, which may move them to make a "fairer" proposal.

Medical negligence claims will usually be highly emotional. One can accept that a former patient disputant might be confused by and angered that a medical procedure, which was supposed to heal and/or improve their quality of life, has resulted in the exact opposite. Doctors, on the other hand, may well feel angered by their professional ability being questioned; or they may experience self-doubt, which may affect their treatment of other patients.

Dealing with and managing emotions during mediation is, therefore, an essential skill for mediators.

2.5.5 Interpersonal factors

The relationship between individuals is often the cause of conflict. A personal relationship consists of various facets. These facets are:

- The perceptions the parties formulate of each other based on how they go about achieving differing goals;
- How the parties communicate with each other;
- How the parties conduct themselves and interact with each other;

[103] Boulle & Rycroft 1997:99.

[104] Spangler 2012:1453.

- How the relationship is structured; and
- Previous interactions between the parties.

Factors related to each of these facets may cause conflict and each of them will have an effect on the interpersonal relationship.[105] The subsections below will provide a synopsis of how these factors may influence conflict creation, and how they could affect the relationships of the conflicting parties.

2.5.5.1 Perceptions

The potential for conflict based on perceptions relates to the idea that, if one party achieves their goal/s, it comes at the cost of the other party reaching success in attaining their goal/s. This, coupled with interpreting the intentions of the opponent as unfair and/or deliberate, is likely to increase the potential for conflict to ignite.[106] The conflict, thus, causes perceptions that the opponent wishes to harm the other party and the opponents hold reciprocal negative attitudes towards each other. These perceptions result from interpreting the conduct of the adversary as injurious, distrusting their intentions, and being unable to grasp the opposing point of view.[107]

The duty of the mediator in these situations is to move the parties away from positions that are based on what they perceive the intentions of the opponent to be, to matters of common interest between them. In the opening joint session of mediation, the mediator may sensitise the parties to perceptions resulting from previous interactions between them by saying, for example, *"I noticed in the pre-mediation agreement that you have previously resolved differences between you?"* In this manner, the attention is subconsciously shifted from a negative perception borne of previous interaction, to the positive reminder that, despite perceptions, a previous matter was settled. In other words, it is possible to settle it again.

---

[105] Wall & Callister 1995:520–522.

[106] Ausberger 1992:256.

[107] Deutsch 1993:516; Thomas 1976:921.

2.5.5.2 Communication

Conflict related to communication is often caused by a lack of communication, or a lack of information.[108] Verbosity in communication, on the other hand, can also provide fertile ground for conflict; it could lead to misunderstandings between parties and is especially prevalent when emotions, such as anger or distrust, are present.[109] Similarly, communication that conveys insults, threats or destructive criticism, even if it is lucid, accurate and true, have high potential for creating conflict.[110]

These are issues that the mediator ought to address in the opening joint session between the parties; the mediator may even conceivably include an undertaking in the mediation agreement to sensitise parties about the conflict-escalation potential of discourteous, insulting, threatening and other aggressive remarks and insulting facial expressions. Nonverbal communication, such as facial expressions and body language, conveys messages that could be interpreted as intent to engage in a dispute.[111] Examples of nonverbal communication that may be indicative of intent to engage in conflict are crossed arms, indicating defensiveness, and anger or irritation, which may be expressed through a tight jaw or lips, or a frown that shows anxiety.[112]

Mediators should possess the skill to identify and be cognisant of nonverbal communication, and to foster effective communication during negations. Nonverbal communication should, however, be managed with care, because there may be other causes or motivations for the behaviour. As mentioned earlier, cultural differences have to be taken into account when interpreting behaviour, for example, avoiding eye contact, which could be a sign of respect rather than rudeness or not paying attention to what is said.[113] This type of communication does not occur in isolation, and the mediator should interpret it in combination with words and other emotional signs, and

---

[108] Pondy 1967:207.

[109] Putnam & Poole 1987:269.

[110] Baron 1990:241.

[111] Thomas & Pondy 1977:1093.

[112] Wiese 2016:15.

[113] Anstey 2006:233.

manage it accordingly.[114] In a private session, for example, a mediator may make known their observation of the disputant's body language and, if necessary, inquire into the reasons behind it.

Asking open-ended questions, asking the parties to generate options without evaluations, or asking "what if" questions are further practical tools that mediators could employ to facilitate constructive communication. It is proposed that mediator training should include not only questioning techniques aimed at gaining information, but questioning techniques that may change, for example, positional reasoning by a disputant.

2.5.5.3 Behaviour

Conduct or behaviour is a further source of potential conflict on the interpersonal level. Actions, either deliberate or unintentional, with the purpose of preventing the other person from achieving their goal or aspirations may lead to conflict.[115] Groups in conflict develop opposing goals, with the effect that they are unable to work together. Leadership styles in structured relationships, such as families or in the workplace, may, in the face of conflict, tend to be more autocratic.[116] Like in the case of communication, the frequency of interaction between the parties could be a cause of conflict. Minimal contact may cause negative perceptions and misinterpretations of the motivation for certain actions, for example, the other party may be perceived to have a hidden agenda, or to be hiding something.[117]

Mediation, by its very nature, is dependent on high levels of interaction. It is an established technique of mediators to disengage interaction between parties when emotional outbursts could derail the negotiations, thereby giving participants the opportunity to cool down and gather their thoughts.[118]

---

[114] Wiese 2016:15.

[115] Alter 1990:495.

[116] Bettencourt *et al.* 1992:306; Cosier, Dalton & Taylor 1991:81–92.

[117] Wall & Callister 1995:521.

[118] Boulle & Rycroft 1997:146.

The interpersonal relationship between a medical practitioner and patient will suffer similar effects when a claim based on negligence arises. The perceptions of the former patient of the practitioner may vary, from a knowledgeable to an incompetent practitioner. The practitioner's perceptions of the patient may vary from a thankful patient to an antagonistic one. In litigation, the potentially explosive communication between the parties based on negative perceptions of one another is routinely conducted through their respective legal representatives. As valuable as this may be in litigation, the parties may feel that they were robbed of an opportunity "to speak their minds". In mediation, however, given the facilitative intervention and under the control of a seasoned mediator, there is opportunity for the parties to vent their emotions. The value of mediation becomes apparent as the mediator is, or ought to be, trained in facilitating constructive communication between the parties, and should allow each of them the opportunity to not only vent emotions, but also to seek common ground as a basis for settlement.

2.6 ESCALATION AND DE-ESCALATION OF CONFLICT

2.6.1 Escalation

Any facilitator or "solver of conflict" must de-escalate rather than escalate conflict. "De-escalation moves parties from emotionality to rationality", says Noll.[119] Conflict is a cyclical process, i.e. there is an initial cause that triggers certain effects, and as the conflict cycle continues over time, the effects may change the original cause or generate new causes (or issues), which in turn may add fuel to the fire in a proverbial sense, and escalate the conflict.[120] Simply put, as the conflict escalates, the parties tend to become more aggressive and their perceptions of one another become more negative: Their approaches to the conflict change, from achieving their goals to destroying the "enemy". They could invest considerably more resources in the fight and their demands than in seeking common ground.[121]

---

[119] Noll 2005.

[120] Wall & Callister 1995:526; Anstey 2006:36.

[121] Wall & Callister 1995:526; Anstey 2006:36.

Pruitt and Rubin propose three models to describe how a dispute may evolve, and that can help us to understand ways to de-escalate conflict.[122]

The first model is the “aggressor defender” model, where one party increases the use of adverse tactics in pursuing their goals. An example of such a tactic is referring to offensive conduct of the other; to which the other party responds by way of “tit for tat”, and the conflict intensifies accordingly.[123]

Secondly, in the “conflict spiral” model, the escalation of the dispute is caused when both parties act and react in either defence of or in retaliation to the actions of the other.[124]

Lastly, the “structural change” model is based on “residual changes” in the parties, caused by their conflicting tactics. These residual changes refer to changes in the parties’ approaches the conflict psychologically, and changes in the group dynamics. Psychologically the number of issues increase and demands become elaborate and generalised. Communication between the parties decreases and becomes unreliable, thereby increasing the risk of misperceptions. The parties view each other as enemies (much in the same way that litigants view one another in the formal civil process) and tend to focus only on the negative aspects of the other, thereby decreasing their ability to objectively consider the issues at stake.

Understanding that conflict can escalate, and the way the escalation process works, are clearly defined, though the causes of the escalation have been a matter of debate amongst experts. The first school of thought is that conflict is predisposed to escalation, due to the competitive relationship of the parties involved, or that the causes of conflict and its escalation are inseparable, and happens by itself.[125]

The second and more generally accepted school of thought is that an escalation of conflict is caused by either general circumstances or specific causes.[126] As far as

---

[122] Anstey 2006:36.

[123] Anstey 2006:36.

[124] Anstey 2006:36.

[125] Wall & Callister 1995:529–530, referring to Fisher, Deutsch, Retzinger, Baron, O’Neil, Thompson, Rubin and Kim and Perez.

[126] Ember & Ember 1994:620.

cultural-historic reactions to conflict are concerned, the reactions tend to be non-rational and intuitive, because they are shaped by long-held beliefs of self-identity, and form as much a part of the contextual perception of the dispute as the actual issue at hand.[127] This may be illustrated with a South African example, where tensions because of perceptions of historical imbalances may lead to an escalation of a dispute. A mediator is advised not to behave in any manner that may imply condecension paternalism and racial attitudes. Another technique would be for the mediator to meet these perceptions head-on. *"I know that the perception may be that you, because of your respective backgrounds, may perceive one another as either privileged or suffering from a sense of unjustified entitlement. Let's talk about it.*"

Power imbalances may escalate conflict. Power imbalances can manifest during negotiation between disputants when one perceives themself as powerful and, therefore, tends to dominate the less powerful disputant. In such a case, the "weaker" disputant may refuse to compromise, because this disputant is focussed on a struggle for recognition and legitimacy. In such a situation, finding a solution becomes a secondary outcome for them.[128] When a disputant is not concerned with the effects that the conflict may have, their conduct is not restricted. Such a person may have a low self-regard and sometimes may be inexperienced in dealing with crises. In such a scenario, conflict may escalate and make resolution difficult and may steer focus away from resolving the primary issue.[129] A mediator who is experienced at identifying these "side-tracking" factors, can achieve success with intelligent questioning that steers the disputant away from irrelevant issues.

The most common specific escalator of conflict occurs when the aim of one or both of the disputants is to escalate the conflict intentionally. Such a disputant's singular purpose may be to achieve "victory", irrespective of whether their conduct is rational or not. This attitude could be the result of the disputant having a total disregard for the consequences of their conduct.[130] This attitude relies on a perception that escalated

---

[127] Sandole & Van der Merwe 1993:187.

[128] Anstey 2006:35, Wall & Callister 1995:530; Hornstein 1965:282–293.

[129] Retzinger 1991:37–59.

[130] Anstey 2006:32.

conflict achieves greater gains and limits losses in the process of negotiation.[131] In the formal court process, in cross-examination in particular, we witness this bullying tactic from cross-examiners.

A mediator should recognise the type of conduct described here. When necessary, the mediator should have a private session with a disputant with this attitude, and subject the disputant to what is called, in mediation, “reality checking”. Reality checking in mediation will be discussed in paragraph 3.1. It is a process in mediation in which the mediator focusses the attention of disputants on the negative consequences of failing to settle their disputes. Reality checking can be achieved by reminding the disputants of their intention to mediate (i.e. to settle their dispute, instead of subjecting themselves to the cost and time of the conventional litigation process).

It is apparent from the discussion above that claims based on medical negligence will have the propensity to escalate, based on a combination of all of the causes listed. These types of conflict are fraught with uncertainty for both the patient and the physician, as it may have serious consequences, for example, it may affect the patient’s ability to provide for themselves and their families should they not be able to generate income because of the injury, or, in the case of the medical practitioner, their professional reputation could be ruined. A failure to prevent de-escalation could lead to perpetuation of the conflict, because of the perception that conventional litigation is the only option. It is necessary, therefore, to make disputants aware that mediation has the potential to create the same result without the need for conventional litigation.

2.6.2 De-escalation of conflict

Kriesberg states that “conflict behaviour does not increase in magnitude indefinitely” – of necessity, it de-escalates, stagnates or stops at some point.[132] The departing premise in understanding the concept of conflict de-escalation is that the de-escalation is not the reverse of escalation.[133]

---

[131] Brockner *et al.* 1984:77–79.

[132] Kriesberg 1973:163.

[133] Wall & Callister 1955:532.

De-escalation occurs when disputants realise that they do not desire to, or cannot continue with the conflict because of various reasons.[134] One reason is a stalemate, which means one or both disputants realise that, to continue escalating the conflict is not worth the cost and time it will require. It is coupled with the realisation that combative manoeuvres – part of how formal litigation is often depicted – are counter-productive. In community context, a realisation that communal support for the cause of a disputant is depleted, may convince the latter to, as it were, to "come to their senses".[135] Further reasons contributing to de-escalation of conflict include the realisation that, if a settlement is not reached, the situation may worsen, and that the parties may face calamity if settlement is not reached.[136]

Conflict may be de-escalated by one of the parties taking a step towards mollification, such as issuing an apology.[137] The aim of de-escalating conflict is to resolve the dispute – not stabilise it – for the simple reason that festering conflicts may be as injurious in the long term as those that escalate.[138] Parties that have escalated a medical negligence claim to the point of litigation may come to the realisation that a continued court battle is simply too costly and too time-consuming, or may not achieve the outcome initially hoped for. Mediation in these circumstances provides the ideal forum for finding a mutually agreeable solution to the conflict through facilitated negotiation.

De-escalation encompasses transformations within the disputants and altered modes of interaction between them. It is a gradual process that involves incremental steps to initiate de-escalation strategies.[139] It, therefore, makes sense that the mediator (a) should do regular "reality checking" where there is need for it, and (b) regularly, in private sessions, inquire whether apologies for untoward conduct are forthcoming, where applicable.

---

[134] Zartman 2001:232.

[135] Wall & Callister 1995:532, Anstey 2006:50.

[136] Wall & Callister 1995:532, Anstey 2006:50.

[137] Wall & Callister 1995:532.

[138] Wall & Callister 1995:533.

[139] Maiese & Burgess 2020.

The task of a mediator is to assist the parties to decipher their dispute in all its multiplicity and constantly search for proverbial “golden nuggets” to convey between the parties to facilitate the negotiation process.[140] A mediator does this by using techniques such as active listening, i.e. being attentive both physically and psychologically to what a disputant says. Doing so bolsters trust in the mediator and encourages participants to raise their real concerns frankly, which, in turn, enables the mediator to identify communal interests.[141] An apology made and accepted may, for example, satisfy the self-esteem need of one party and even the need to show remorse by the party tendering the apology, which assists in de-escalating the conflict.[142]

Another tool with which to manage conflict in mediation is the use of context.

2.6.2.1 Context as de-escalator of conflict

This brief description of using context in conflict aims to explain that conflicts do not happen in insolation or vacuums, without other relevant factors playing a role. It is argued here that a proper and reciprocal understanding of the context within which a conflict has arisen between parties can be used as a tool by the mediator to de-escalate the conflict. The environment in which the conflict started, the factors that caused the conflict and the effects they had on the parties all provide the mediator with context that they can use to conduct the mediation, and to de-escalate conflict if the mediator verbalises and conveys that context to the parties. It also assists the mediator to prepare better for the mediation by understanding the “bigger picture”.

The concept of context in conflict is approached from four perspectives. Firstly, it is an explanation of the conflict setting without reference to the causes or the impact of the conflict. Not referring to the causes or impact of the conflict therefore downplays the “whose fault is it” factor.[143]

Secondly, the context of conflict is a reference to the independent variables that are being explored. These contextual factors include matters such as the extent of

---

[140] Boulle & Rycroft 1997:50.

[141] Boulle & Rycroft 1997:155.

[142] Boulle & Rycroft 1997:50.

[143] Morrill &Thomas 1992:400–428; Druckman & Broome 1991:571–593.

pressure to come to an agreement, and the number and complexity of the issues involved.[144] In the context of a claim for compensation based on medical negligence, the context will have bearing on, for example, the resources, or lack thereof, available to the parties. A claimant under financial pressure because of the costs of litigation may be more inclined to settle for less than they initially anticipated. The type and severity of the injury may influence the complexity and number of issues required to prove the merits and quantum of the claim.

The third perspective relates to the area or environment in which the conflict is embedded. Conflict does not exist separately from the environment in which it takes place and environmental factors influence the causes, effects, escalation and management of the dispute.[145] In a hospital environment, one example of an environmental factor that may have bearing on the aspects mentioned, is hospital protocols. These protocols may cause and escalate a conflict, because they may require complicated and bureaucratic processes to obtain information related to the claim. This may negatively affect the claimant's perception of the medical practitioner. It may also add to the frustration and anger of both the claimant and the medical practitioner, who may wish the dispute to be resolved speedily. The inaccessibility of hospital records, because of bureaucratic red tape, may very well add further and unnecessary "fuel" to a volatile situation.

Lastly, the structural level at which the conflict takes place is relevant. Studies indicate that a shared attack–attack strategy may occur at the interpersonal and intergroup levels, even though the causes of the conflict are different.[146] This means that what is happening at one level is not indicative of what is happening at another level, and decisions about managing the conflict will require a proper investigation of a specific set of facts. In a hospital setting, the hospital management and the nursing staff may be in conflict at the intergroup level about protocols that were allegedly not followed, whilst the nursing staff may be in conflict amongst themselves about the specific individual/s allegedly at fault for non-compliance with the protocols. Internal battles

---

[144] Baron 1988:272–279; Prein 1984:81–102; Pinkley 1992:95–113.

[145] Sheppard 1992:325–334.

[146] Putnam & Folger 1988:349–359; Polley 1988:617–629; Morrill 1991:871–893, Womack 1988:437–445.

between management and staff may cause further frustration for the claimant's ability to access the records necessary to formulate a claim.

Gorton points out that conflict decreases the ability of a party to use rational problem-solving to deal with conflict. The ability to think rationally enables us to see problems from multiple perspectives. A mediator would use de-escalation methods to re-engage this ability.[147] Gorton explains that people attribute the way others behave to internal characteristics, such as personality traits, and ascribe the way they (themselves) behave to external factors beyond their control. Parties then approach conflict with the attitude that "you wronged me because you are inherently inclined that way, whereas I base my reaction on peripheral causes". Knowing this tendency enables the mediator to anticipate how parties will communicate during mediation, and to adjust their strategies accordingly.[148]

Gorton developed a two-step process to de-escalate conflict. Initially, emotional conflict is de-escalated through emotional reframing, which involves acknowledging emotional concerns and then reframing them so that they are less confrontational. Once the emotions have cooled down, parties are in a better position to replace negative attributions based on personal issues with situational factors achieved through role reversal exercises. Putting parties "in each other's shoes" facilitates a move from blame towards mutual understanding of their respective views, and doing so promotes conciliation.[149]

Noll suggests that, at the outset of the session, mediators ask the parties to explain their perspectives of how the conflict started and what it entails. The mediator then explains that three perspectives are usually present, namely personal, legal and business or economical, and parties should keep these perspectives in mind during their explanations[150] Allowing the parties to vent their emotions at the start enables

[147] Gorton 2005.

[148] Gorton 2005.

[149] Gorton 2005.

[150] Noll 2005.

them to regain self-control and enables the mediator to assist the parties to identify shared interests, rather than to focussing on positions.[151]

Medical negligence claims are fraught with emotions. The patient may be angry about the unexpected injury and associated trauma and, to add insult to injury, the patient than has to deal with bureaucratic obstacles in an attempt to find answers. The medical service provider regards the claim as an affront to their professionalism, and may think the patient is ungrateful. A mediator should allow the parties to air their frustrations and acknowledge these feelings. The mediator then facilitates the conversation by steering the dialogue in a different direction, with a new message and fewer emotions. Doing so sets the stage for the parties to realise their shared interests. For example, it may appear during the deliberations that the injury resulted from external factors beyond the control of the doctor. The parties may then be moved to understand that they both want the dispute to end, they could tender reciprocal apologies and shift their attention to crafting creative ways to ensure future medical care for the patient.

2.7 CONCLUSION

This chapter provided an explanation of the psychological factors that impact on conflict and demonstrated the influence of these factors on the mediation process. A basic understanding of the psychological thought processes involved, from inception to resolution, is an essential skill for all mediators.

A variety of factors cause conflict. These causes have effects on the individual, and on the individual's interpersonal relationship with the opponent. The causes and effects influence whether the conflict will escalate or de-escalate, and how the individuals involved in the conflict manage it. The main causes of conflict were identified as personality type, different cultural and personal views, different goals, emotions and interpersonal factors.

Mediation for medical negligence complaints can be fast paced. The claims are often, by their nature, complicated and laden with emotions. Mediators must possess the ability to identify and accurately predict what a disputant is thinking and feeling by

[151] Noll 2005.

processing large amounts of information and formulating strategies to deal with that information in a short time. This information is received via verbal and non-verbal communication, i.e. what the mediator sees and hears. The mediator has to deduce the possible meaning and context of what is communicated, and based on the information received and interpreted, decide on the most appropriate approach.

Mediation has as its purpose dispute settlement through facilitated discussions. The most difficult task a mediator faces is moving parties off positions and getting them to focus on their true needs and interests. The positions parties take during conflict and the strategies they use to deal with it, stems, in part, from their psychological orientation. These factors have the potential to influence the mediation process from start to finish. The skilled mediator will need to have the ability to identify these orientations and use de-escalation techniques to achieve movement towards settlement. In essence, this involves placating emotions by granting the parties an opportunity to express how they feel, and acknowledging their feelings. Once the parties are less confrontational, the process of facilitating dialogue aimed at identifying mutual interest follows. This is predominantly achieved through role play exercises and re-framing.

The importance of the theoretical underpinnings of the concepts discussed in this chapter is that they equip the mediator with knowledge, so that a mediator can apply their skills effectively in assisting parties to find solutions to their problems.

Chapter 3 examines the adversarial litigation process in the civil court system as the conventional method of dispute resolution. The investigation seeks to establish if civil litigation, as the principal dispute resolution mechanism in South Africa, is the most appropriate way to solve civil disputes.

CHAPTER 3: CONVENTIONAL DISPUTE RESOLUTION IN SOUTH AFRICA

3.1 INTRODUCTION

In Chapter 2, the researcher postulated the behavioural theory that underlies disputes and their resolution. Rarely, if ever, is this considered in conventional civil litigation. In litigation, the behavioural traits of the litigants are of no consequence to the court or the legal representatives. In this chapter, the researcher will investigate the formal litigation process, with the broad purpose of determining whether it is suitable as a primary civil dispute resolution tool for all circumstances and, in particular, in a post-democratic South Africa. Not all mediators are trained in the law and the chapter will provide a general background of the process – essential knowledge for mediators not trained in law. Mediators use reality checking during mediation to alert disputants who are unwilling to reach a settled solution to their dispute about the potential difficulties of the court process and court-imposed relief. It is, therefore, important that non-lawyer mediators have knowledge of the most important tenets of the civil process. The chapter will also critique the formal process in litigation, as a continuum to substantiate the thesis argument in favour of mediation with reference to the relevant aspects of the formal process that are discussed in this chapter.

The overall chapter theme is a discussion of adversarial litigation, as the conventional dispute resolution system in South Africa. A brief historical overview will provide context and augment the constitutional transformational argument presented in the thesis. The chapter is important in terms of the constitutional framework that South Africa accepted in 1994. The discussion in this chapter specifically relates to the rights guaranteed to all in section 34 of the South African Constitution,[152] which encapsulates the promise of the notion of “access to justice”, which will be discussed in more detail in Chapter 4.

[152] The normative principles underpinning the ideal of access to justice are contained in sections 9(1) and (2), 10 and 34 of the South African Constitution 1996.

3.2 CONVENTIONAL DISPUTE RESOLUTION IN SOUTH AFRICA: LITIGATION

3.2.1 Introduction

There are many classifications of the South African law.[153] Two basic classifications are criminal, as opposed to civil law cases. Another is the classification of the law into substantive and formal law.[154] The civil process as expressed in the law of civil procedure belongs to civil law, even if the complaint lies against the state or one of its institutions. The civil process aims to provide relief when a right, prescribed in the substantive law (for example, in the law of contract and the law of delict), was breached, and caused the plaintiff to suffer damages. The rules that prescribe the process in terms of which the plaintiff obtains relief against the defendant (the law of civil procedure; the law of evidence, statutory interpretation and the law of damages), belongs to the formal law classification.

3.2.2 Historical overview

A brief historical overview of the South African legal system is included in this chapter mainly because the state order in South Africa changed drastically, from a Westminster parliamentary sovereign model, to a democratic constitutional order. This shift, in itself, may arguably advocate for the transformation of dispute resolution. Naturally, the transformation includes our notion of justice and our preferred ways to settle civil disputes. South Africa's democratic legal order, furthermore, provides full recognition to customary law, Africa's indigenous legal system. There are scholars who argue that mediation, by its nature, finds strong resonance in traditional African dispute resolution.[155] Normatively speaking, these factors warrant a re-examination of alternative dispute resolution.

The influence of both the Dutch and English legal systems on the early development of the South African legal system and its substantive and formal law is well

---

[153] Hahlo & Kahn 1973:567–578.

[154] Hahlo & Kahn 1973:567–578.

[155] Faris 2015:6; Aiyedun & Ordor 2016 156–159.

documented.[156] With the arrival of Jan van Riebeeck in the Cape in 1652 to establish a refreshment station on the trade route of the VOC (Vereenigde Oost-Indische Compagnie, or Dutch East India Company) in the East, opened the doors for the European settlement in South Africa. Roman-Dutch law, as the prevailing legal system in the Netherlands, by default became the law applicable in the Cape Colony. The settler community was familiar with it in their countries of origin. During the period 1652 to 1806, various institutions were responsible for the administration of justice by councils and courts with both criminal and civil jurisdiction.

Dutch reign in the Cape ended 1806, when the British took over the governance of the Cape Colony. Although the British never abolished the use of Roman-Dutch law, they considered the administration of justice and the justice system in the Cape to be substandard. Gradually, English common law started to influence procedural (formal) and substantive law in the Cape Colony.

Under British rule, legislation was enacted to ameliorate shortcomings in the administration of justice in the Colony. In this manner and with numerous other legislative changes, the English law of criminal and civil procedure, the law of evidence, the jury system and the separated bar system of advocates and attorneys, were incorporated into the South African legal system. In addition to the development of the substantive and procedural law occasioned by these enactments under British rule, the Roman-Dutch common law followed in the Cape at the time was further developed through the jurisprudence emanating from the courts and which was based on English law. This was brought about by many legal practitioners and judicial officers practicing in the Cape having been schooled in English law at universities such as Cambridge and Oxford.

The influence of English Constitutional Law is also noteworthy, as the constitutions of the Union of South Africa in 1910, the later Republic of South Africa in 1961 and the 1983 constitution, arranged governance by the state and state institutions according to the British model. This influence was significant in relation to the role the courts assumed in dispensing justice. The English system of parliamentary sovereignty

[156] Humby *et al.* 2012:101–114, from which the researcher draws substantially in the discussion that follows. See also De Vos 2000:344–345.

contributed to the courts interpreting and applying the law strictly in accordance with the court's perceived interpretation of the intention of the legislature, i.e. the intention of parliament. Today, the South African legal, social and political systems are subject to the Constitution and our courts have the right to rule whether any enactment of parliament or lower legislative institutions (provincial and local), as well as the conduct of any of the three arms of government and their agents are constitutionally invalid. The 1996 Constitution, therefore, introduced the mandate that the totality of societal structure, including the actions of private citizens and members of the three arms of government, is constantly measured against the values, norms and founding principles contained in the Constitution.[157] This change also introduced constitutional law as a major component of the country's substantive law.

In contrast to South Africa's mixed Roman-Dutch and English legal background, the Constitution gives full recognition to indigenous or African customary law. This is the part of South African law that derives from the social practices and customs that specific indigenous tribes or communities have accepted as applicable to them.[158] This area of South Africa's law was generally disregarded under both Dutch and English rule in South Africa. Indigenous tribes and the manner in which they practiced law were largely ignored. The colonisers only interfered when local communities came into conflict with European settlers, often after livestock theft and due to competing claims to grazing rights. As the conflict between the communities increased, the government-enacted legislation that interfered with the custom of inherited traditional leadership, and the government appointed leaders who supported the colonial authorities. Only after the Union of South Africa came into being, and after the promulgation of the Black Administration Act 38 of 1927, was the application of customary law given formal recognition. In terms of the Black Administration Act, presiding officers were authorised to apply customary law in as far as it was not inconsistent with public policy and the rules of natural justice. The Black Administration Act introduced commissioner courts to deal with customary law, and when these courts were abolished in the late 1980s, all courts were authorised to take judicial notice of and apply customary law.

---

[157] Klare 1998:146.

[158] Cassim & Mabeka 2019:1–17.

Section 212 of the Constitution now stipulates that customary law must be applied when it is relied on by litigants, except where it is inconsistent with the Constitution.[159]

The South African legal system, the country's jurisprudence, and common law is therefore an amalgam of influences from both Roman-Dutch and English law, case law and, in particular cases, indigenous law.[160] The underpinnings of South African substantive law was largely influenced by Roman-Dutch law of the 17th century, which is a civil-law-oriented system. South Africa's formal law, in contrast, was largely influenced by English common law. Despite legislative and jurisprudential developments over the past five centuries, much of the South African legal system today retains a mixture of Roman-Dutch and English common law influences.

The discourse now turns to a general discussion of the civil procedure system in South Africa, with specific focus on its adversarial nature. It is proposed that the system does not function optimally, due to a number of factors. Included in this discussion is specific reference to aspects of South African medical law. The goal is not only to explain the mechanical working of the system and to highlight its technical nature and inadequacies, but to demonstrate, simultaneously, the influence it has on the notion of access to justice in a post-democratic South Africa. Throughout the discourse, the aim is to highlight the areas where mediation may obviate the inefficiencies of the adversarial system.

3.2.3 The adversarial system of civil dispute resolution

3.2.3.1 Background

It is sensible to start this discussion by investigating the purpose of civil litigation and drawing a distinction between the adversarial and inquisitorial systems of dispute resolution.[161] Historically, the main aim of civil litigation was to prevent private vengeance and, instead, to achieve peaceful resolution of disputes. Today, the objective remains to resolve disputes, but attaining justice has replaced attaining

[159] Constitution of the Republic of South Africa, 1996.

[160] O'Regan 1999:2.

[161] For a comprehensive discussion, see the unpublished LLD thesis of Van der Merwe Fick 1994.

vengeance. Civil litigation is the vehicle used to redress inroads into rights and duties.[162] It is submitted that achieving "justice", as lofty as the ideal may be, is linked to the perceptions and the meaning that society attaches to the availability and accessibility of court services. It translates directly into the legitimacy of any legal system that it must be supported by confidence of the public in the system. To achieve legitimacy, the social and legal system, in protecting the rights of citizens, must be fair, objective, impartial and transparent. Court decisions must reflect these features.[163]

A detailed description of the origins and historical development of the adversarial and inquisitorial systems is beyond the scope this work. At the core of the adversarial system is the impartial and neutral adjudicator who decides on the matter based on the evidence gathered and presented by the parties (adversaries). The adjudicator acts as a passive referee in the contest between the parties and ensures that the parties comply with the rules and procedures of the contest.[164] The process is, in totality, "party-controlled". Each party decides which evidence to present to the court. The court plays no role in this decision. A party may find out, to their own detriment, when the court delivers its judgment they had it failed to, in the view of the court, deliver sufficient and persuasive evidence. The practice of cross-examination of witnesses plays a pivotal role in the adversarial trial system. Cross-examination is stated to serve the purpose of testing evidence for truth, reliability and credibility.[165] It could occur that, in cross-examination of a witness, the witness becomes nervous, forgetful and confused. When this happens in cross-examination, these reactions are routinely attributed to the falsity, unreliability and improbability of evidence given by witnesses. Even avoiding eye contact with the questioner in cross-examination has been said to be indicative of a person who is deliberately avoiding the truth. In reality, this has been shown to be a response by members of a certain culture, who customarily avoid direct eye contact with persons perceived to be in high or powerful positions.[166]

---

[162] Hurter 2007:241.

[163] Hurter 2007:241.

[164] Roodt 2004:138–139.

[165] Marnewick 2007:327–328.

[166] Boulle & Rycroft 1997:159.

In inquisitorial trial systems, the parties also bring their own evidence to court. However, the adjudicator plays an active role in the investigation and the evidence gathering process to find, as it is stated, “the material truth”. The adjudicator may, therefore, conduct their own and additional investigations without obtaining the consent of the litigating parties. The adjudicator then rules on the matter on the “totality of evidence” provided by the parties and that gathered by themself.[167]

South Africa follows an adversarial system of civil dispute resolution. The main principles of adversarial civil litigation may be summarised as a “trial by battle” between opponents, who seek a binding winner/loser outcome based upon facts and evidence they present in accordance with strict rules of procedure and evidence. This culminates in a decision (judgment) by an impartial adjudicator (judge or magistrate), which finalises the dispute. It must be mentioned that South Africa, like other adversarial jurisdictions, has, over time, introduced certain traits of the inquisitorial system into its existing system. At present, it is readily accepted that the pretrial procedure in South Africa’s formal civil process, by its nature, represents an alternative dispute resolution purpose, namely the curtailing of issues, and therefore costs, before the formal trial.[168] Before formal litigation commences, a myriad of preliminary considerations apply – they will be discussed briefly in paragraph 3.2.3.2.

3.2.3.2 Preliminary considerations

The formal civil process consists of pre-litigation, litigation and post-litigation phases. Before a party institutes a civil claim, normally, upon advice of their lawyer, a number of preliminary issues must be considered. These are, amongst others:

- A determination of the correct court with jurisdiction over the matter;
- Considering whether the parties have standing to sue or to be sued;
- Whether any statutorily prescribed notice periods apply (where the action lies against the state and its organs); and

[167] Jolowicz 2003:293. See Van der Merwe Fick 1994:10–56 for a discussion on the origins and development of the inquisitorial system.

[168] See De Vos and Broodryk 2018:18–35.

- Whether the plaintiff has a sustainable cause of action and a decision regarding the correct procedure (action or application) to be used.

Although these issues are mentioned here cursorily, there is a considerable body of rules and regulations applicable to each of these issues. It is sufficient to say that, (a) it is unlikely that any litigant can successfully embark upon civil litigation without the services of a lawyer, and (b) that all this implies access to legal services with the view to accessing justice, which is beyond the financial ability of most citizens. For efficacy, the researcher will discuss these considerations in the context of medico-legal claims in paragraph 4.3. The field of medical law is complex and, in the context of this study, it would not be practical to include a comprehensive treatment of the topic. It is, however, prudent to refer to the basic principles of this field of the law, for two reasons. First, to illustrate that the already multifaceted and convoluted process of litigation becomes even more so for medical law-related matters and, second, to show that the mediator needs to have at least a basic understanding of aspects of medical and procedural law to mediate effectively in such matters.

3.2.3.3 The litigation phase

The civil litigation phase consists of two parts. The pretrial phase, which comprises pleadings, and the trial preparation phase. In the first phase, the parties exchange pleadings that define the issues and set out the basis of their claims.

In the trial preparation stage, the discovery of documents takes place, as does a pretrial conference between the parties. The pretrial conference aims to limit the issues and evidence that need to be presented at trial. It is notable and significant that the presiding officer/judge(s) play no role in this conference. Uniform Rule 37A, which deals with judicial case management in defended actions in the high court by way of a case management conference, also aims to limit issues. This procedure is in addition to the pretrial conference between the parties, and its ultimate goal is that the presiding judge declares the matter trial ready. Although the idea is to keep matters that are not “trial ready” off the court roll and expedite the hearing of matters that are, it is doubtful that this always materialises; rather, it delays the finalisation of cases further.

During the trial itself, the witnesses for the parties present oral evidence to substantiate their respective contentions and claims.[169] There exists a myriad of rules and regulations about the periods within which pleadings are exchanged between the parties. In general, each consecutive step in the civil process for delivering the next pleading is 10 court days.[170] Considering a case where only a summons is served, a notice to defend, a plea, and a replication are filed, and 45 court days will be required to reach the close of pleadings. The exchange of pleadings is often interspersed with so-called interlocutory notices in cases where litigants fail to comply with rules and other requirements. Examples are applications for summary judgment that a plaintiff may bring under certain circumstances, and notices to bar, where a litigant fails to timeously deliver such pleadings as the plea or a declaration. These interlocutory interventions in civil litigation are often the rule, and not the exception. The 45 days required for this phase is a conservative estimate and only brings the exchange of pleadings to a close and entitles the plaintiff to apply for a trial date. Often, courts have waiting periods for trial dates in excess of one year.

Examples of case law related to medico-legal claims paint an even more time consuming situation. These cases generally take longer to finalise than the process explained in the preceding paragraph. A study by the South African Law Reform Commission reveals that, in 19 randomly selected cases, the shortest turnaround time from inception to finalisation was one year and six months, the longest was 16 years and one month, and 75% of cases took more than five years to conclude.[171] These findings attest to the outdated nature of the civil process, which leads to it taking a long time to achieve an outcome. Paragraph 3.2.3.4 will provide an exposition of some of the legal aspects relating to medical negligence litigation.

---

[169] Peté *et al.* 2016:1–2.

[170] For delivery of the notice of intention to defend the action, 10 days – Uniform Rule 19(1) and Magistrates Court Rule 13(1), for delivery of the plea, 10 days – Rules 22(1) and 17(1), and the reply, 15 days, Rules 25 and 21.

[171] South African Law Reform Commission 2017:20–22.

3.2.3.4 Valid cause of action[172]

Historically, the relationship between a patient and a healthcare service provider resorted under private law. In the post-constitutional era, South Africans are guaranteed the right to access healthcare services by the Bill of Rights.[173] This, coupled with legislative changes, such as the National Health Act 61 of 2003, of which one of the aims is to realise the healthcare rights guaranteed in the Bill of Rights, together with the fact that the majority of citizens receives healthcare from the public sector, caused a move by the government to also consider public law aspects and interests.[174]

Ordinarily, the law of contract regulates the relationship between a patient and healthcare service provider. The parties agree to the delivery of a health service against payment of a fee. An implied term of the agreement is that the service provider is under duty to deliver the service in a manner consonant with the average knowledge and skill expected of such a person. If the service provider subsequently neglects to adhere to this standard of care, and through their conduct causes damage to the patient, the provider may be held liable in terms of contractual and delictual legal principles.[175] In a claim for damages, the patient, in their summons, must formulate a valid cause of action in delict and/or in contract. For a successful claim in delict, the patient must allege and prove wrongful conduct, fault, causation and damage.[176] In contract, the allegations are proof of a valid contract, the material terms, negligent breach of the contract, causation and damages.[177]

It may be safe to assume that a medical negligence claim rests partly on contract, (what was agreed upon, and subsequent breach of contract) and partly in delict (the standard of care, and subsequent consequences of failing to meet the required

---

[172] In this section, the researcher relied substantially on the comprehensive work of Carstens & Pearmain 2007.

[173] Constitution of the Republic of South Africa, 1996: sec. 27.

[174] See, for example, also the regulations of the *Medical Schemes Act* 31/1998, which allow medical schemes to designate state facilities as preferred service providers for their members.

[175] Harms 2015:259–260.

[176] See Neethling, Potgieter & Knobel 2017 for a comprehensive discussion on the elements of a delict.

[177] Harms 2018:259–260.

standard).[178] The claim in contract is limited to patrimonial damages (medical costs, loss of income, maintenance, etc.) while in delict, non-patrimonial damages (loss of amenities, shock, etc.) may be claimed in addition to patrimonial damages.[179] A discussion of aspects related to medical negligence claims now follows.

It is a trite principle of civil procedure that plaintiffs must be able to prove the factual allegations contained in their particulars of claim on a balance of probabilities. Proof of a contract for the delivery of healthcare services by the private sector should, generally, not be a matter of contention between the parties, whether it was agreed upon in writing or orally. By the time an aggrieved patient seeks legal redress for harm allegedly suffered at the hands of a physician or hospital, in private practice it would be inconceivable that a paper trail proving that services were delivered does not exist. However, the situation can be different in the public sphere.

Given the adversarial nature of our civil process, in which nothing is conceded without the strictest onus of proof, and, the absence of which may be fatal for the success of the plaintiff's claim, the following assumptions must be made. Because patients in the public sector are, in most instances, required to pay a nominal amount for the healthcare services they receive, the receipt for the money would presumably serve as proof of an agreement. If the service is rendered completely free of charge, the patient file could constitute proof of the existence of an agreement. These aspects are mentioned because, in the course of a conventional civil trial, it may become very relevant and, as mentioned, may mean failure for a plaintiff who cannot persuade a court that a valid contract existed between the plaintiff and the healthcare service provider. In addition, the terms of the contract concluded (for example, regarding the required treatment or medical procedure) may be vital for the establishment of a valid cause of action. Needless to say that, in such a case, the word of an uninformed, often uneducated patient does not stand much chance against that of the medical establishment.

---

[178] See Neethling *et al.* 2017 for a comprehensive discussion on the concurrence of remedies.

[179] Howarth & Carstens 2014:71.

Patients use the services of healthcare professionals reliant on the inherent requirement that healthcare professionals possess the required standard of knowledge and skill to treat the patient. In *Van Wyk v Lewis,* the then Appellate Division referred to "the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs".[180] Professional medical negligence arises when the health professional neglects to bring to bear this required standard of knowledge and skills in treating the patient.[181] The test for medical negligence aims to establish whether a reasonable professional with the same knowledge, and in the same circumstances as the defendant, would have foreseen the risk of harm to the patient and would have taken reasonable steps to avoid it. If the answer is no, the service provider is not liable to the plaintiff for the consequences. The test for medical negligence is applied in the context of the unique circumstances of every case. Factors such as the place where the services were rendered, the physical and financial resources available to the practitioner, the nature of the operation and so on are all taken into account when the test is applied.

The unfortunate reality in many public sector hospitals in South Africa is that they are under-resourced and understaffed, and the doctors and nursing staff who work in such conditions have to do the best they can with the resources available to them.[182] Anything less may amount to negligence.

During a mediation session, a scenario such as the following may present the mediator with an excellent opportunity to restore the relationship between the aggrieved patient and the doctor. In many instances, given the current state of affairs in South African state hospitals, the harm suffered by the patient is not so much due to the doctor's lack of skill, but to the lack of resources.[183] The patient may not be aware of this, and may blame the doctor for the ills suffered. The blame is often associated with emotions such as anger and frustration, which lead to aggressive behaviour to "get back at" or

---

[180] *Van Wyk v Lewis* 1924 AD 438 at 444.

[181] See Neethling *et al.* 2015 for a comprehensive discussion on negligence generally. See also Moore & Nöthling Slabbert 2013:62.

[182] Malherbe 2013:84; Oosthuizen & Carstens 2015:272; Walters 2014:717.

[183] Oosthuizen & Carstens 2015:275.

"teach the doctor a lesson", as part of normal human behavioural tendencies. Suing the doctor and/or the hospital is often perceived by the patient as the only way to achieve this goal. The doctor raises the lack of resources as their defence, and the veracity of this defence can only be tested once the matter goes to trial. Had the matter been referred to mediation, the issue relating to a lack of resources would have been raised much earlier. An astute mediator would raise the possibility of an apology or expression of empathy for the harm suffered by the patient, and not require an admission of negligence by the doctor.

According to Regis and Poitras, "(A)n apology can provide moral reparations for a psychic injury, for which financial compensation, though necessary, cannot always atone."[184] Conversely, the mediator could canvass the possibility with the patient to express that they realise the doctor was not the cause of their injury, but rather the prevailing circumstances at the facility where they received treatment. Such reciprocal communications would, in all probability, result in, at least, establishing a better relationship within which to facilitate a settlement.

The third element of the medical negligence claim is that a plaintiff must prove causation. This means that the plaintiff must show that the conduct of the defendant factually caused the loss and that the conduct is linked directly, or is sufficiently close, to the loss suffered. This requirement serves to establish the legal liability that ensued. Factual causation exists when the plaintiff is able to prove that, but for the conduct of the defendant, a loss would not have occurred. Legal causation relates to the limits of legal liability. In essence, it means that a defendant will be held liable for the reasonably foreseeable or direct consequences of negligent conduct if it can be shown that the damages are "linked sufficiently closely or directly for legal liability to follow."[185]

According to Carstens and Pearmain, in the context of healthcare-related claims, the merging of contractual and delictual principles becomes apparent when causation has to be established, because the facts that a plaintiff will rely on for contractual and delictual claims are similar.[186] In other contexts of the medical negligence claim,

---

[184] Regis & Poitras 2010:48.

[185] Carstens & Pearmain 2007:509.

[186] Carstens & Pearmain 2007:512.

powerful contractual legal principles are in play. Contractual claims aim to place the plaintiff in the position they would have been in had the defendant performed according to the contractual requirement (often implied) of a reasonably required minimum standard. A delictual claim seeks to restore the position that the plaintiff would have been in had the defendant not acted wrongfully.[187] Often healthcare professionals are unable to contractually guarantee the outcome of treatment, because of the unpredictability in health outcomes.[188] The nature of the agreement between the patient and the healthcare professional is that the latter is obliged to act with reasonable care in treating a patient, which, in essence, is a "contractualisation" of delictual principles. It is, hence, appropriate to the treat these claims similarly.

The final element for setting out a proper cause of action is alleging and proving damages. A plaintiff in a medical negligence claim is entitled to claim for patrimonial damages, such as reasonable medical expenses that were incurred; loss of earnings up to the date that summons is issued; future loss of earnings and future medical expenses, and for non-patrimonial loss, such as for pain and suffering.[189] The "once and for all" rule stipulates that a plaintiff may claim damages flowing from a single cause of action only once, which means all current and potential future damages must be claimed in a single action.[190] The Constitutional Court in *MEC for Health and Social Development, Gauteng v DZ obo WZ* confirmed the rule.[191] The court, on the question of whether the common law can be developed to accommodate periodic payments or provision of medical services in lieu of a lump sum payment for future medical costs, left the matter open. Froneman J, writing for the majority, emphatically stated that should a proper factual basis exist, and where it is properly before the court in pleadings, the court may very well develop the common law on the basis alluded to above.[192] In the subsequent case of *MEC for Health, Gauteng Provincial Government*

---

[187] Carstens & Pearmain 2007:512.

[188] Carstens & Pearmain 2007:513.

[189] Harms 2018:144.

[190] Dendy 2019:29.

[191] *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2017(12) BCLR 1528 (CC):1529 J.

[192] *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2017(12) BCLR 1528 (CC):1548 E. See also MSM obo KBM v The MEC for Health, Gauteng Provincial Government, unreported case number 4314/15; Mashinini v MEC for Health Gauteng [2021] ZAGPJHC Case number 1352/2017 and Member of the Executive

v PN, the Constitutional Court found that it is open for the high court to consider developing the common law for determining quantum *i*n medical negligence cases.[193] The essence of the decision of the court is that it opens the door for high courts to order, where it is properly before the court, compensation other than by lump sum payments, for example through the provision of future medical care. In the mediation context, the parties are free to agree that future medical care will be provided, and not a lump sum payment done.

The plaintiff, furthermore, needs to set out the damages in a manner that will enable both the defendant and the court to assess the quantum.[194] Both the Uniform Rules and the Magistrates Court Rules require the plaintiff, in the particulars of claim in respect of pain and suffering and disabilities, including loss of amenities and disfigurement, to state which injuries caused the temporary or permanent condition. For loss of income, the plaintiff must state the loss of income to date, future loss, and the type of work they will be able to perform with a decreased capacity.[195]

It is plain from the discussion above that, before a plaintiff considers proceeding with court action, careful consideration of the merits and quantum is required. In medico-legal claims, this is especially relevant, as the witnesses in respect of both the plaintiff and the defendant will often be experts, and depending on the facts of the case, often more than one expert per party may be required. The court does not necessarily have technical knowledge of medical procedures, and relies on expert evidence to assess the merits and the need for future medical treatment. Because of the adversarial nature of litigation, the plaintiff and the defendant will call expert(s) who will have divergent opinions on matters. Consequently, litigating medico-legal claims becomes extremely expensive, because, in addition to legal fees, the experts also charge a fee for their time. It is submitted that mediation could drastically reduce costs, as the

---

Council for Health, Gauteng, Gauteng Provincial Government v PN [2021] ZACC 6 that confirm the sentiment of Froneman J.

[193] *MEC for Health, Gauteng Provincial Government v PN* [2021] ZACC 6.

[194] Harms 2018:144.

[195] Uniform Rule 18(10) and Magistrates Court Rule 6(9) respectively.

parties could agree to use a single independent expert, to abide by their opinion, and to share the cost.

This exposition explained the complicated nature of a medical negligence claim. It is unconceivable to embark on such a claim without legal representation.

3.2.3.5 Legal standing

The second consideration for prospective litigants relates to the question of who the parties are and whether they have standing (*locus standi in iudicio*) to appear before the court. Generally, standing depends on two factors: first, whether the party has a direct and substantial interest in the subject matter of the case, and secondly, if the party has the capacity to litigate.[196] The requirement to demonstrate a direct and substantial interest is a direct interest in the relief sought. Further legal requirements are that the relief claimed is not too far removed, that the relief claimed is directly related to the cause, and that it is not abstract, and hypothetical.[197] Whether these requirements are met will depend on the facts of each case. In medical negligence claims, the plaintiff (patient) generally complies with these requirements, as the patient suffered harm as a direct consequence of an injury caused by the defendant and seeks redress in the form of compensation for damages suffered. However, there may be situations where the direct cause of the injury is not quite so clear. There may be multiple causes of the patient injury, which, in litigation, creates fruitful avenues to deny liability. If the plaintiff is, for example, a dependant suing for loss of support due to death, the plaintiff must prove their relationship with and dependency on the deceased.

The second requirement is that a litigant must possess the capacity to litigate. This requirement relates to the mental capacity of a litigant, and when dealing with prodigals, insolvents, diplomats, trusts, partnerships, associations, etc. Brief reference is made to two examples that have bearing on the theme of the study.[198] This is done

---

[196] Peté *et al.* 2016:17.

[197] Van Loggerenberg 2012:5–17.

[198] See Peté *et al.* 2016:39–54 for a detailed discussion.

briefly to illustrate that parties who intend to engage in litigation need to apply their minds to technical issues before they institute legal proceedings.

If the plaintiff is a minor, their parent or guardian must represent them if they are younger than seven years of age. If the minor is seven years or older, action may be instituted either in the name of the guardian or parent in their representative capacity, or in the name of the child, assisted by their parent or guardian. It would often be the case in claims relating medical issues, a parent or guardian could sue in a dual capacity. The parent will sue in their personal capacity for patrimonial damages, and represent or assist the minor in a claim for non-patrimonial damages.[199] Section 17(1) of the Matrimonial Property Act 88 of 1984 requires parties married in community of property to obtain written consent from their spouse to institute or defend legal actions against third parties. Although lack of consent does not eliminate the standing of the spouse, it does mean, however, that, if a spouse loses the case, the court may order that the losing spouse pay the costs out of their separate estate. Where the costs is paid from the communal estate, an adjustment is usually made in favour of the other spouse upon divorce.[200] This is important, because the legal costs of instituting a medical negligence claim has the potential to deplete the estate of an individual claimant. This, coupled with the stress associated with such financial difficulties, could arguably, in some instances, place an unbearable strain on a marital relationship.

In contrast, parties to mediation need not concern themselves with the technical and procedural issues related to standing. Parties voluntarily agree to participate in the process, they normally share the cost of the mediation, unless agreed otherwise, and the agreement to mediate includes (or should include) a clause that the parties have the authority to settle the matter. What is more, the cost of mediation is fixed and the parties are aware of it – this is not necessarily always the case in civil litigation, due to a range of complexities that may arise at different stages of the process. Additionally, during pre-mediation discussions, the diligent mediator would ensure that the parties agree to mediate with the required capacity. The costs of mediation are agreed upon

[199] Peté *et al.* 2016:39–41.

[200] Peté *et al.* 2016:43–44.

and the general rule in litigation, namely that the loser pays the legal costs, is irrelevant.

3.2.3.6 Jurisdiction[201]

The third preliminary matter to consider before proceeding with litigation is a determination of the correct court with jurisdiction to hear the matter. Jurisdiction of a court means the power or competency of a particular court to hear and adjudicate upon a dispute between parties brought before it. Different courts exist in the South African civil justice system; they can be divided into two groups.

First, specialist courts deal with specific matters, examples are the labour court, equality court, tax courts, electoral court and so on, and second, courts that deal with general civil disputes, such as magistrates and high courts. Deciding on jurisdiction requires of the litigant to decide, firstly, which court would generally have jurisdiction over the matter, whether a high court, magistrates court or labour court. The monetary value of the claim and the nature of the claim are among the determining factors for making the decision. The higher the monetary value of the claim, the higher the status of the court needs to be to determine the matter. If the nature of the claim relates to a labour dispute between an employer and employee, for instance, the labour court has jurisdiction. In the case of claims for general damages, the plaintiff's estimation of the amount of the claim, may, because of the unpredictability of the judgment, differ from that of the court. If a court finds that a litigant chose a court with higher jurisdiction based on the size of the claim, that litigant may, even if successful, be divested of their full costs in that court and only receive the benefit of the lower court costs. Once the general type of court that may hear a matter has been determined, the litigant must decide in which specific court to proceed with the case. This is determined with reference to the geographical area of jurisdiction of that court – normally where the defendant lives or works or where the cause of action arose.

The nature of claims related to medical negligence are mostly for compensation. These matters resort under the jurisdiction of either the magistrates or the high courts.

---

[201] See Peté *et al.* 2016:60–121 for a detailed discussion.

The specific court where the matter is instituted will depend on the monetary value of the claim and geographical factors.

The monetary jurisdiction of the district magistrates court is a maximum of R200 000,00, that of the regional magistrates court is a maximum of R400 000,00, and that of the high court unlimited.[202] Plaintiffs mostly institute claims based on medical negligence in the high court, due to the amount of money (*quantum*) that is claimed. Because medical care is expensive and based on the "once and for all" rule, the plaintiff must sue for all their damages in one claim, i.e. patrimonial loss for the cost of current and future medical care, as well as non-patrimonial loss in respect of for pain, suffering, and current and future loss of income. The reality is that, because this litigation is so expensive, individuals are often only able to pursue it if their lawyers are willing to take the matter on a contingency fee basis (no success, no fee). The firm of attorneys finances the disbursements, such as the costly expert reports.[203] Consequently, the matters that proceed to litigation on this basis are, by necessity, cases that, in the opinion of the lawyers, are meritorious on the facts, and the potential fee, based on the quantum claimed, is sufficient to risk financing the case. It would be remiss not to mention that parties may bring a matter that is not otherwise within the monetary jurisdiction of the magistrates court based on consent, in terms of section 45 of the Act.[204] The provisos are that the consent must be in writing, the matter must not be excluded from the court's jurisdiction in terms of section 46 of the Act, and the court would normally have jurisdiction over the person of the defendant in terms of section 28 of the Act.[205]

Jurisdiction based on geographical issues entails considering where the defendant is domiciled, resident, carries on business, is employed or where the cause of action wholly arose. A defendant may be, for example, a natural person, a company, a partnership or a state entity.

---

[202] *Magistrates' Court Act* 32/44 sec. 29, read with GN216/217 Government Gazette 2014:37477.

[203] *Contingency Fees Act* 66/1997. See also Howarth & Carstens 2014:71

[204] *Magistrates' Court Act* 32/44.

[205] *Magistrates' Court Act* 32/44.

In the context of medical negligence claims, the defendant could be a doctor conducting their practice as a sole proprietor, in partnership with other doctors, or as a director of an incorporated company. The defendant could also be a doctor or the nursing staff employed at a government hospital. In cases involving state or provincial hospitals, the minister or the member of the executive council (MEC) of Health may be the appropriate defendant(s). This raises questions, such as where a natural person, company, a partnership or the state resides, so as to establish the correct court with jurisdiction. If the plaintiff gets this wrong, the opponent can raise a so-called special plea, which, if successful, dismisses the plaintiff's case with costs. The answers to these questions are contained in, for example, decided cases and statutes, such as the Companies Act 71/2008. A detailed discussion of all of the possible factors in a jurisdiction inquiry are beyond the scope of this study. Sometimes, the answers to technical questions about preliminary matters, such as the jurisdiction inquiry, are complex from a legal perspective.

In contrast to litigation, mediation is not subject to any statutory limitations regarding subject matter, quantum or geography. On a general note, it is accepted that certain matters, such as broad matters of public policy, or human rights issues that affect the public at large, and which requires a legal precedent, may not be suitable for mediation. These cases would, however, be the exception. Once the disputants have decided to mediate their dispute and have chosen a mediator, it is the duty of the mediator to facilitate the logistical arrangements associated with the venue. The main concern in the choice of the venue is the convenience of the parties. Mediators will usually have suitable facilities at their disposal or would have to travel. The shrewd mediator would visit a venue they are not familiar with, beforehand, to confirm that it is a suitable venue for mediation.

3.2.3.7 Action or application procedure

The final preliminary consideration is the choice between the action and application procedure. When a litigant must make the decision, they face three possibilities. Legislation necessitates that certain matters proceed by way of application, for example sequestrations and certain other matters. Other causes, such as divorces, must proceed by way of the action procedure. Unliquidated claims that require evidence to prove the quantum, must always proceed by way of the action

procedure.[206] In the event that a matter does not fall in one of these categories, the question to determine the correct procedure is the existence or absence of a real dispute on material questions of fact between the parties.[207] If there is such a dispute, the (longer) action process must be followed, so that the conflicting versions of the parties are presented, tested and decided upon at a trial.

A plaintiff in medical negligence cases claims for damages based on patrimonial and non-patrimonial loss that, by its nature, are unliquidated claims. It is submitted that unless the defendant admits liability in totality, the plaintiff will have to lead evidence to prove the quantum of their claim and will, thus, use the action procedure. Even if the defendant admits the claim for medical costs incurred up to the time the plaintiff issues the summons, it is unlikely that the defendant will admit the quantum of, for example, future medical cost, future loss of income and pain and suffering. Neither the court nor the lawyers are in a position to determine these quantum components. Experts are, therefore, required to determine the quantum, and their oral evidence in court substantiates their calculations subject to cross-examination by the opponent.

It is, therefore, evident that litigation, even at the outset of the process, entails careful and sometimes complex preparatory work, in general, and particularly so for medical negligence claims, which are intricate and multifaceted by nature. The lawyers of the potential litigants are ethically bound to act in the best interests of their clients, which includes giving advice on the prospective merits, the estimated duration and costs involved in conducting the case.[208] It also includes advice on alternative methods of resolving a dispute, such as mediation.[209] The recent insertion of rule 41A to the Uniform Rules of Court now compels attorneys to indicate by notice, with reasons, if their principal consents to the mediation of the matter, or not.[210] The researcher holds the view that the number of matters referred to mediation subsequent to this rule depends directly on the advice given to clients by their legal representatives. It is,

---

[206] Peté *et al.* 2016:147.

[207] *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

[208] See De Klerk 2016:33-59. See also, generally, the *Legal Practice Act* 28/2014 and the rules and regulations promulgated thereunder.

[209] *MB v NB* 2010 (3) SA220 (GSJ).

[210] Government Gazette 2020:107(43000).

furthermore, believed that, in order to provide accurate and objective guidance to clients so that they can make informed decisions, lawyers must be knowledgeable about the mediation process.[211]

3.3 CONCLUSION

It is not the purpose of this chapter, or the thesis in general, to criticise the adversarial trial system used for conventional litigation. It may be justifiably argued that certain cases are simply not susceptible for resolution by any way other than through conventional litigation. It would, however, be illogical to fail to reflect, in broad strokes, on postmodernist commentary on a system that has become ingrained over time as a one-size-fits-all dispute resolution mechanism for civil disputes. This research must however, in its barest essence, provide persuasion that, in certain type of disputes, and in particular in medical negligence cases, alternative methods to resolve such disputes are better suited and, therefore, preferable.

The purpose of this brief discussion was to illustrate the multifaceted nature of the litigation process and the challenges that litigants face even before a single document is filed at court. These are matters that mediation is not concerned with, for the same reasons mentioned in Paragraph 3.2.3.

In Chapter 4, the researcher will comment on the adversarial system of trial, viewed against transformative constitutionalism, in order to achieve social justice and access to justice. This commentary will be undertaken while acknowledging that the broad theme of such a commentary leads directly to philosophical and policy considerations, such as what “justice” is; what the primary goal of any dispute resolution process is, and, indeed, if any method can ever be typified as the ideal dispute resolution method. Ultimately, the choice of a dispute resolution mechanism is multilayered and complex. The fact remains that choices have to be made, and the options that are available should not only be fit for purpose, but should ideally also reflect the normative character of the Constitution.

---

[211] See Joubert 2020. The author points out that an unreasonable refusal to mediate may lead to a punitive cost order at the end of the trial. This may act as an incentive to mediate.

CHAPTER 4: PREFERENCE FOR A CONSTITUTIONALLY INFORMED MECHANISM OF DISPUTE RESOLUTION

4.1 INTRODUCTION

In this chapter, the researcher will elaborate on access to justice as part of social justice. It augments a preferred normative framework of constitutionalism, including the transformation of dispute settlement culture, in particular.

Transformative constitutionalism as a notion signifies an attitude to solving legal problems that is informed by the normative principles contained in the Bill of Rights.[212] This attitude requires a move away from formalistic adversarial approaches, to dispute resolution, i.e. a change in legal culture from formalism to contextually sensitive results that enhance access to justice for disputants. This change will generally broaden social justice as a constitutional imperative.[213]

The narrative in this chapter will depart from the premise that mediating medical negligence claims – as opposed to adversarial litigation – provides a means to achieve the normative ideals set in the South African Constitution. This premise necessarily requires a fundamental change in the prevailing dispute resolution legal culture exhibited by government, the legal profession and the general public.

4.2 LITIGATION, MEDIATION AND THE NORMATIVE PRINCIPLES IN THE CONSTITUTION

The Constitution proclaims its supremacy through the rule of law as foundational values of the South African democracy. It states that any law or conduct inconsistent with the Constitution is invalid and that all obligations imposed by the Constitution must be fulfilled.[214] The Constitution does not only regulate public power and create enforceable rights for individual members of society, it also fashions an impartial system of values and norms that applies to the law in its entirety. The Bill of Rights

---

[212] Davis & Klare 2010:412

[213] Brickhill & Van Leeve 2015:142.

[214] Constitution of the Republic of South Africa, 1996: sec. 1(2) and 2.

guarantees, amongst others, the right to equality,[215] the right to human dignity[216] and access to courts[217] – these rights are specifically relevant to the research theme. These rights do not exist in the abstract and the Constitution commands the legislature, judiciary and executive alike to, within its means, fulfil these obligations.[218] As a further indication of the ample provision the Constitution makes for the realisation of rights guaranteed in it, sec. 38 has broadened standing provisions considerably from the common law; in other words, it has created a means for more people to access justice in cases where their constitutional rights have been infringed upon.[219]

Adherence to the rule of law, as a central tenet of the Constitution, means that no person is above the law and that government legitimately exercises authority based on laws enacted through due process. For present purposes and in general, government is obliged to deliver and maintain a civil dispute resolution system that functions optimally and guarantees access to and the proper administration of justice. It makes sense to argue that, where this system falls short in respect of this requirement, government has a constitutional duty to address it. The dynamic nature of the law, technological advances, and the constant development of societal norms, necessitates continuous law reform, including the reformation of the civil justice system where it is inadequate.[220] The challenges related to the adversarial system of dispute resolution become apparent when explained and illustrated with reference to the judgment in *AB & ID v MEC for Health and Social Development, Western Cape Provincial Government***.**[221]

---

[215] Constitution of the Republic of South Africa, 1996: sec. 9.

[216] Constitution of the Republic of South Africa, 1996: sec. 10.

[217] Constitution of the Republic of South Africa, 1996: sec. 34.

[218] O'Regan 2008:6.

[219] Swanepoel 2014:63 and further.

[220] Hurter 2007:240-262; Theophilopoulos 2016:68-93.

[221] Unreported Western Cape Division decision, Case No. 27428/10 available from Saflii.org.

4.2.1 *AB & ID v MEC for Health and Social Development, Western Cape Provincial Government*[222]

It is beyond the scope of this discussion to engage in a detailed discussion of the arguments on behalf of the parties or the reasoning of the court in coming to a decision. The purpose is, rather, to illustrate some of the inefficiencies of the adversarial system, and, importantly, how a transformative methodology of dispute resolution may have led to a much more constitutionally informed outcome.

The salient facts of the matter are that the parents of a minor child (ID), issued summons against the Western Cape MEC of Health and Social Development for damages based on negligence. The negligence stemmed from a failure to diagnose and treat jaundice timeously, resulting in the child suffering irreversible brain damage that, in turn, manifested in athetoid cerebral palsy.

The summons was issued in December 2010 and the defendant conceded the merits in July 2012, leaving the court to decide the quantum of the claim only. Despite the merits being conceded, the trial on the quantum ran for 45 days. Arguments lasted for four days and the 185-page judgement was handed down on 7 September 2016, some seven years after the incident.

The parties between them employed 37 experts, of whom 19 testified at the hearing. The transcript of oral evidence consists of 4 880 pages and the papers filed, excluding heads of argument, totalled in excess of 3 282 pages. At the time the trial started, the total claim amounted to R38 235 717,00.[223] One would be hard pressed not to realise that this case does not represent a model of efficiency, and that there must be more effective ways to resolve disputes. Below, the researcher includes some specific passages from the case that highlight examples of the wasteful nature of adversarial litigation in this case.

Rodgers J observed in his discussion of the assessment of the expert evidence that incomplete expert reports necessitated the leading of unnecessary evidence, which,

---

[222] Unreported Western Cape Division decision, Case No. 27428/10 available from Saflii.org.

[223] Pages 2–7 par. [1] [10].

in addition to not complying with court rules, wasted court time and impaired the ability of the judge to prepare for and understand the testimony.[224] The judge also expressed his discomfort with the number of opposing expert opinions, which differed significantly in the extent of the damage they purported to support. In some instances, the judge viewed some of the expert opinions as "subconscious pro-client biased".[225] The legal representatives for the parties are responsible for preparing the expert summaries, and failure to do it properly amounts to professional misconduct, including negligence. The researcher holds similar views about the testimony of the experts, which exhibit extreme bias in favour of the party who calls for such expert evidence. It touches on the theme of medical ethical conduct. That aside, however, the most concerning aspect is the monumental waste of time and money.

By way of illustration, the applicable tariff of fees for attorneys on the party and party scale at the time, allowed R53 per page for perusal of documents and R263 per quarter of an hour for attending the court hearing.[226] The judgement mentions 8 777 pages of court documents that the presiding judge had to read. It is safe to assume that at least one attorney for each of the parties also read at least the same, probably more, pages.[227] That means the party and party costs for perusal alone by one set of attorneys amounted to R930 362! The judgment, furthermore, mentions that the case was heard over 45 days. If the court sat for an estimated six hours per day, it would bring the cost for attending the court for one set of attorneys to R568 080.[228] The researcher estimates the cost of counsel for the 45 days conservatively, at R80 000 per day, adding up to a total of R3 600 000 for court attendance only. Excluded here are the professional fees and disbursements for the experts, which would have run into millions of rands, let alone the total attorney and client fees and counsels' fees for other work. There is little doubt that, had this case been aired in the realm of public opinion, it would offend every sense of justice.

---

[224] Page 15 par. [44].

[225] Page 15 par. [45].

[226] GK 31 Government Gazette 2015:18 (38399).

[227] Page 6 paragraphs [5] and [6].

[228] Page 6 paragraph [4].

The facts of this case provide opportunity to elucidate the discussion on transformative constitutional practices and the need for a change in legal culture pertaining to dispute resolution, so as to enhance social justice.

In his judgement in *Port Elizabeth Municipality v Various Occupiers,*[229] Sachs J stated, albeit in the context of an eviction matter:

> *[T]he procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's length combat by intransigent opponents*[230]

This statement accords with what Hoexter refers to as "transformative adjudication". It connotes a commitment to infusing adjudication with the norms of substantive equality, achieving social justice, instilling human rights standards and inculcating rationalisation in public law dispute resolution interventions.[231]

The unfortunate reality is that no amount of money can ever compensate for the trauma suffered by parents who have to deal with raising a mentally handicapped child, particularly knowing that the condition was preventable. There is no dignity in having to sit through a trial for 45 days, rehashing an already traumatic experience. Nor does having to wait almost seven years for a matter to be ready for a trial instil any degree of confidence in the rule of law and its remedies.

---

[229] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 CC.

[230] *Port Elizabeth Municipality v Various Occupiers*:239 [39]. See also *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2017(12) BCLR 1528 (CC) on the possibility to develop the common law once-and-for-all rule in personal injury claims. Although the rule was not developed, due to the lack of substantiation, the possibility to do so if a proper case is made out for it, was left open. This, in the view of the researcher, is indicative of a transformational mindset of the judiciary, despite instances where legal representatives, for whatever reason (presumably driven by economic profit) do not exhibit a concomitant transformational mindset.

[231] Hoexter 2008:286. See also Khampepe 2016:444.

Lawyers are trained to analyse legal problems with the view to finding solutions in existing and established legal rules and reasoning as a matter of course, without regard to alternatives that may facilitate transformation and social justice.[232] A departure from the prevailing legal culture of formalism, towards substantive reasoning *in casu,* may have yielded a completely different outcome for the case under discussion.[233] The merits in the case were conceded and a decision to refer the matter to mediation on the quantum of the claim could have saved the parties time, money and the emotional burden associated with the drawn-out trial.

Mediation costs a fraction of that of litigation, and takes considerably less time to conclude.[234] As a result of negligence claims, the public healthcare sector in South Africa is under enormous financial pressure, and saving time and costs through mediation will have various additional positive effects for healthcare and the justice system.[235] Money saved on litigation signifies the availability of much-needed additional resources for primary healthcare, frees up valuable court time, and reduces the burden on the fiscus from which the judicial infrastructure is funded.[236]

All the factors listed above contribute to the need for legal transformation and enhancing social justice. In addition, an apology during mediation could have restored the strained relationship between the parties and could have opened the possibility of an agreement to treat the patient at the same facility in the future. It is important to consider alternative dispute resolution methods and to use alternative legal reasoning when dealing with disputes. Doing so represents the ideal of constitutional transformation. The responsibility for effecting change, towards a dispute resolution culture, lies not only with government, but also with lawyers, the medical industry, the medical insurance industry and consumers.

In Paragraph 4.2.2, the researcher will expound on existing legislative enactments and judicial interventions that denote a shift towards a transformative constitutionalism and

---

[232] Van der Walt 2006:19.

[233] Hoexter 2008:299.

[234] Meruelo 2008:302–303; Nelson 2017:2

[235] South African Law Reform Commission 2017; Mashego 2019.

[236] Nelson 2017:2.

that focusses specifically on mediation as a means to achieve it. Education as a means to change the legal culture of the legal profession and the consumer will receive specific consideration.

4.2.2 Legal culture

The consensus among commentators is that legal culture informs the approach lawyers take to transformative constitutionalism.[237] As indicated in Paragraph 4.2.1, formalistic approaches to legal reasoning hinder the transformation that the Constitution enjoins all legal actors to engage in. Both the legislature and the judiciary have, through statutory interventions and jurisprudence, contributed to the progressive accomplishment of transformation – this denotes an initial change in legal culture. What remains is changing the way lawyers approach dispute resolution, especially as this would inform the approach they take when advising their clients. The Legal Aid Board of South Africa, often the first port of call for legal assistance by many poor members of the public, ought to be particularly educated, through sensitisation drives, to change the legal culture of the legal profession.

Khampepe refers to “meaningful participation” by the judiciary, and refers to the judiciary’s purposive engagement with disputes, with the aim of encouraging solutions that enhance transformation, and to stress that the court is not always involved in making authoritative decisions.[238] She illustrates how the process of meaningful participation has developed in constitutional jurisprudence by referring to decisions related to housing, the legislative process, and education.[239] The common thread of judgements such as this is that the court encourages parties to engage in processes such as negotiation and mediation to facilitate mutually agreeable solutions. Justice Khampepe warns that all involved must robustly endeavour to deviate from a culture

[237] Davis & Klare 2010:406; Heyns 2014:86; Van der Walt 2006:17.

[238] Khampepe 2016:445. The need, in large public interest cases, for litigation is often informed by the need for an authoritative court decision as part of judicial function, i.e. to set legal precedent. This need is, however, often absent in private disputes that concern the parties to the dispute only.

[239] See Kampepe 2016:441–453 for a comprehensive discussion.

of passivity, to a culture of active participation that can achieve mutually acceptable and lasting solutions.[240]

In the context of mediation, it is noteworthy to record that, in South Africa; around 50 statutes make provision for mediation as a dispute resolution mechanism in some or other form.[241] A comprehensive discourse of all the statutory provisions is beyond the scope of this thesis and a few examples by way of illustration will suffice. These examples signify that the legislative arm of government, as a form of expression of the will of the people, has already shifted from a formal to an accommodative regime for addressing disputes in various contexts. It also signifies the existence of the required political will, through the executive arm of government, to break an embedded culture of formal dispute resolution. The judiciary has also embraced this change.[242] To reinforce the broad research statement, it is important to record these examples here.

- The Children's Act provides that conciliatory methods of dispute resolution should be followed in matters concerning children generally.[243]
- Consumers may refer disputes with suppliers to mediation.[244]
- Chapter 2 of the rules governing the conduct of matters in the magistrates courts contain detailed provisions regarding court-annexed mediation in the lower courts.[245]
- Uniform Rule 41A requires parties to litigation in the high court to indicate at the start of exchanging pleadings if they consent to mediating their dispute.[246]

These transformative practices that have been adopted by the judiciary and legislature attests to the need in South Africa to proceed with a progressive engagement with

---

[240] Khampepe 2016:253.

[241] See Brand *et al.* 2012:92–99 for a comprehensive list.

[242] See, for example, *MB v NB* 2010 (3) SA 220 (GSJ); *FS v JJ & Another* 2011(3) SA 126 (SCA); *PE Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

[243] *Children's Act* 38/2008:sec. (4)(a).

[244] *Consumer Protection Act* 68/2008:sec. 70(1)(c).

[245] Government Gazette 2014:183(37448).

[246] Government Gazette 2020:107(43000).

constitutional values and norms by including the use of alternative dispute resolution methods.

Government and the judiciary alone will not, however, be able to entrench mediation in the civil dispute resolution "culture". It is, therefore, critically important for promoting the process of transformation that legal practitioners embrace, rather than resist, the use of alternative dispute resolution methods in accordance with the foundational work done by the judiciary and the legislature.

Some commentators opine that transforming legal education will contribute to attaining this objective.[247] The late Constitutional Court judge Justice Langa held the view that teaching the law involves more than the conventional transfer of knowledge; instead, judicious applications of legal principles can lead to logical deductions.

Although critical scrutiny of legal tenets is an indispensable component of teaching and practicing law, it does not always promote a mindset that is favourable to accomplishing transformative constitutionalism.[248] According to Langa J, incorporating human rights and constitutional law courses in the law graduate curriculum is insufficient. Law graduates must possess the ability to critically engage with the Constitution and be willing to apply its norms in their practices.[249]

According to Quinot, the prevailing formalistic legal culture establishes how the law is taught, and a shift in teaching methodology is required to inculcate transformative objectives.[250] He suggests that teaching practices should encourage students to perceive the law not only in relation to what the legal position is, but could be. This approach would deviate from a culture that propagates only singular solutions to legal problems, to a culture that encourages finding various ways of resolving issues, which infuses constitutional precepts into teaching.[251]

---

[247] Fourie 2016:6–8; Langa 2006:355–356; Quinot 2012:411.

[248] Langa 2006:356; Fourie 2016:7.

[249] Langa 2006:356; Fourie 2016:8.

[250] Quinot 2012:416.

[251] Quinot 2012:418.

Fourie advocates for “preventative lawyering” that emphasises a culture of future-oriented practices that are aimed at providing for and averting future disputes. Incorporating such practices through, for example, client role play and moot court preparation, instils in students an approach to legal practice that may produce social change and transformed adjudication, as enjoined by the Constitution.[252] Fourie considers the introduction of mediation as an alternative to adversarial practices as part of the law curriculum, as a means to cultivate an ethos in students to search for methods to resolve disputes in order to reduce the negative effects of litigation.[253]

Law faculties should, therefore, include core modules on alternative dispute resolution in their curricula and law teachers should constantly remind students of the potential and merits of mediation and other alternative dispute resolution methods. The effect would be to create a culture among law students to advise future clients to consider alternative dispute resolution as a matter of course, based on comprehensive knowledge of the subject.

In 2019, Legal Education and Development, the education arm of the Law Society of South Africa, introduced an alternative dispute resolution module in the curriculum of the practical vocational training courses for candidate attorneys.[254] The effect of such practical training would be much enhanced if it were underpinned with a substantive course during undergraduate studies of all law students.[255] In the context of medical negligence claims, the decision of the preferred dispute resolution method, more often than not, is based on legal advice. It follows that lawyers advising their clients have to be properly educated about mediation.

Lawyers are ethically bound to act in the best interest of their clients in performing their duties. An essential duty of any legal practitioner is advising clients on the most appropriate manner of solving disputes. The decision involves considering the facts of the particular case and then weighing up the advantages and disadvantages of the

---

[252] Fourie 2016:5.

[253] Fourie 2016:17.

[254] The researcher knows this from personal experience, from serving as the course director for the Bloemfontein modules.

[255] Fourie 2016:17–18.

alternatives.[256] Where the facts lean towards favouring alternative dispute resolution, lawyers are duty bound to advise accordingly, even where it results in the matter being removed from the control of the particular legal representative. The choice remains that of the client.[257] Based on the discussion of the facts in Paragraph 4.2.1, the obvious and ethical choice, after an objective analysis of the matter, should have been a referral to mediation. The advantages for both the parties are clear, irrespective of the possibility of advancing the broader objectives of social justice through transformative constitutionalism.

Lastly, on the question of changing a legal culture from adversarial to more facilitative, the following observations are made. These observations draw mainly on the Australian experience of institutionalising mediation:

a) It must be accepted that the further institutionalisation of mediation in South Africa will receive its impetus from the legal profession. The legal profession in Australia, after some initial resistance, accepted mediation as part of the professional services they provide to clients. Barristers and solicitors elected to become trained mediators.[258]
b) It has been shown by the discussion in this thesis that the various legislative interventions fostering mediation in South Africa, together with judicial acknowledgement and encouragement of mediation in various reported judgments referred to, have laid the foundation for the full-scale reception of mediation in South Africa.
c) The Australian experience of mediation demonstrates that the most powerful driver for changing the adversarial legal culture to a facilitative legal culture, lies in the institutionalisation of mediation through professional bodies, such as the Legal Practice Council of South Africa.
d) Provision of education for mediators, their accreditation, an ethical framework for mediators, and their professional liability should be undertaken by the legal profession led by the Legal Practice Council as a matter of urgency.

---

[256] Marnewick 2007:39.

[257] Marnewick 2007:39.

[258] Noone & Ojelabi 2017:528.

It is submitted that, once mediation is recognised in South Africa as a professional qualification alongside the qualification of a legal practitioner, the slow change of the adversarial legal culture can be hastened. The situation in Australia serves as an appropriate example of how the regulatory body/ies provide impetus for the use of mediation. Professional indemnity insurers consider mediation to be part of legal services and the lawyer mediators enjoy protection for the mediation work they perform. The professional bodies for legal practitioners, furthermore, keep databases of their members who also act as mediators, for easy reference by the public.[259] The ethical code of conduct for solicitors in Australia applies equally, whether the practitioner acts as mediator or litigates a matter in court.[260]

Having dealt with legal culture, the discussion will move on to access to justice through social justice, with a specific focus on the potential of mediation to realise social justice, in medical negligence claims in particular.

4.3 ACCESS TO JUSTICE

This research departs from the premise that it is necessary to inquire whether mediation, as an alternative dispute resolution process, has the potential to extend access to justice in the specific context of civil claims for medical negligence/malpractice.

There is neither dignity nor equal enjoyment of rights and freedoms or equality before the law where the court system that section 34 guarantees is beyond the financial reach of most South Africans. The fair adjudication of a dispute (because of the intricacy of the civil process, as set out before) invariably requires legal representation. Such representation is exorbitantly expensive, and South Africa's adversarial trial system is complicated, technical and time-consuming. The consequence of not being able to access courts has many negative consequences: it leads to a denial of the ability to protect individual dignity, which, in turn, leads to a loss of confidence in the rule of law, democracy and the values espoused in the Constitution. It makes sense

[259] Noone & Ojelabi 2017:528.

[260] Clause 3.1 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules, 2015.

that a fledgling democracy, like that of South Africa, can ill afford a lack of confidence and trust in its legal system.[261]

Access to justice has a broader meaning than mere access to courts, or resolving a dispute. It also involves the fairness of the process, the satisfaction of having been listened to, and a satisfactory outcome, even if it only is a sincere apology. The formal adjudication process does not always cater for these outcomes.[262] A litigant who embarks upon litigation may, at the end of their case, or at the end of the defendant's case, receive a court order referred to as "absolution from the instance".[263] In essence, when this order is given at the end of the trial, it means that the court is unable to deliver a judgment either in favour of the plaintiff or in favour of the defendant. Practically, this means that the time and expense incurred in civil litigation was wasted. The plaintiff receives no redress for their initial complaint against the defendant.

Supreme Court of Appeal Judge Cameron (at the time) remarked in his judgement in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*, that "(T)he law is a scarce resource in South Africa. This case shows that justice is even harder to come by".[264] This comment emanated from the court's affirmation that a right to bring a class action is a constitutional right in South Africa. The applicants' right to bring the class action was supported further by their individual lack of access to legal representation and the fact that their individual, relatively small claims, were unsuitable for individual and separate enforcement.[265] Irrespective of the context of the quote, it expresses the sentiments (mores) of the South African public. It provides a sensible point of departure for a discussion on access to justice. The intention is not to engage in a philosophical or theoretical examination of the meaning of the concept of "justice" or "access" to it. It would, however, be impossible to advocate for measures to improve

---

[261] Heywood & Hassim 2008:279.

[262] Hurter 2011:414.

[263] See Uniform Rule 39(6) for the High Court and Rule 29(7)(b) for the magistrates court in respect of the application at the close of the case for the plaintiff. See also section 48 (c) of the *Magistrates' Court Act* for provision related to competent judgements in the magistrates court.

[264] 2001 (4) SA 1184 (SCA):par. 1.

[265] *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*:par. 14.

the realisation of access to justice without brief reference to, and understanding of, the theories that underpin the notion of access to justice.

4.3.1 Access to justice and democracy

According to Cappelletti, as a theory, the notion of access to justice emanates from a reaction to the formalistic and dogmatic interpretation of legal norms that ignores the roles of people, institutions and processes.[266] Therefore, the rights, responsibilities and protections described in legal norms must include the judicious consideration of the citizenry, and governing processes by the bodies that will administer these principles, in order for them to have effect.[267] Realisable or actual, and not merely theoretical "access", necessitates reform of the entire legal landscape, including substantive and procedural law.[268] The text of legal formulations generally, and the norms and values prescribed in the Constitution, especially those in the Bill of Rights, represent the "ideal". Public acceptance validates these legal formulations. Legal norms only become "realistic" when the public generally adheres to them, and voluntarily allows a democratic government to enforce them. Put differently, the theory and function of "the law" must be practically realisable and enforceable. Without that, the law and its systems have no value.[269] The premise upon which the rule of law depends is the belief in both the law itself and the system that establishes and enforces it.[270] It follows that a democracy grounded in a normative constitution cannot function without effective mechanisms to enforce legal rights. It is the duty of the democratically elected government to provide access to these mechanisms.[271] In essence, access to justice aims to bring the law closer to the consumer as an indispensable part of a functioning democracy.[272]

---

[266] Cappelletti 1992:22–26.

[267] Cappelletti 1992:22–26.

[268] Cappelletti 1992:28.

[269] Malan 2015:1226. Brickhill & Van Leeve 2015:152.

[270] Heywood & Hassim 2008:266; Malan 2015:1220; Madondo 2019:356.

[271] O,Regan 2008:10; Hurter 2011:408; Malan 2015:1026; Madondo 2019:356.

[272] Cappelletti 1992:39; Hurter 2011:408.

All the aforesaid means that access to justice is an indispensable cog in the wheel of any democracy and is based on the premise that the better access to justice for remedying societal wrongs is, the more true democracy is achieved. It is in this context that this study deals with alternative dispute resolution mechanisms.

4.3.2 Alternative dispute resolution mechanisms as a means to achieve access to justice

Failing a precise definition or all-encompassing description of access to justice, it is justified to require that all dispute resolution mechanisms are fair, open and dignified.[273] Litigation is not always the best vehicle to achieve justice for the parties; therefore, alternative methods of dispute resolution may offer more suitable options.[274]

"Justice" means different things to different people, but at the core, it means achieving an outcome as close as possible to an ideal of a mutually acceptable outcome for the opposing parties. The judgements that litigation offers do not necessarily always represent the outcomes the parties envisioned. Apart from procedural and substantive justice, in the sense of relief, opposing parties often yearn for a process in which their views were listened to and considered in an effective and impartial process.[275] Courts sometimes decide civil cases on legal technicalities. Although one party "wins" the case, both parties may feel dissatisfied with the outcome because they never had the opportunity to state their cases.

In medical negligence disputes, the parties may place considerable value on the opportunity to, for example, defend their professional reputation. Mediation offers access to outcomes other than court-based justice because of the informality of the process, which contrasts to the formalistic approach of courts.[276] Mediation does not aim at "winner–loser" outcomes; instead, the process is transformative in nature.[277] During mediation, parties have the opportunity to face and discuss frankly

[273] Hurter 2011:413–414.

[274] Menkel-Meadow 1996:33, Howarth & Carstens 2014:71.

[275] Dugard 2008:216; Hurter 2011:414.

[276] Boulle & Rycroft 1997:53.

[277] Rycroft 2011.

preconceived biases on neutral ground, which has the potential to restore the relationship and to convert conflict into a mutually satisfactory and positive outcome. Therefore, there occurs a reversal or transformation of conflict, which transforms, and not exacerbates, existing tension between the parties. Justice is not attained if the formal legal system cannot provide appropriate outcomes for all involved.[278]

There can be little doubt that financial constraints currently hamper proper access to justice in South Africa. Due to its nature and complexity, civil litigation, in most cases, requires that the parties employ legal representatives.[279] Legal representation is beyond the means of the majority of South Africans; for those with money, more money means better legal representation, of which the unfortunate consequence is a denial of access to equal justice based on socio-economic power imbalances.[280] According to the constitutional mandate, Legal Aid South Africa (LASA) is primarily responsible to provide legal representation to members of the public who cannot otherwise afford it.[281] To qualify for representation, individuals must comply with the means test of LASA, which is often exclusionary.[282] It is impossible to fathom how anyone earning even twice the monthly income required to qualify for legal aid would be able to finance civil litigation for a prolonged period whilst maintaining even a modest household. The reality is, therefore, inescapable that the ideal of access to justice is reduced to a mere fiction.

The vast majority of legal representation granted by LASA, in any event, pertains to criminal matters. In their 2018/2019 annual report, LASA indicated that a mere 13% (around 53 000 cases) of the total finalised matters and new matters taken on, represented civil matters.[283] LASA, and any other initiatives to provide legal aid in civil

---

[278] Hurter 2011:414.

[279] Dugard 2008:220.

[280] Langa 2006:355; Dugard 2008:216.

[281] *Legal Aid Act* 39/2014; *Preamble Constitution of the Republic of South Africa,* 1996: sec. 34. See also McQuoid-Mason 2000:115–142 for a general discussion of the delivery of legal aid in South Africa.

[282] At the time of writing, that meant the following:(a) a monthly income of no more than R7 400 per month after deduction of tax for individuals, or a total income of no more than R8 000 per month for a household; (b) movable assets to the value of no more than R128 000; or (c) fixed property and movable assets with a combined value of no more than R640 000. See Legal-aid.co.za/wp-content/uploads/2019/09/Legal-Aid-SA-Integrated-Annual-Report-2018-2019-WEB.pdf (accessed on 27 July 2020).

[283] Legal-aid.co.za/wp-content/uploads/2019/09/Legal-Aid-SA-Integrated-Annual-Report-2018-2019-WEB.pdf (accessed on 27 July 2020).

cases, is constrained by their capacity. These institutions have limited financial and human resources and can only provide assistance to the extent their budgets and staff capacities allow.

The total amount allocated to the Department of Justice and Constitutional Development from the national budget for the 2020/2021 financial year was R22.4 billion (2% of the total national budget). LASA received approximately R2 billion (9.3%) of the total budget of the department.[284] From the fact that legal aid for civil matters represents only 13% of the total number of cases taken on by LASA, it follows that a proportional amount will be allocated to civil cases. This substantiates the conclusion that many South Africans are left without recourse as far as assistance for civil litigation is concerned. It also warrants considering an increase of the amount allocated for dispute resolution through alternative dispute resolution methods by government from the central budget.

4.3.3 Social justice through mediation

The increased number of medical negligence claims instituted against government institutions hamper access to justice further, in the sense that access to justice also involves achieving social justice through legal recourse. Social injustices, in the context of a lack of access to primary healthcare for the poor, cannot be rectified by litigation alone. It requires systemic changes to address a host of root causes of the problem. [285] An example of a root cause that necessitates systemic change is the small tax base in South Africa. The personal income tax source of approximately three million taxpayers contributed 97% of the total income tax collected in the 2019 tax year. This unsustainably small tax base funds, in large part, the country's infrastructure, including the healthcare of the whole country.[286] Unfortunately, the office of the Receiver of Revenue, too, is a government agency infested by the rot of state capture. The statistics quoted above bears out the reality that any progress with

[284] Vulekamali.gov.za/2020-21/national/departments/justice-and-constitutional-development/(accessed on 3 September 2020).

[285] Hurter 2011:414.

[286] Kruger 2020.

basic medical care and access to justice can only be achieved by a rejuvenated fiscus that is employed to the benefit of all South Africans.

A root cause of problems related to medical negligence is that already limited resources that are allocated to provide primary healthcare, are used to fund litigation.[287] In Gauteng, for example, the Department of Health recently warned personnel that it would recover some of the money paid for medical negligence claims from those found to be responsible for the negligence.[288] Effective and responsible use of resources involves, amongst other matters, appointing competent healthcare personnel and providing them with the necessary means to perform their duties. It is an indictment of the Department of Health if it fails to adhere to the mandate to provide effective primary healthcare services. It is a vicious circle: Money spent on litigation could have been used to provide proper primary healthcare, which may have prevented the cause of the injury to a patient in the first place.

Uniform Rule 41 provides a mechanism for the legal representatives of government healthcare institutions to use mediation. When instructing their legal representatives, public healthcare providers should, as a matter of course, state that mediation must be considered, and where legal representatives advise against the use of mediation, they must provide suitable reasons for doing so.

From the perspective of the potential claimant, attaining justice may seem to face insurmountable obstacles. Private legal practitioners only take matters on a contingency basis if they consider it meritorious on the facts, and potential payment based on the quantum makes the claim worth the risk of funding the case. Therefore, the claimant is deprived of the opportunity to obtain, firstly, financial relief, and secondly, the physiological peace of mind associated with compensation for economic loss, and a day in court. Mediation does not require having legal counsel present. If parties choose to mediate medical negligence claims, it is still likely that the defendant, usually a doctor or hospital, will employ representation, because these matters are often perceived to be complex and they can afford to do so. The claimant (plaintiff)

[287] Howarth & Carstens 2014:69.

[288] Broughton 2019.

may, however, not be able to afford representation. It would make perfect sense to provide legal aid for cases where parties choose to mediate medical negligence claims. It would enhance access to justice by levelling the playing field regarding power imbalances related to legal representation. It would also increase the capacity of the courts, because matters that are resolved without having to resort to litigation assist to unclog congested court rolls. Effective dispute resolution through mediation also frees up time for legal aid lawyers to attend to matters that necessitate going to court.

The constitutional imperative to enhance access to justice implores the state to provide mechanisms to resolve disputes in ways other than court-based adjudication. Mediation is an alternative option.[289]

4.4 CONCLUSION

The focus of this study is to argue that mediation offers a viable alternative to litigation in medical negligence claims, specifically. It has been indicated that medical negligence claims, by their nature, are often complicated and very costly to pursue.

Mediation has the potential to enable the participants to reduce the costs, both financially and psychologically, significantly. To realise this potential necessitates that parties not only actively engage in the process of mediation, but that a culture change, away from viewing litigation as the only way to resolve these types of disputes, occurs.

Achieving this goal will require government, the judiciary and lawyers to adjust their approaches to dispute resolution. It requires a move away from adversarial means to less confrontational methods, such as mediation. Government has, to a certain extent, contributed by enacting legislation and amendments to the rules that govern civil procedure in the courts. The judiciary, through decisions such as *MB v NB and PE Municipality v Various Occupiers,* has also indicated its support for mediation as an appropriate method for dispute resolution.

Civil justice reforms, such as those mentioned above, signifies a step in the right direction and conforms with the mandate to realise constitutional rights. It fosters

---

[289] Heywood & Hassim 2008:266.

access to justice, in keeping with the normative nature of the Constitution. Government alone will, however, not be able to entrench mediation in the civil dispute resolution "culture". Disputants must choose to mediate their disputes. That choice is largely influenced by the legal advice of lawyers, and necessitates a mind-shift towards transformative practices and legal education.

Law faculties should include core modules on alternative dispute resolution in their curricula. Law teachers should constantly remind students about the potential and merits of mediation and other alternative dispute resolution methods. The effect would be to create a culture amongst law students to advise future clients to consider alternative dispute resolution as a matter of course, based on the students' comprehensive knowledge of the subject when they enter practice.

Legal practitioners have a professional duty to advise clients of appropriate dispute resolution mechanisms, including mediation. The ideal would be that such advice stems not from the threat of potential professional liability, but because they believe it is the best choice. That belief must be borne from mindfulness of the transformative goals of the Constitution and the concomitant change from a formalistic culture to a caring, humanistic approach. The duty to ensure access to justice and equitable redress resorts primarily with government. In a constitutional democracy based on the rule of law, it means that the functionaries entrusted with the enforcement and administration of the justice system must carry out this responsibility in a manner that ensures that rights are practically realised and protected, and that confidence in the rule of law is maintained. In addition, all legal practitioners should augment the efforts of government by actively participating in the process of transformation and attaining justice.

CHAPTER 5: THE CHANGED ENVIRONMENT RELATED TO MEDICAL NEGLIGENCE CLAIMS IN SOUTH AFRICA

5.1 INTRODUCTION

In Chapter 3, the researcher investigated the efficacy of conventional civil dispute resolution through adversarial litigation in the courts. In Chapter 4 transformative constitutionalism and access to justice received attention. The conclusion was that litigation is inefficient and, furthermore, fails to promote fundamental human rights, both generally and in the medical negligence context. It is submitted that poor governance and administration is largely to blame for this unacceptable state of affairs, thus necessitating reform through a departure from litigation and a move towards alternative methods of resolving medical negligence disputes.[290] In addition to the prevailing formalistic legal culture, which leads to poor governance, it is apparent that, especially legal practitioners face, amongst further constraints, challenges relating to adopting transformative practices, which requires a change of culture.[291]

In light of the increase in medical negligence claims, Chapter 5 will examine whether this reality, in addition to the aspects related to conventional dispute resolution in South Africa and the need for constitutionally informed dispute resolution mechanisms discussed in Chapters 3 and 4 respectively, support arguments in favour of alternative dispute resolution. An exposition of the reasons for the increase in claims will provide the necessary context for understanding the need to develop and enhance alternative ways to resolve disputes related to medical issues. In addition to providing context for the increase in claims, understanding the reasons for the increase in claims will provide valuable insight into the opportunities the mediation process affords for early resolution of disputes. It will be proposed that any solution must arise from the context in which it exists.

The researcher will proceed with a discussion of the reasons for the increase in medical negligence claims. The argument is that the increase in claims validates the

[290] See Paragraph 4.3.3 in Chapter 4.

[291] See Paragraph 4.2.2 in Chapter 4.

need for a change in legal culture, towards the use of alternative dispute resolution mechanisms for medical negligence cases.

5.2 CAUSES OF INCREASE IN NUMBER OF CLAIMS

5.2.1 Introduction

The literature postulates a variety of reasons for the increase in medical negligence claims in South Africa and abroad.[292] In the analysis that follows, the reasons will be categorised into four groups, as follows:

- Communication;
- Professionalism and systemic factors;
- Legal developments; and
- The legal profession.

This demarcation is done for purely practical reasons and it is not a closed list of causes. It will become apparent from the discussion that the causes are often interrelated, and are all contextually relevant to the research theme.

5.2.2 Communication

Communication often causes conflict at the interpersonal level, which can be attributed to either excessive or inadequate communication, or the manner in which information is conveyed.[293] The nexus between the increase in medical negligence claims and communication as a cause rests primarily on a breakdown in communication.[294]

Meruelo, based on studies conducted in the USA, indicates that patients litigate because they value a *full disclosure of the reasons for and the extent of* the culpability of the physician or hospital, to such a degree that patients are willing to risk the cost of litigation.[295] In a survey, 98% of doctors who were interviewed indicated that

---

[292]See, for example, Coetzee & Carstens 2011; Meruelo 2008; Saleh 2019; Pienaar 2016; Pepper & Slabbert 2011; Grauberger *et al.* 2017; Claassen 2016; Björkman *et al.* 2018, and others.

[293] See paragraph 2.5.5.2 in Chapter 2.

[294] Meruelo 2008:289; Claassen 2016:7; Van den Heever 2016:49; Oosthuizen & Carstens 2015:282.

[295] Meruelo 2008:289.

disclosing serious medical errors to patients was important, but only 56% indicated that they would mention that harm occurred, and none indicated that they would be willing to concede that an error caused the harm.[296] In essence, what irks patients, ostensibly to such an extent that they engage in litigation, is being deprived of information about what happened to them, or failing to express genuine interest in their well-being. This results in a deterioration of the essential trust relationship between the two parties.[297] Though divulging information to patients about medical errors is imperative, Orenstein holds the view that combining such a disclosure with an expression of regret for the patient's suffering renders such a disclosure significantly more profound.[298] This illustrates the importance of the manner in which something is said, so that it does not escalate, and prevents conflict. If a party to mediation does express emotion in a manner that evokes a negative reaction in the other party, the mediator should reframe the phrase to indicate that the party is frustrated about the situation, and the utterance did not originate in anger.[299]

Failing to disclose medical errors may, therefore, lead to patients filing suit, as it is considered to be the only option they have to obtain information about the cause of their injury. [300] According to Coetzee and Carstens,

> *Merely obtaining money may not be the only objective of injured patients; the reason for filing suit may be due to the manner in which the practitioner subsequently managed the situation after the occurrence of the adverse event.*[301]

These authors advise medical practitioners to communicate effectively and empathetically with their patients following unfavourable medical outcomes.[302] The researcher proposes that, should the dispute be taken to mediation, the astute mediator would, during a private session with the physician, suggest that an

---

[296] Gallagher *et al.* 2006:1585.

[297] Meruleo 2008:2090; Oosthuizen & Carstens 2015:280.

[298] Orenstein 1999:268.

[299] Boulle & Rycroft 2007:157.

[300] Coetzee & Carstens 2015:282; Van den Heever 2016:49; Oosthuizen & Carstens 2015:280.

[301] Coetzee & Carstens 2015:282.

[302] Oosthuizen & Carstens 2015:280.

expression of empathy is considered. The mediator will only propose an expression of empathy where they are of the view, based on their mediation skills, that such an utterance is honest and would stimulate further discussions.

Physicians have a legal duty in terms of the National Health Act to obtain informed consent from patients before proceeding with a procedure.[303] It is beyond the scope of this discussion to provide a complete explanation of the content of this duty. It will, however, suffice to state that the core of this obligation requires that the medical practitioner communicates all the risks and consequences of a particular procedure to the patient, to enable the patient to make an informed decision on whether to proceed with treatment or not.[304] Failure to obtain informed consent renders the medical practitioner and/or service provider both criminally and civilly liable.[305]

Studies conducted in the USA, Italy and Turkey show that the failure to obtain informed consent is a contributing cause of medical negligence claims.[306] There is evidence that, not only the failure to explain the risks involved in surgery, but also failing to explain alternative treatment options, contribute to the risk of a medical claim.[307]

Tarantino *et al.,* in an analysis of judgements in the civil court of Rome, found that obtaining informed consent in a standardised form and mechanically adding the details of the patient without a proper explanation of the risks associated with a particular procedure increased the probability of the court finding in favour of the plaintiff who raised the issue.[308] In Turkey, similar results emanated from a study of medical negligence claims in procedures related to cosmetic surgery.[309]

It is evident from the analysis that a breakdown in communication may cause an increase in the likelihood of litigation, because medical service providers fear liability

---

[303] *National Health Act* 61/03:sec. 6 and 7.

[304] Claassen 2016:7; Pienaar 2016:9; Oosthuizen & Carstens 2015:280.

[305] Coetzee & Carstens 2011:1290.

[306] Saleh 2019; Grauberger *et al.* 2017:E6; Tarantino *et al.* 2013:8; Balcik & Cakmak 2018:5.

[307] Grauberger *et al.* 2017:E6.

[308] Tarantino *et al.* 2013:9.

[309] Balcik & Cakmak 2018:5.

if they disclose information to patients. Eventually, litigation all but eliminates communication between the parties.

Most doctors are insured against medical negligence and it can be assumed that their insurers, as a ground rule, insist that fault is never admitted. Professional indemnity is routinely associated with risk profile and legal practitioners are not willing to risk having to pay higher insurance premiums. (Therefore, and at the risk of digression, it is, nevertheless, important to stress that the medical and insurance professions/industries [as mentioned previously] are, as much as the legal profession, under a constitutional obligation to transform according to South Africa's constitutional mandate.)

Legal representatives speak on behalf of their clients. Mediation differs fundamentally from litigation in this respect. It offers a platform for constructive communication. The mediation process is conducted on a "without prejudice" basis and is private and confidential. It offers the parties the opportunity to communicate openly and honestly without the fear of reprisal or adverse effects to their rights, which often leads to them addressing the real issues at hand.[310]

It is the duty of the mediator to encourage and facilitate unrestricted deliberations; the mediator must endeavour to resolve miscommunication between the parties. In the event that the subject matter at hand relates to scientific or technical matters, the mediator is in a position to assist the parties in jointly appointing a single expert to provide a neutral explanation, thereby saving time and costs.[311]

5.2.3 Professionalism and systemic factors

A decline in professionalism could contribute to an increase in medical negligence claims. The Health Professions Act (henceforth the Act) governs medical practice in South Africa.[312] Medical practitioners are required to register in terms of the Act, and unregistered medical practice constitutes an offence punishable by a fine,

[310] Claassen 2016:9.

[311] Claassen 2016:9.

[312] *Health Professions Act* 56/74.

imprisonment, or both.[313] The Health Professions Council of South Africa (HPCSA) is the statutory regulatory body established under the Act to, amongst other responsibilities, establish medico-ethical codes of conduct and conduct disciplinary proceedings against medical practitioners accused of acts or omissions that warrant disciplinary action.[314] The codes of conduct do not bind courts, but the defined scopes of practice they contain are key considerations when adjudicating officials consider what establishes medical negligence.[315] For the year 2019/2020, the HPCSA reported receiving 2 059 complaints, 29% (597) relating to negligence.[316] An interesting observation is that the medical negligence claim pay-outs for the 2018/2019 financial year amounted to R1.95 billion, for the state alone. This relates to a quadrupling of these pay-outs over the previous four years.[317]

The question is, furthermore, whether healthcare practitioners in South Africa are acting less professionally, and/or whether a lack of resources is to blame for unprofessional behaviour. State employees are indemnified from personal financial consequences relating to claims that result from their negligent conduct in the scope and course of work.[318] A conclusion that public healthcare professionals act recklessly because of the indemnity, and that indemnity is, thus, a substantial contributing factor to increased medical negligence claims is, in the view of the researcher, unfounded. Although an assumption that recklessness on the part of public healthcare providers could contribute to an in increase in claims cannot be excluded in totality, it is submitted by the researcher that the contribution would, at best, be minor. To surmise otherwise is a serious indictment on the integrity of public healthcare professionals.[319] Academic opinion, nevertheless, seems to hold that *systemic failures in the healthcare*

---

[313] *Health Professions Act*, sec. 17, 33 and 34.

[314] *Health Professions Act*, sec. 2, 3 and 10.

[315] Coetzee & Carstens 2011:1267.

[316] Health Professions Council of South Africa 2020.

[317] MedicalBrief 2020.

[318] The government is liable for payment of compensation.

[319] See the *State Liability Act* 20/1957 and the *Public Finance Management Act* 1/99 read with regulation 12.2.1 of the Treasury Regulations.

system[320] contribute considerably to increased claims in the public sector, in particular.[321]

Coetzee and Carstens consider the skills shortage in the health sector to be a major contributing factor to increased claims, because medical practitioners in the public healthcare sector seek greener pastures in private practice early on in their careers. Due to staff shortages, personnel in the public sector are overworked, and inexperienced staff often have to work unsupervised, leading to an increased likelihood of medical errors.[322]

The majority of South Africans rely on public healthcare services. Poor management and a lack of accountability results in a compromised healthcare system and fuels public law concerns over a lack of service delivery, and results in a greater number of civil law suits.[323]

Private healthcare practice has also seen an increase in both the value and number of claims.[324] Whether the rise is attributable to a decline in professionalism seems to be arguable. The HPCSA has raised concerns about the increase in the number of complaints that they receive that, in their view, was caused by allegedly unprofessional conduct. In contrast, private medical practitioners argue that the increase of complaints is due to other factors, such as an increased awareness of consumer rights among patients. They also argue that the legal profession exploits the increased consumer awareness, and advertise their services in order to capitalise on it.[325] Oosthuizen and Carstens point out that mistakes do occur, and the focus should be on implementing strategies to avoid preventable mistakes.[326] The consequence of increased claims in the private sector is an increase in the cost of private healthcare

---

[320] Author's italics.

[321] Oosthuizen & Carstens 2015:275; Coetzee & Carstens 2011:1299, Pienaar 2016:6; Claassen 2016:7, Van den Heever 2016:49.

[322] Coetzee & Carstens 2011:1299; Claassen 2016:7.

[323] Carstens & Pearmain 2007:283; Coetzee & Carstens 2011:1268. Oosthuizen & Carstens 2015:275. See also the discussion in Chapter 3.

[324] Malherbe 2013:83; Oosthuizen & Carstens 2015:276; Coetzee & Carstens 2011:1297.

[325] Malherbe 2013:83; Oosthuizen & Carstens 2015:282.

[326] Oosthuizen & Carstens 2015:282.

for the consumer, and leads to increased strain, both personally and professionally, on medical practitioners.[327]

In the USA, misdiagnosis, or delayed diagnosis, constitutes the “number one reason” for medical negligence claims in an outpatient setting, which is indicative of failure by practitioners to exercise the required standard of care.[328] Empirical research in Italy confirms an increase in the number of medical insurance claims during 2004–2010.[329] The authors indicate that managerial interventions aimed at increasing economic efficiency in hospitals, on its own, do not decrease claims. They suggest that such interventions should be customised according to the needs in a particular discipline of medicine, such as in obstetrics.

Channelling resources to departments where the need is the highest could reduce the risk of medical errors.[330] This, it is proposed, is a sensible approach in the South African context, where corruption and misappropriation of funds in public healthcare is rife.[331] The suggestion is that heads of department control the procurement of resources required from the funds allocated from a central budget. This could, to the extent that it is possible in the context, prevent misappropriation of funds through, for example, accepting inflated tenders by possibly corrupt administration officials.

Björkman *et al.* found that organisational aspects, such as excessive workload, pressure to achieve institutional targets, and unconducive work environments in Sweden, led to increased claims.[332]

Mediation is not suitable in situations where systemic errors are of such a nature that it affects fundamental rights of patients to the degree that it is in the public interest for a court to set legal precedent to remedy a position.[333] Improvement can be facilitated by a sensitisation programme for the public, to inform them that incidents of unethical

---

[327] Oosthuizen & Carstens 2015:278–279.

[328] Saleh 2019:1.

[329] Buzzacchi *et al.* 2016:158.

[330] Buzzacchi *et al.* 2016:158.

[331] Ncala 2020:12.

[332] Björkman *et al.* 2018:11-12.

[333] Boulle & Rycroft 1997:75.

or unprofessional medical conduct should be reported to the HPCSA, which is tasked to deal with such complaints.

5.2.4 Legal developments: Constitutional and rights awareness

Another reason advanced for the increase in medical negligence claims is that the dictates of the Constitution advances the enactment of patient-centred legislation. Legislative enactments aimed at the progressive realisation of fundamental human rights, as set out in the Bill of Rights, affect the healthcare sector. A comprehensive exposition of all legal developments that may have contributed to a rise in medical negligence claims in the recent past is beyond the bounds of the current discussion. Instead, the aim is to provide a succinct overview of certain core legal developments. The constitutional imperative to bring to fruition these rights has led to greater public awareness of their rights, including the enforcement of civil liberties, which affect the healthcare sector directly.

5.2.4.1 The Constitution

The Constitution sets out the right to bodily integrity, dignity, privacy and access to healthcare.[334] The overarching reach of the Constitution is undeniable. So, for example, Pienaar states that failure to obtain informed consent may be interpreted as a transgression of the right to bodily integrity. The basis of the argument is that a decision to proceed with treatment without the consent of a patient, where the patient is able to consent, divests the patient of control over their body.[335]

Chapter 2 of the National Health Act sets out the rights and duties of patients, and provides detail and effect to general fundamental rights referred to above.[336] Sections 6 to 8 of this Act, in essence, codify the common law principle of informed consent; where a medical practitioner fails to adhere to these obligations, it places a patient in a position to enforce these rights through litigation.[337] Dereliction of the duty to obtain

---

[334] *Constitution of the Republic of South Africa,* 1996: sec. 12, 10, 14, and 27 respectively.

[335] Pienaar 2016:8; Van der Westhuizen 2015:66.

[336] *National Health Act* 61/03, sec. 5–20.

[337] *National Health Act*.

informed consent constitutes breach of contract, because the patient was not made fully aware of the risk of possible injury when agreeing to the treatment.[338]

5.2.4.2 The Children's Act

The Children's Act echoes the constitutional principle that the best interest of the child is paramount in all matters that concern the child.[339] The Act, furthermore, grants children the right to participate in an appropriate way in decisions that concern them and prescribe that their views must be considered.[340]

Healthcare providers are obliged to obtain the consent of a child for medical treatment and surgical operations if the child is over the age of 12 years, subject to certain provisos.[341] If the parents or guardian of a child or the child themself unreasonably refuses to consent to treatment, the minister of Health may consent. The high court or a children's court may consent if no other person capable of consenting does so.[342] The National Health Act, furthermore, requires suitable consideration of the level of literacy of the patient when making information available to a patient.[343] The proviso requires that a consenting child must be sufficiently mature and able to understand the risks and implications of the procedure. It is the duty of the healthcare professional to ascertain whether this is the case if a child consents to treatment. This may prove to be challenging at the time consent is required.[344] Should the veracity of the decision by the child to accept the consent be challenged during subsequent litigation, the healthcare provider must present evidence to contradict the statement of the plaintiff – this evidence would probably be provided by an expert. When a dispute related to the accuracy of the decision of the medical professional to accept consent arises in litigation, it should be mediated at the outset in terms of the procedure provided for by

---

[338] See Paragraph 3.2.3.4 on a valid cause of action in Chapter 3.

[339] *Children's Act* 38/2005, sec. 9; Constitution of the Republic of South Africa, 1996: sec. 28(2).

[340] *Children's Ac*t, sec. 10.

[341] *Children's Act*, sec. 129 (2) and (3); Van der Westhuizen 2015:66.

[342] *Children's Act*, sec. 129 (7), (8) and (10).

[343] *National Health Act*, sec. 6(2).

[344] Pienaar 2016:11.

Uniform Rule 41 A, as discussed in paragraph 3.2.3.7 of Chapter 3.[345] A social worker or advocate attached to the Office of the Family Advocate might be the ideal mediator. The researcher proposes that hospitals would be wise to have mediators on call to deal with conflict of this kind, as early intervention could prevent unnecessary litigation.

5.2.4.3 The Consumer Protection Act

The Consumer Protection Act (CPA) aims to protect the rights of consumers and, in the context of this study, patients. The provisions of the CPA comprehensively regulate all aspects of the consumer/supplier relationship.[346] The CPA defines the terms "service", "supplier", "supply" and "consumer" very broadly, so as to include most interactions between a patient and a medical service provider.[347] Of particular relevance to the discussion at hand is the strict liability for damage caused by goods.[348] The effect of these provisions is that a patient can sue anyone in the supply chain in the case of harm being caused, irrespective of whether the harm was caused by their negligence.[349] The plaintiff needs only prove a causal link between the defective goods, for example, medicine or a pacemaker, the harm suffered, and the quantum of the claim, and does not need to prove fault in the form of negligence, as would normally be required in delict.

The CPA requires that any clause in an agreement, for example , consent to medical treatment, that stipulates a patient may be at serious risk of injury or death, must be pointed out explicitly, and written assent from the patient must be obtained.[350]

Additionally, the CPA states that all information supplied to a patient must be in plain and understandable language.[351] It follows that patients and healthcare providers, in

---

[345] De Jong 2010:517; Van der Westhuizen 2015:74.

[346] *Consumer Protection Act* 68/08.

[347] *Consumer Protection Act* 68/08, sec 1.

[348] *Consumer Protection Act* 68/08, sec. 54(1)(c) read with sec. 55(2) and sec. 61.

[349] *Consumer Protection Act* 68/08, sec. 61.

[350] *Consumer Protection Act* 68/08, sec. 49.

[351] *Consumer Protection Act* 68/08, sec. 22.

this context, face challenges analogous to the ones described in relation to the National Health Act and Children's Act.

Sections 69(3)(c)(iii) and 70(1)(c) of the CPA provide that a consumer may seek to enforce any right referred to in the Act, or attempt to resolve a dispute with a supplier through the use of alternative dispute resolution, including mediation.[352] It is submitted that mediation offers effective solutions in these circumstances. Hospitals may be well advised to include a clause in admission documents to the effect that mediation would be the dispute resolution method of choice in these and, in fact, in all disputes between hospitals and patients.

5.2.5 The legal profession

The conduct of members of the legal profession is also among the reasons for an increase in medical negligence claims.[353] Lawyers are accused of advertising and targeting patients who have suffered personal injury, possibly due to amendments to the Road Accident Fund Act, which makes medical negligence claims a more lucrative prospect.[354]

Pienaar asserts that some members of the public may perceive lawyers as being devious for soliciting personal injury claim work due to the decrease in third party compensation work. A different interpretation may be that lawyers are only keeping abreast with legal developments to provide clients with expert legal representation.[355] Members of the legal profession may advertise their services as long as it does not amount to unlawful solicitation, which is referred to as "touting".[356] The use of so-called "ambulance chasers", which are employed by members of the legal profession to solicit work, would be considered to be touting.

---

[352] *Consumer Protection Act* 68/08.

[353] See, for example, Oosthuizen & Carstens 2015:282–283, Pienaar 2016:6; Van den Heever 2016:49; Claassen 2016:7; Pepper & Slabbert 2011:30.

[354] Malherbe 2013:83; Pepper & Slabbert 2011:30; Van den Heever 2016:49. See also Gounden 2007, who reports on fraudulent conduct of in respect of Road Accident Fund claims by, amongst others, attorneys and doctors.

[355] Pienaar 2016:7.

[356] See, generally, the Code of Conduct for Legal Practitioners published in GG 42377 of 29 March 2019.

Both Claassen and Van den Heever[357] advise that, in instances where it is apparent that lawyers, without being asked, solicit work from patients, hospitals should enforce their rights to restrict admission. Legal practitioners are bound by the ethical rules of the profession. Members of the public who are of the opinion that a legal practitioner acted unethically may address a complaint against the legal practitioner to the Legal Practice Council. It is suggested that litigation on a "no win no fee" basis, in terms of the Contingency Fees Act,[358] may cause some lawyers to come into conflict with their ethical responsibilities, such as overinflating claims despite the fact that taking matters on a contingency basis affords justice that is more accessible to the indigent.[359] Practitioners engaging in such practices face the risk of an adverse cost order, as well as possible disciplinary action should a trial court hold the view that they acted unethically in representing their client. Noteworthy is the opinion that criticism should conceivably be levelled at the civil dispute resolution system, rather than the practitioners in that system.[360] Encouraging legal practitioners to acquaint themselves with the advantages of mediation, and advising their clients accordingly is supported by Nelson, who advocates for the use of mediation instead of litigation in medical claims.[361]

5.3 CONCLUSION

This chapter explored the main reasons forwarded in the literature for the increase in medical negligence claims. A lack of communication is a cause of increased claims, which corresponds with the finding that communication may result in conflict. The process of adversarial litigation exacerbates the problem, because it discourages dialogue between the parties. Systemic reasons also contribute to an increase in

---

[357] Claassen 2016:7; Van den Heever 2016:49.

[358] *Contingency Fees Act* 66/97.

[359] Oosthuizen & Carstens 2015:283; Van den Heever 2016:49. See also *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2017(12) BCLR 1528 (CC) referred to in Paragraph 3.2.3.4 in Chapter 3. Should the court, in the future, develop the common law to the effect that future medical costs may be covered by delivery of medical services and not payment of lump sums, taking matters on a contingency basis may become less appealing. Future medical costs often constitute a large portion of the quantum of claims and if courts do not award lump sums sounding in money, the fee the legal practitioner stands to gain is considerably reduced. This may open the door to more lawyers advising clients to mediate matters based on cost savings and efficiency of the process.

[360] Nelson 2017:1; Oosthuizen & Carstens 2015:283. See also the discussion in Chapter 3 generally.

[361] Nelson 2017:2.

medical negligence claims. Insufficient physical and human resources heightens the probability of medical errors, and is also a contextual factor that perpetuates conflict.

Statutory enactments that, at their core, aim to endorse and protect constitutional rights were shown to augment negligence claims, not because of, so it is submitted, conceptual flaws, but rather a failure to seek non-adversarial methods to resolve issues.

Lastly, legal practitioners are accused of being opportunistic by seeking personal injury claim work, mainly because of amendments in third party compensation legislation. Lawyers will argue that it is common practice to identify opportunities where the need exists for representation. In doing so, legal practitioners assist the public to seek redress for injuries suffered. However, it is submitted that advising clients to use mediation as the preferred method to resolve disputes will significantly reduce the negative impact of litigation. The difficulty is convincing the profession to make the mind-shift in the first place – doing so would require a change in legal culture, something that will require a tremendous effort from all the stakeholders in the legal and related industries.

In Chapter 6, the process and features of mediation will be explored comprehensively.

CHAPTER 6: MEDIATION

6.1 INTRODUCTION

In previous chapters, the researcher investigated the causes of conflict and ways to de-escalate it (Chapter 2), the adversarial litigation process (Chapter 3), how litigation impedes transformative constitutionalism (Chapter 4), and how changes in the environment affect medical negligence claims (Chapter 5). Collectively, these chapters point to the conclusion that mediation offers a practicable and sustainable solution for addressing medico-legal claims, which is the essential rationale of this study. In this chapter, the discourse will centre on mediation, its features and processes. It will endeavour to develop a best-practice guide for medical negligence mediators and, in addition, will investigate the ideal features and qualifications of a mediator. Structurally, the chapter will start with a brief mention of alternative dispute resolution mechanisms other than mediation; these include arbitration, referrals to an ombudsman and negotiation. Other strategies for settlement include administrative and statutory interventions, such as capping claims and screening panels for claims. These alternative dispute resolution mechanisms and strategies will be discussed briefly in this chapter, (a) to underscore the main proposition that mediation is the best way to resolve medico-legal claims, and (b) to substantiate some of the thesis proposals. After these preliminary observations, a comprehensive investigation into the mediation methodology will conclude the chapter.

6.2 CONVENTIONAL ALTERNATIVE DISPUTE RESOLUTION METHODS

The history of alternative dispute resolution can be traced back as far as 1800 BCE, when certain kingdoms used mediation and arbitration to resolve disputes amongst themselves. Modern Western alternative dispute resolution developed from the 1600s in Europe, where nations used negotiation, mediation and arbitration to resolve disputes that ranged from commercial and labour matters to peace treaties.

Negotiation and mediation in traditional African societies have always been part of the way these societies resolve disputes.[362] The principle of *Ubuntu* underpins African-

[362] Barret 2004:xxv.

style dispute resolution. In essence, the term connotes a non-adversarial, community-based dispute resolution process that is aimed at restoring social harmony and cohesion disturbed by conflict.[363] Proponents of modern alternative dispute resolution view it not only as an effective means, in contrast to litigation, to resolve disputes, but also a way to achieve superior solutions and quality of justice.[364]

6.2.1 Arbitration

Arbitration is a process in which the parties to a dispute elect to have it adjudicated by an arbitrator who renders a final decision in the form of an award based on the evidence presented.[365] Arbitration offers flexibility of process, in that the parties may agree to present their cases with less rigid formalities, the process is confidential, and it may lead to quicker resolution. Although arbitration differs fundamentally from litigation,[366] most of the disadvantages associated with litigation also apply to arbitration, most notably that it may be slow and expensive.[367] In the private sector, resort to arbitration in cases of contractual disputes are usually agreed upon by the parties. Arbitration is inevitably used by wealthier members of society who do not wish to engage in litigation, often for reasons of confidentiality.

6.2.2 Ombud

The term ombudsman, or the gender-sensitive “ombudsperson or ombud”, generally refers to an independent third party who is tasked with addressing and resolving complaints by members of the public in a particular sector or industry.[368] Relevant to the discussion at hand is the Office of the Health Ombud, which was established in

---

[363] Boniface 2012:378; Faris 2015:1. See also Aiyedun & Ordor 2016:154 and further for a discussion of integrating traditional African dispute resolution methodology with contemporary dispute resolution. The authors contend that the similarities between traditional and contemporary dispute resolution processes, such as collective decision-making, airing of grievances, flexibility, accessibility, etc. render integration feasible.

[364] Menkel-Meadow 1997:1616.

[365] Brand *et al.* 2012:13; Boulle & Rycroft 1997:66. See also Wiese 2016:126–146 for a more comprehensive introductory discussion.

[366] Brand *et al.* 2012:13; Boulle & Rycroft 1997:66; Wiese 2016:127-128.

[367] Brand *et al.* 2012:13–14; Marnewick 2015:10. See also the discussion in Chapter 3 generally.

[368] Wiese 2016:202.

terms of the National Health Act.[369] The function of the Health Ombud is to investigate complaints against health service establishments that do not comply with industry standards.[370] Should an investigation reveal that a healthcare establishment does not comply with prescribed standards, such an establishment will be required to correct any defects, failing which sanctions, ranging from a warning to criminal prosecution, may be imposed.[371] The mandate of the ombud is, however, to ensure compliance with industry norms and standards set for healthcare facilities, and not for claims for compensation due to medical negligence.

6.2.3 Negotiation

Negotiation is the oldest and most common form of consensus-seeking dispute resolution mechanism, and it is employed daily. Even mediation itself is, to a large extent, the facilitation of a negotiated settlement between disputing parties. The relevance of negotiation in the context of mediation lies in the use of a variety of negotiation techniques, which may be gainfully used by a mediator and which are briefly referred to below.

The literature proposes various definitions for negotiation.[372] Fisher, Ury and Patton, in their seminal work on the topic, *Getting to Yes*, simply defines negotiation as follows:

> *Negotiation is a basic means of getting what you want from others. It is a back and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.*[373]

From the different definitions of negotiation, certain commonalities with mediation emerge, among which the following:

---

[369] *National Health Act* 61/03, sec. 81.

[370] *National Health Act* 61/03, sec. 81A. As a matter of interest, the Office of the Health Ombud reported a total number of complaints received as 1 122, 1 902 and 2 083 respectively for the reporting years of 2017/18, 2018/19 and 2019/20. The distribution ratio of complaints investigated for public and private facilities during the same years of reporting were 60:40; 90:10 and 70:30. See the *Office of the Health Ombud Annual Report 2019/20*, available at healthombud.org.za

[371] *National Health Act* 61/03, sec. 82A.

[372] Anstey 2006:103.

[373] Fisher *et al*. 1981:xi.

- Two or more parties negotiate in their own interest, or on behalf of others;
- They do this because they are in a dispute, and they seek a resolution for it;
- The process is voluntarily based on the belief that negotiation will best serve their needs; and
- The parties are prepared to make compromises in order to reach a settlement.[374]

Wiese points out that successful negotiations involve "the management of tangibles and the resolution of intangibles".[375] In the context of a medical negligence claim, the tangibles may, for example, be the merits and quantum of the claim, and the intangibles the emotions of the parties, such as anger, and trust issues between the claimant and doctor.

The essential characteristics of negotiation provide for a variety of approaches that may be followed in mediation. These possible approaches are influenced by numerous factors, both tangible and intangible. The factors Wiese refers to that may influence negotiation are philosophical, religious and cultural differences or similarities, which may be relevant factors between the disputants.[376] The causes of the conflict and how a person reacts to it influence their attitude towards resolving the dispute. By implication, it influences their approach to negotiation.[377]

This discussion will focus briefly on two main negotiation approaches, namely positional and interest-based negotiation. These approaches are, in the view of the researcher, relevant for devising an individual mediation style. Reference to passive negotiation styles are made only in passing.[378] A mediator should be aware of the types of approaches a party may take when negotiating in the mediation process. More importantly, the mediator should possess the ability to adapt their own approach to the

[374] Anstey 2006:104; Wiese 2016:12; Boulle & Rycroft 1997:43–44.

[375] Wiese 2016:12.

[376] Boulle & Rycroft 1997:44.

[377] See the discussion in Chapter 2.

[378] Boulle & Rycroft 1997:44; Anstey 2006:122; Wiese 2016:11; Brand *et al.* 2012:15.

mediation in cases where a party adopts a negotiation style that has the potential to lead to an impasse.[379]

6.2.3.1 Positional negotiation

The customary approach to negotiation is positional bargaining.[380] Parties state their (often unrealistic and totally opposite) positions at the outset, and then attempt to reach some sort of middle ground by making concessions that deviate as little as possible from their initial position through the unfolding of the process.[381]

The advantages of positional negotiation are that it requires little preparation, and is fairly predictable, and easy to do. It has the further benefit of providing the parties with a good overview of the information at the disposal of the opponent, which would have led the opponent to take their initial position.[382]

Fisher *et al.* state that, despite the possible advantages, positional bargaining creates what they term “unwise agreements”, which are inefficient and jeopardise future relationships. [383] Adopting a positional stance when you negotiate entails defending and elucidating a position, which often results in intractability, and which reduces the likelihood of reaching an agreement.[384] The claimant in a medical negligence claim may feel that the amount, or any other remedy they claim, is a reasonable amount of compensation or suitable other remedy for their injuries, whilst the defendant may deem the amount exorbitant, or may refuse to give an apology. Defending positions detracts from the actual apprehensions of the parties, narrows the discussion to a singular issue, and if agreement is reached, both parties may be dissatisfied with the

[379] Brand *et al.* 2012:18-19; Boulle & Rycroft 1997:44, Wiese 2016:83.

[380] Boulle & Rycroft 1997:44.

[381] Wiese 2016:5; Brand *et al.* 2012:15; Fisher *et al*. 1981:3–4.

[382] Boulle & Rycroft 1997:45; Fisher *et al*. 1981:4.

[383] Fisher *et al.* 1981:4–10.

[384] Fisher *et al.* 1981:6.

outcome.[385] The further apart parties are at the start of deliberations and the smaller the concessions are, the more drawn out and inefficient the negations become.[386]

Competitive negotiation also has the effect of rendering a continued relationship between the parties impossible.[387] In medical negligence matters, preserving a relationship is often a very important consideration that, if it is disregarded during negotiations, may have lasting detrimental effects for all involved. If a patient relies on primary healthcare services or lives in a rural area, they may have no choice but to return to a facility for treatment, simply because they have no alternative.

A mediator, who should be equipped with knowledge of the potential pitfalls of positional stances, must manage the process carefully, especially if one party seems to hold intractable views. A mediator would be wise to use the individual sessions with that party to determine the reasons behind the position, and attempt to steer the conversation towards matters of mutual interest between the parties.

6.2.3.2 Interest-based negotiation

In reaction to the shortcomings of positional bargaining, Fischer *et al.* developed a concept of negotiation they call “interest based negotiation”.[388] The purpose of this negotiation style is to focus on the needs, and not the positions, of the parties, in an effort to find a mutually agreeable settlement as close as reasonably possible to the objectively identified needs of the parties.[389] Collaborative bargaining rests on four establishing characteristics, namely,

a) Separating the people from the problem;
b) Focussing on needs, not positions;
c) Creating and contemplating various options that could satisfy the mutual interests of the parties; and

---

[385] Anstey 2006:124; Fisher *et al.* 1981:6; Boulle & Rycroft 1997:45.

[386] Fisher *et al.* 1981:6-7.

[387] Boulle & Rycroft 1997:45; Fisher *et al*. 1981:7.

[388] Boulle & Rycroft 1997:47; Brand *et al.* 2012:16. See also Fisher *et al.* for a comprehensive discussion.

[389] Anstey 2006:123; Boulle & Rycroft 1997:47; Brand *et al.* 2012:16, Wiese 2016:31.

d) Applying objective standards to assess options.[390]

During negotiation, separating the people from the problem means that substantive issues and people issues should be dealt with separately. It would be impossible to negotiate without a working relationship between the parties. To achieve that, it is necessary to de-escalate emotions first, and then continue to focus on the substantive issues, separate from the emotional ones.[391]

Positions are what a party has decided they want; interests are what motivated the decision.[392] For example, the amount of compensation that plaintiffs claim for injuries due to medical negligence would represent their position. The reason for claiming the amount may be that they need to provide for their family because they can no longer work. A defendant may not dispute the merits, but opposes the amount claimed. The position of the defendant is that they want to part with as little money as possible, and their interest is protecting their professional reputation. Identifying these needs enables the parties to concentrate on the merits of their respective claims, and not superficial, predetermined and sometimes emotion-based positions.[393]

Parties to negotiation often reach an *impasse* simply because the parties perceive the options put forward to resolve the dispute implies a winning and losing party. Therefore, principled bargaining implores parties to generate as many options as possible to resolve their dispute, keeping in mind that the possibilities suggested should, as far as possible, include value for both parties.[394] An offer to supply a claimant with medication or treatment for as long as they need it, for example, instead of offering a lump sum of money, could satisfy the needs of both parties. The claimant no longer needs to be apprehensive about how they will be able to afford the medication and/or the treatment, while the medical service provider's cash flow is not negatively affected.

---

[390] Boulle & Rycroft 1997:47-48; Brand *et al.* 2012:16; Wiese 2016:31.

[391] Fisher *et al.* 1981:19-41; Wiese 2016:31. See also the discussion in paragraph 2.6.2 of Chapter 2 on de-escalating conflict.

[392] Fischer *et al.* 1981:45; Boulle & Rycroft 1997:47.

[393] Halpern 1997:15; Wiese 2016:37.

[394] Halpern 1997:14; Fischer *et al.* 1981:58–81.

Using objective standards to evaluate the options created negates the possible pitfalls of choosing a solution based on pressure from another party. The parties may agree to use expert opinion or generally accepted industry standards to measure the various options against which to ensure value for both. Parties should consider the best alternative to a negotiated agreement (BATNA) when deciding if a particular suggested option is acceptable and viable. If, for example, a court-ordered decision offers a superior solution, objectively speaking, to a negotiated solution, then negotiating is not worthwhile for that party.[395] It is imperative for negotiating parties on both sides to be aware of the BATNA of the other, because parties will usually only settle on terms that offer a more advantageous outcome than their best alternative.[396]

Boulle and Rycroft consider principled bargaining as advantageous for addressing the actual conflict, by focussing on the needs of the parties. It is effective because it encourages consideration of numerous options, it preserves relationships, uses objective standards to measure settlement options, and is future-oriented.[397]

Despite the strengths listed above, possible shortcomings of interest-based negotiations are the following:

- It assumes that both parties are committed and able to negotiate on interests. In reality, this may not be the case; for example, positional negotiation is such an ingrained part of the negotiation culture of lawyers that they, almost by default, revert to positions at the expense of exploring interests.
- The intentions of some of the parties may be underhanded and aimed at collecting information to employ in some manner during litigation in the future, rather than bargaining on interests. This is, of course, applicable only where negotiations were not conducted without prejudice of parties' rights.
- The assumption is that parties negotiate on equal footing, while the reality may be that the one party possesses significantly more negotiation power and may resort to intimidating positional tactics.

---

[395] Boulle & Rycroft 1997:48; Wiese 2016:38; Halpern 1997:15; Fischer *et al*. 1981:82–95.

[396] Brand *et al.* 2012:18.

[397] Boulle & Rycroft 1997:48.

- In some instances, and despite efforts by both parties to bargain on interest to settle the matter, interest-based negotiation requires sharing scarce resources, rendering a win–win solution difficult to achieve.
- It may be tenuous to agree on objective criteria to measure suggested solutions proffered during the negotiations, which, in turn, makes settlement difficult to achieve.[398]

It is clear from the advantages and disadvantages listed here that the interest-based method of negotiation may not be the ideal method to resolve all disputes.[399] Nonetheless, it is considered as the base model of negotiations in modern mediation.[400]

6.2.3.3 Passive negotiation styles

According to Wiese, negotiators may choose to utilise a passive style of negotiation as an alternative to either the modes referred to in Paragraphs 6.2.3.1 and 6.2.3.2, because it is less confrontational.[401] The four types of passive negotiation styles are yielding, compromising, accommodating and avoiding.

A negotiator who yields does not negotiate, but simply gives in to the demands of the other party, for fear of conflict or due to disinterest in the outcome. In turn, compromising implies "splitting the difference", which is frequently used in wage negotiations. This style requires little ingenuity and, although it fosters solid relationships, it does not always equate to the most advantageous result. Where the main concern is maintaining a good relationship, a negotiator will be accommodative in their approach, by making concessions and providing information. A negotiator who uses this style of negotiation should be careful of being too accommodative or liberal about sharing information, as it may result in an opponent abusing their generosity to solicit terms favourable to them, and disadvantageous to their opponent. A party who is not comfortable with confrontation or emotion may elect to avoid these matters and

---

[398] Anstey 2006:216–221; Brand *et al.* 2012:18; Boulle & Rycroft 1997:48-49.

[399] Boulle & Rycroft 1997:48-49.

[400] Brand *et al.* 2012:18-19; Boulle & Rycroft 1997:49.

[401] Wiese 2016:38-39.

concentrate purely on the facts. Such behaviour could result in an *impasse*, due to failure to acknowledge the sentiments of the other party.

Having dealt briefly with conventional alternative dispute resolution methods and strategies, the discourse will now turn to administrative and statutory intervention strategies. The discussion relates, in particular, to the proposals on best practices in mediation that will be presented in paragraph 8.4 of Chapter 8.

6.3 ADMINISTRATIVE AND STATUTORY INTERVENTIONS

The discussion in this paragraph centres on literature related to foreign jurisdictions, mainly the USA, on administrative and legislative alternative dispute resolution interventions in reaction to increased medical negligence claims. Except for no-fault liability in terms of the Consumer Protection Act, discussed in paragraph 5.2.4.3, none of the measures included here forms part of the civil dispute resolution system in South Africa.[402] A comprehensive discussion of all the various interventions is beyond the scope of this study; though it was considered prudent to refer to predominant strategies succinctly and to reflect on their applicability in the South African context.

6.3.1 Screening panels[403]

Medical screening panels were developed in the USA as an early intervention mechanism (pre-litigation or pre-discovery) for medical negligence matters, so as to reduce the number of claims culminating in litigation. The panels consist of experts who evaluate the merits of a claim and who subsequently submit reports aimed at encouraging early settlement of meritorious claims. Depending on the state involved, these reports either remain confidential or are entered into the court record, constituting independent expert opinion in addition to expert evidence during the trial.

Instituting screening panels, despite positive reform being anticipated, was not successful. The literature suggests that the panels increased the number of cases that proceeded to litigation, which increased costs for the parties. Backlogs due to matters

[402] See the discussion in paragraph 5.2.4.3 of Chapter 5.

[403] See Kaufman 2007:247; Nussbaum 2017:267; Tan 2009:186; Oosthuizen & Carstens 2015:392; Crous 2009:105 for comprehensive discussions of the topic.

awaiting hearing at panels, caused delays, and costs increased because of discovery and preparation before appearance before the panel. Interestingly, litigants used the cost savings occasioned by using the expert evidence adduced on behalf of the panel, to fund litigation costs.

The South African Law Reform Commission solicited comment on the introduction of a requirement that plaintiff attorneys submit a certificate of merit before initiating medical negligence litigation.[404] The researcher submits that such a requirement would impose essentially the same discovery burden and associated costs as experienced in the USA, making the suggestion untenable. Such certificates of merit would entirely draw on medical expert opinion, which is (a) expensive and (b) takes a long time to obtain.

6.3.2 No-fault liability[405]

As the term indicates, no-fault liability seeks to compensate injured patients for adverse medical events without the requirement of proving fault in the form of negligence. The emphasis of no-fault liability schemes is on speedily investigating and resolving preventable medical errors caused by systemic failures, such as the unavailability of necessary equipment. It does not involve the negligence of the physician *per se*.[406]

Canada and Scandinavia have functioning no-fault liability schemes.[407] Claimants who qualify in terms of the prescribed requirements for no-fault compensation generally receive smaller lump-sum payments with continued future treatment through state-funded healthcare systems.[408]

No-fault liability removes the cost linked to proving fault, and would, by necessity, incorporate more instances of medical error than a system based purely on

---

[404] South African Law Reform Commission 2017:56 at point 9.

[405] Tan 2009:201; Oosthuizen & Carstens 2015:394; Bismarck & Dauer 2006:55; Dauer 2003:45; Nussbaum 2017:285 for a more comprehensive discussion on the topic.

[406] Tan 2009:201; Oosthuizen & Carstens 2015:394.

[407] Tan 2009:201.

[408] Bismarck & Dauer 2006:55; Dauer 2003:45.

establishing fault as the exclusive criterion for compensation. Defining the instances that qualify for redress through no-fault liability schemes have presented challenges, and remains a matter of debate.[409] Another important factor to consider in the South African context is the cost implications for the government, due to increased payments to injured patients, because more types of claims would be covered even though the amounts paid to claimants are lower than successful claims in court-litigated cases.

No-fault liability schemes depend on an optimally functioning primary healthcare system for their viability, something that is currently grossly lacking in South Africa.[410]

6.3.3 Capping of damages

Some states in the USA have enacted legislation that caps damages. The capping relates mostly to non-financial loss (pain and suffering), as a measure to counter substantial and excessive amounts awarded at jury trials out of sympathy, rather than from an objective assessment of the matter.[411] Certain territories in Australia also introduced structured statutory thresholds for claims for non-financial past and future loss.[412] In the USA, these interventions have proven successful for reducing payments to claimants.[413] Oosthuizen and Carstens point out that similar reforms in South Africa may yield the same results, but would, however, do little to enhance patient safety/care.[414] It is also submitted that the protracted process to enact legislation in South Africa will not offer a solution. Even though such legislative amendments would be limited in scope to reduce the quantum of payments, the issue at hand requires immediate resolution.

---

[409] See, for example, Tan 2009:201; Oosthuizen & Carstens 2015:394; Bismarck & Dauer 2006:55; Dauer 2003:45; Nussbaum 2017:285.

[410] Carstens & Pearmain 2007:283; Coetzee & Carstens 2011:1268. Oosthuizen & Carstens 2015:275. See also the discussion in paragraph 4.2.1 of Chapter 4.

[411] Tan 2009:211; Cass & Rose 2016:301.

[412] Tan 2009:210.

[413] Tan 2009:211; Cass & Rose 2016:301.

[414] Oosthuizen & Carstens 2015:282.

6.3.4 Early discussion and resolution

Patient safety proponents in the USA suggest the establishment of reform programmes aimed at early disclosure of adverse medical events and subsequent early discussions between patients and healthcare providers. These Communication and Resolution Programs (CRPs) endeavour to compensate patients for preventable injuries, with no requirement to prove fault.[415] CRPs function within closed healthcare institutions, or are offered by healthcare insurers. The procedure is uncomplicated, informal and voluntary. Upon receipt of a report of an adverse medical event, trained clinical staff investigate whether a medical error occurred, and the reasons for it occurring. The patient or their family then meet with the CRP team to discuss the results of the investigation. If the investigation reveals no error, no compensation is offered. If it does, then the parties negotiate a settlement.[416] The state of Oregon, for example, enacted legislation in 2014 to establish a programme along these lines, with the additional option to engage in mediation should settlement negotiations prove unsuccessful.[417] Dauer, in 2003, advocated for what he termed “early intervention mediation” to commence before patients institute formal litigation procedures, in order to prevent the negative financial and emotional consequences associated with adversarial court procedures.[418] This measure is supported for the same reasons that are advanced in the discussion of mediation in paragraph 6.4.[419]

6.4 MEDIATION

In the discussion that ensues, the features, process and practice of mediation will be investigated. The aim of the investigation is to develop a best practice guide for mediators and to identify the features of an “ideal” medical negligence mediator.

---

[415] Nussbaum 2017:289.

[416] Nussbaum 2017:290.

[417] Nussbaum 2017:292.

[418] Dauer 2003:48.

[419] See also the comment made in paragraph 5.2.4.3 in Chapter 5.

6.4.1 Defining mediation

The consensus amongst authors is that no single authoritative definition of mediation exists, nor would it be sensible to attempt to formulate one, because mediation functions in a variety of contexts and is engaged in to achieve a myriad of goals. In the main, mediation is either defined with reference to its normative values, or definitions are descriptive of the process. Such an approach is consonant with the adaptability of alternative dispute resolution for different contexts and cases.[420]

For present purposes, a plausible definition may read as follows:

> *Medical dispute mediation is a consensus-seeking, mediator-facilitated discussion following an adverse medical event, where the parties seek a mutually acceptable resolution for their dispute.*

It is proposed that mention of the features of mediation in a definition is superfluous, as they are explained in the mediation agreement and during pre-mediation meetings. Mediating a matter does not always result in a final settlement. It is important at this juncture to mention another advantage of mediation generally, namely that the matter is not settled outright. The advantage is that the parties may still agree on and record the "settlement" of certain issues, which could substantially limit the scope of future litigation.

6.4.2 Key features of mediation

The key features or characteristics of mediation are that it is designed to create an environment that is as conducive as possible for discussion and resolution of the issues between the parties. These key features will be summarised in the subsections that follow.

6.4.2.1 Voluntariness

Parties generally choose to mediate and may leave the process at any time. The dispute resolution process in terms of the Labour Relations Act 66 of 1995 at the Commission for Conciliation Mediation and Arbitration, requires the parties in a labour

---

[420] Boulle & Rycroft 1997:3; Brand *et al.* 2012:19; Marnewick 2015:11; Wiese 2016:47.

dispute to mediate their dispute. However, a party to mediation cannot be forced to settle their dispute. In that sense, participation in mediation may be involuntary, but the settlement always remains voluntary. The rationale behind voluntarism is that parties who choose to engage in a dispute resolution process voluntarily tend to also keep to the agreed solution they have created.[421]

6.4.2.2 Flexibility and informality

Even though mediation is structured in, for example, joint and private sessions, it remains flexible and informal. The parties decide who the mediator will be and are free to choose who may attend, where and when the mediation will take place, and what needs to be discussed. Everything may be adjusted by mutual consent during the course of the mediation. Formal procedural and rules of evidence do not apply and the parties are autonomous in deciding how the process unfolds.[422]

6.4.2.3 Non-binding, without prejudice and confidential

Until the parties have agreed to all the terms they wish to include in a signed settlement agreement, they remain free to change their minds during the deliberations and generate further settlement options. Participants are, furthermore, at liberty to agree on certain issues and leave others to be decided upon in an adjudicatory process.[423]

Any offer or concession made during mediation is without prejudice and may not later be disclosed or used as evidence in court or any other adjudicatory process. The function of this feature is to motivate parties to negotiate openly, to make concessions and present offers without fear of prejudice later.[424]

Mediation is conducted behind closed doors, no transcripts or records are kept of the proceedings or what is discussed during the various sessions. Nothing may be used

---

[421] Boulle & Rycroft 1997:15; Brand *et al.* 2012:19; Claassen 2016:9; Wiese 2016:47.

[422] Brand *et al.* 2012:19; 24 Claassen 2016:9.

[423] Nelson & Joubert 2016:9. It matters not whether that process is any other form of alternative dispute resolution, or even litigation.

[424] Boulle & Rycroft 1997:39; Brand *et al.* 2012:25 Claassen 2016:9; Wiese 2016:52.

as evidence in later proceedings. This feature, again, emphasises that mediation is a "safe space" for frank discussion of issues.

Confidentiality in mediation operates on two levels. The first is that all dialogue between the mediator and the parties during joint sessions remains private. Should a settlement be reached, that too remains confidential, unless the parties elect to make the contents public. Furthermore, any communication between the mediator and a party during individual sessions remains confidential. Only the information a party specifically mandates the mediator to disclose to the other participant, may be communicated to them by the mediator. Confidentiality builds trust, and without trust, there can be no mediation. The right to confidentiality is, however, not absolute, as there are instances where mediators are required by law to disclose information. This happens, for example, when threats to health and safety are made or future or past criminal conduct is revealed.[425]

6.4.2.4 Mediator impartiality/neutrality

Mediators must demonstrate absolute impartiality when conducting the mediation. Impartiality refers to treating all the parties fairly and without bias. Any actual or perceived partiality will lead to parties losing trust in the mediator and leaving the mediation. The mediator is there to apply their skills and expertise to assist the parties to decide their own outcomes – the mediator makes no decision in this regard. That being said, no person can be absolutely neutral. Mediators may well have their own views on how issues should be resolved and, in that sense, may not be completely neutral. The crux is, however, that the mediator should in no way influence the decisions of the parties.[426]

It is apparent from this description of the features of mediation that, in principle, at least, mediation should provide a conducive platform for resolving medical negligence issues. The high value placed on party autonomy, confidentiality and impartiality must

---

[425] Boulle & Rycroft 1997:39; Brand *et al.* 2012:24; Claassen 2016:9; Wiese 2016:52; Marnewick 2015:110. The mediator should draw the parties' attention to these limitations to confidentiality during the preliminary phases and at the mediation meeting by explicitly stating that, should a party, for example, make an incriminatory statement, the mediator is legally obliged to report it.

[426] Boulle & Rycroft 1997:17; Brand *et al.* 2012:25; Wiese 2016:77; Marnewick 2015:109.

sit well with all the role players, particularly with medical service providers, who are likely to regard the protection of their professional reputations as a crucial concern.

The general context provided in this paragraph, and the references to the advantages of mediation throughout this study provide the platform for the discourse in paragraph 6.5, which will discuss the decision to mediate.

6.4.3 Factors favouring the decision to mediate

As explained in paragraph 6.4.2.1, mediation is generally a voluntary process, and the parties must elect to mediate their dispute before it can commence. Medical negligence claims, by their nature, involve multiple parties, all of whom influence the choice to mediate. These parties are: 1) the patient; 2) the medical service provider; 3) the legal representative(s) for the claimant and medical service provider respectively; and 4) the indemnity insurance provider for the medical service provider.

Mabusela conducted an empirical study to determine the views of members of the legal profession on the complementarity of civil litigation and court-annexed mediation in South Africa.[427] Although the study does not relate to medical negligence cases specifically, and the results cannot be generalised, it does contain some noteworthy findings on perceptions about the mediation process as it is described in the rules governing court-annexed mediation. Findings the researcher considers pertinent to the topic under discussion are listed below.[428]

- Regarding the benefits of mediation, the participants indicated they were satisfied that mediation:
    - Saved time (75%);
    - Was cost effective (81.3%);
    - Offered realistic chances of settlement and better resolutions (78.1%);
    - Maintains relationships (78.1%);
    - Offered informality of process (84.4%);
    - Meant parties were autonomous/controlled the outcome (78.1%); and

[427] Mabusela 2019:i. The study was conducted with questionnaires completed by 32 members of the legal profession, including legal practitioners, judges and magistrates.

[428] Mabusela 2019:174–199.

    - Settlements were tailored to the parties' needs (81.3%).
- 93.8% of the participants considered mediation to be an effective alternative to litigation.
- 75% of the participants agreed that mediation offers disputants formal justice similar to that provided by courts.
- 71.9% of the participants agreed that the procedures in mediation provided the disputants the highest possibility of a fair outcome, compared to normal litigation.
- Court-annexed mediation effectively achieved distributive justice (socially just allocation of resources), including an outcome that:
    - Is consistent with the rule of law and the Constitution (90.6% agreed);
    - Is responsive to disputants' needs (93.8% agreed);
    - Maintains/improves relationships (90.6% agreed); and
    - Parties perceive as fair (84.4% agreed).

The findings of Mabusela's study quoted here demonstrate a generally positive view of the use of mediation in civil dispute resolution, particularly from the perspective of members of the legal profession involved in the study. Although the results reflect the views of a very limited sample of legal professionals, at least it indicates that, after engaging with the mediation process as described in the court-annexed mediation rules, the participants considered mediation viable. Whether this finding indicates a general, wider acceptance of mediation by legal practitioners remains to be seen, though it is nevertheless heartening and suggests that it may be possible to break the dominant litigation culture in South Africa.

An important feature of mediation is the voluntary decision by the parties to engage in mediation. The implication of this decision connotes a commitment by the parties to engage actively in a non-adversarial, facilitated process of dispute resolution that is founded on an understanding that the intrinsic worth of mediation advances a more suitable mechanism to determine the outcome of their conflict. It also connotes a pragmatic realisation that something else in terms of process – other than the litigation route – could serve their interests. Hospitals and doctors enter into agreements with patients before treatment commences. It is proposed that medical service providers include a clause in these agreements that states that, should a dispute arise between

the patient and the service provider as a consequence of the treatment of the patient, mediation will be used as the modality to resolve the dispute. In Chapter 8, which will provide recommendations, the researcher will include suggestions on the proper formulation of such clauses, so as to ensure legal compliance.

Once the parties decide to mediate, they need to agree on a choice of a mediator. A discussion of where mediation may not be a suitable option to resolve a dispute, and some disadvantages of mediation, will be offered next.

6.4.4 Unsuitability and disadvantages of mediation

The subject matter and facts of certain disputes may render mediation unsuitable for resolving the conflict. According to the mediation literature, the following aspects will generally be indicative of matters that should be adjudicated upon, rather than mediated:

- Cases concerning matters of policy, and public interest issues;
- Disputes on pure legal questions, or that require the declaratory function of the court;
- Where the use of mediation could involve the risk of violence;
- When one or more of the parties is emotionally or psychologically incapable of participating in the mediation;
- If participants have underhanded intentions for using the process;
- If resolution is only possible based on obfuscated factual or credibility findings; and
- When the conflict is about matters of principle and values, which are not open to negotiation.[429]

It is suggested that the aspects mentioned here could form part of what the mediator attends to during the preparation phase of mediation (paragraph 6.5.1). Pre-mediation meetings with the participants, and information gathered through questionnaires will help the mediator to to assess the suitability of a particular dispute for mediation.

[429] Bondy & Doyle 2011:14; De Jong 2010:22; Boulle & Rycroft 1997:74.

Marnewick[430] states that, "[t]he disadvantages of mediation are few and are far outweighed by its advantages". Marnewick identifies two disadvantages of mediation. The first is that mediation with a deceitful participant is not possible, and the second is that enforcement in the event of non-compliance with a settlement agreement may prove to be difficult.[431] Marnewick suggests that a consent to judgement or acknowledgement of debt clause should be inserted into the mediation agreement to address this concern.[432] As pragmatic and valid as the suggestion may be, the researcher fears that the parties may interpret such a clause to mean diminished trust in the mediator – trust that the mediator worked hard to establish in the first place.

Van Der Westhuizen[433] considers the main disadvantage of mediation as opposed to litigation to be the failure by mediation to create legal precedent to follow in the future and, thus, legal certainty. The concern is noted, though the researcher is of the view that the potential of mediation to achieve access to justice and social justice prevails over the setting of precedents. It is doubtful whether a significant percentage of medical negligence/malpractice civil cases, (a) are ever conducted until a court judgment; and even if some are (b), they seldom form part of reported case law.

6.4.5 Selecting a mediator

Parties who decide to mediate a dispute are free to decide themselves who the mediator in their matter will be.[434] In certain contexts, for example court-annexed mediation, the participants are limited to selecting a mediator from the panel of mediators registered under the rules governing mediation.[435] Disputants in medical negligence claims can solicit the services of mediators who are members of private mediation service providers.[436] The choice of mediator depends on the particular

---

[430] Marnewick 2015:17.

[431] The first contention relates more to unsuitability than a disadvantage of the process. A skilled mediator will be able to recognise and manage such an occurrence during their preparation, or at the mediation meeting.

[432] Marnewick 2015:17.

[433] Van der Westhuizen 2015:78.

[434] Boulle & Rycroft 1997:77.

[435] Court-Annexed Mediation Rule 86 provides that the minister of Justice may enrol mediators on the panel of mediators, subject to compliance with the accreditation standards. The list of enrolled mediators is available on the website of the Department of Justice and Constitutional Development.

[436] An internet search is probably the most convenient method of finding mediation service providers.

dispute at hand, in that the parties should seek to appoint a mediator-practitioner with the appropriate skills, training and characteristics to facilitate a sensible discussion of the relevant facts. Boulle and Rycroft[437] postulate that the choice of mediator centres on objective and subjective factors. The authors enumerate the objective factors as,

- Mediation training and accreditation;[438]
- Experience;
- Subject matter expertise;
- Membership of a professional organisation;
- Accountability to mediation standards and ethics; and
- Fee scales.

The subjective criteria they list are,

- Standing in the community;
- Reputation as a mediator or professional;
- Personal style; and
- Credibility in the judgment of the parties and their legal representatives.

In medical negligence mediation, it is considered particularly important that the mediator should have sound knowledge of basic tenets of the law of contract, delict and damages, given the complex nature of these disputes.[439] In Chapter 8, the researcher will elaborate on the ideal qualities and training of mediators. The mediation profession in South Africa is not regulated by legislation yet. This fact may raise concerns about mediator accountability and compliance with ethical standards. It is beyond the scope of this research to enter into a discussion of these issues; suffice to propose that, when deciding on a mediator, the parties should consider a mediation service provider accredited by the Dispute Settlement Accreditation Council, which holds members accountable to standards associated with training and conduct.[440]

---

[437] Boulle & Rycroft 1997:77-78. See also Brand *et al*. 2012:62.

[438] Both nationally and internationally, the standard for training is 40 hours over five days. The researcher consulted the websites of both the Dispute Settlement Accreditation Council (DiSAC) and Centre for Effective Dispute Resolution (CEDR) for confirmation.

[439] Johnson 2000:29.

[440] Brand *et al.* 2012:69; Boulle 2012:12.

Membership is, however, voluntary. In the discussion of the process of mediation that follows in paragraph 6.5, the inherent required skills for medical negligence cases will be integrated as the discourse unfolds.

The emphasis will now turn to the stages of the mediation process, with the aim of making concrete, practical observations and suggestions on how it may be tailored to deal effectively with medico-legal disputes.

6.5 MEDIATION PHASES

Mediation, due to its flexibility, is not bound by prescribed rules as to the process, which may be adapted as the mediation process unfolds. It is, however, generally accepted that mediation passes through three phases, namely,

1) The preparation phase;
2) The mediation phase and
3) The post-mediation phase.[441]

Broadly, the preparation phase requires the mediator to consider and attend to the following:

- Gathering and exchanging information about the dispute and the parties;
- Having pre-mediation meetings with the parties;
- Finalising the mediation agreement; and
- Finalising ancillary matters, such as logistical arrangements relating to preparing the venue.

The mediation meeting itself is structured to comprise preliminary matters, such as seating the parties, followed by formal introductory remarks, opening statements by the parties in a joint session, individual sessions with the parties, interposed by joint sessions, where required, and ending with a final joint session.

[441] Bondy & Doyle 2011:29 Wiese 2016:67; Boulle & Rycroft 1997:85; Brand *et al.* 2012:34.

Post-mediation activities include, for example, debriefing between co-mediators, and monitoring implementation of a settlement agreement, if requested by the parties.[442] The different facets of each stage will now be discussed in more detail.

6.5.1 The preparation phase

Thorough preparation before the actual mediation session starts is of the utmost importance, as it sets the stage for an environment conducive to settling the dispute between the parties. The parties gain confidence in the process when they are informed what to expect during the mediation process. It also enables the mediator to get a sense of what the parties' expectations are and, at the outset, obtain clarification on the issues to be discussed.[443] Medical negligence disputes are often complex and emotionally loaded and, therefore, require comprehensive preparatory work by the mediator.

6.5.1.1 Information gathering, pre-mediation meeting/s and aspects requiring early focus by the mediator

In medical negligence claims, the volume of documents will depend on the stage at which the matter is referred to mediation. If the matter is referred soon after the adverse medical event, the volume of available documents may be considerably less than if litigation has commenced and pleadings have been exchanged. If the parties decide to mediate shortly after the injury occurred, the mediator should request brief statements from the parties, in which they give their assessment of the case. It is submitted that, where court pleading and notices have been filed, obtaining copies from the legal representatives of the parties will provide a clear indication to the mediator of the positions of the respective parties on both the merits and the quantum of the case.[444] Knowing the stances of the parties early on in the process enables the

[442] Bondy & Doyle 2011:29 Wiese 2016:67; Boulle & Rycroft 1997:85; Brand *et al.* 2012:34.

[443] Brand *et al.* 2012:36; Boulle & Rycroft 1997:86.

[444] A study conducted in the USA revealed that attorneys view the discovery process and pre-trial procedures as indispensable and there is no other way to obtain information to evaluate a case for settlement. See Dauer *et al.* 2000:170.

mediator to isolate impediments to settlement that could be removed or handled before the mediation starts.[445]

According to the literature, pre-mediation interviews with the parties achieve various goals directed at facilitating progress to the mediation meeting. These goals are, amongst others, identifying issues, finalising logistical arrangements, arranging information exchanges, assessing the suitability of a dispute for mediation and settling the agreement to mediate.[446] The researcher is of the view that such meetings are indispensable in preparation for mediating medical negligence claims.

a) Identifying the participants in the mediation meeting

Determining who will attend the mediation is a preliminary issue that should be agreed upon and settled beforehand. As identified in paragraph 6.4.3, multiple parties may be involved in the dispute. In addition to obvious practical considerations, such as arranging a suitable venue to accommodate all the participants, ascertaining who will attend the mediation session during pre-mediation consultations enables the mediator to evaluate possible perceptions the parties may formulate about each other, and to identify their interests in the mediation process itself. The legal representatives of the injured patient and the medical service providers whose negligence allegedly caused the injury that constitutes the subject matter of the claim, may consider the presence of their client at the mediation meeting unnecessary.[447] Conversely, the injured patient is likely to desire the opportunity to confront the doctor and obtain an explanation about the cause of the injury, and the doctor may want to provide that explanation to gain personal vindication.[448] The interests of indemnity insurers differ from that of the doctors they insure – the insurer wants to part with as little money as possible.[449] After acknowledging these factors during the initial interviews, the mediator will be able to gauge the parties' expectations of how the process of mediation may meet their

---

[445] Brand *et al.* 2012:36.

[446] Boulle & Rycroft 1997:89; Brand *et al.* 2012:36; Wiese 2016:69.

[447] Research conducted in the USA and the United Kingdom on resistance to the use of mediation based on the perceptions of the various role players reveals that lawyers consider themselves to be best suited to negotiate complex medical negligence claims. See McMullen 1990:378; Dauer *et al.* 2000:166; Mulcahy 2001:210.

[448] Mc Mullen 1990:374; Dauer *et al.* 2000:178.

[449] Dauer et al. 2000:180.

individual needs. Being aware of the views of all the parties assists the mediator to develop strategies for constructive negotiation towards a mutually agreeable outcome that serves the needs of everyone.

b) Assessing the issues in dispute

Preliminary interviews, furthermore, enable the mediator to gauge the parameters of the dispute, postulate the issues to be discussed at the mediation meeting, and establish working relationships with the participants.[450] Even though perusal of pre-mediation statements or court papers will give the mediator an indication of the positions of the parties, engaging with the parties individually is likely to reveal issues that the statements do not, and what the parties may wish to share in confidentiality. During these meetings, mediators must ensure a more or less equal time division between the parties, to prevent perceptions of bias.[451] An unrepresented patient may reveal that they are concerned about power imbalances in negotiation if the doctor is represented by an experienced negotiator, such as an insurer or legal counsel. The mediator must assure the patient that, in this case, it is the mediator's duty to ensure that all parties are treated equally during the mediation process. Patients affected by medical errors, and medical professionals involved in medical negligence claims, are often traumatised and emotional, to such an extent that they may be unable to communicate constructively and make rational decisions.[452] Should this become apparent at the pre-mediation meeting, the mediator may already start the de-escalation of such emotions by indicating to the parties that the mediator is aware that medical negligence cases are often emotionally laden and that the mediation process provides, if necessary, a milieu conducive to deal with their emotions. Moreover, the mediator is alerted to the possibility that de-escalation of emotions might be necessary before negotiations can proceed, and to formulate de-escalation strategies to deal with it.

Compensatory claims during litigation requires the presiding officer to adjudicate on the merits, i.e. whether the medical professional was negligent , and then, the quantum

---

[450] Brand *et al.* 2012:36; Wiese 2016:69.

[451] Boulle & Rycroft 1997:89.

[452] See paragraph 2.5.4 in Chapter 2.

of the claim, i.e. what would constitute a fair amount of compensation based on the proven facts. Pre-mediation interviews afford the mediator the opportunity to canvass these issues with the parties and to distinguish possible areas of common ground that may limit the issues at mediation.[453] The medical service provider may admit certain facts that would limit the scope of the negotiations, or may even concede the merits, leaving only the quantum to be discussed. The claimant may convey to the mediator in confidentiality that they requested monetary redress on legal advice, and is really only interested in an explanation or an apology.

c) Soliciting expert opinions

An important consideration in medical negligence matters is the need for expert opinions. When the need to gain expert opinion arises, the mediator may request the parties to agree on a single independent expert, to limit costs, or to obtain permission from the parties to have separate sessions with experts to explore areas of agreement and disagreement and to solicit a single combined report during a joint session.[454]

It is proposed that the purpose of expert opinion in mediation is to assist the parties and the mediator to understand the case of the other better, in order to explore points of discussion, and not to "prove a point". Expert opinion will, furthermore, equip the mediator with knowledge that can be applied to explore settlement options other than financial compensation, for instance, redress related to future care, such as provision of prostheses.

d) Settlement authority of the parties

A mediator, furthermore, uses the preparation phase to determine the settlement authority of the parties.[455] Because parties to medical negligence claims are often represented, it is apt to ascertain who will be responsible for making final decisions at the mediation meeting, and that these persons have the authority to sign a settlement agreement. It is submitted that it makes little sense to mediate a matter and reach

---

[453] It must be kept in mind that the mediator is not tasked to adjudicate on the issues, but to facilitate negotiations on them.

[454] Boulle & Rycroft 1997:135.

455 Boulle & Rycroft 1997:135. The mediator will confirm this at the start of the mediation meeting.

consensus on settlement, only to discover that the settlement agreement has to be referred to an external party to sign, and who may not agree with the terms. For example, if indemnity insurers are involved, they would have to approve settlements, because they would be responsible for any pay-outs agreed to, despite legal practitioners or claims agents having represented them at the mediation.[456]

Another matter for discussion and finalisation at pre-mediation meetings is the agreement to mediate. In paragraph 6.5.1.2 the researcher will discuss the contents of this agreement. The preparatory conversations could influence the content of the agreement and the document itself may be signed at a further meeting, or it may be circulated between the parties electronically.

It may be argued that much of the discussions described above could be conducted telephonically or via electronic mail. It is, however, submitted that face-to-face meetings with the parties allow the mediator to also observe the demeanour of the parties. The trained mediator will be able to gain valuable insight into the frames of mind of the participants by taking cognisance of non-verbal communication, such as their facial expressions and body language, which may alert the mediator in advance to prepare tactics to handle hostile confrontations. Should one or more of the parties be unable to attend the meeting, it is proposed that the mediator develops a pre-mediation questionnaire that addresses the issues enumerated above and circulates it to those parties who cannot attend, so that they can complete it before the mediation meeting. It is, furthermore, proposed that the mediator completes the questionnaire with the parties who attend the meeting in person during the consultation.[457]

---

456. Dauer et al. 2000:179–180. As an aside, it is the view of the researcher that, in the interest of expediency and cost savings, parties should carefully consider the issue of having legal representatives present at the negotiation table during the mediation meeting. This proposition is not meant to undermine the valuable advisory role lawyers may have in complex medical negligence cases. What is proposed is that the mediator clearly explains to the parties the importance of personal involvement of the parties during the mediation meeting, and if they do have legal representation, to discuss and record the roles of their representatives in the agreement to mediate.

457 The researcher includes a model pre-mediation questionnaire in Appendix “A”.

6.5.1.2 Agreement to mediate[458]

A written agreement to mediate is an essential part of effective mediation. The agreement is usually finalised at a pre-mediation meeting. It sets out the logistical arrangements pertaining to the mediation meeting, procedural matters, such as completing pre-mediation questionnaires, the costs of the mediation, the powers and duties of the mediator, and matters related to the process. Signing the agreement is an additional indication of the commitment of the parties to the process and prevents unnecessary disputes between the parties about issues such as who is responsible for paying the fees of the mediator, or what standard of behaviour is required during mediation.[459] Importantly, it also sets out the behavioural standards expected of the parties during the mediation process. In pre-mediation meetings and in the agreement itself, a mediator should be focussed on allowing parties to vent their negative emotions. If the parties are still in doubt about why they decided on mediation, the mediator should be at pains to point out all the advantages of mediation and all the negative consequences of formal litigation.

a) Cost of mediation

The negative consequences of litigation often relate to exorbitant cost. A mediator cannot stress this aspect enough in the early stages of the process. If the parties fail to realise the cost benefit of mediation freely, and exercise their unfettered rationality and common sense, the mediator must do so on their behalf beforehand. Parties who elect to employ the services of legal counsel at mediation will be responsible for the fees of their representatives, but these costs for mediation are considerably less than at litigation for all parties involved.[460]

---

[458] The researcher includes a model mediation agreement in Appendix "B".

[459] Boulle & Rycroft 1997:135; Nelson & Joubert 2016:10.

[460] Empirical studies on voluntarily mediated medical negligence claims conducted in the USA reveal substantial savings in respect of litigation costs, preparation time for lawyers and the amounts paid out for claims. Some examples are cost savings for insurers up to a 25% decrease in indemnity cost and a 60% saving of legal fees, a 50% saving in defence costs and a 40% to 60% saving in the amount the hospital would have had to pay in settlements if the matters had gone to trial. Attorneys also indicated that they spent approximately one tenth of the time on preparation for the mediation than they estimated they would have spent on trial preparation for the same case for a court hearing. See Hyman *et al.* 2010:797; Hyman & Schechter 2006:1394; Liebman 2011:135; Meruelo 2008:285 for complete discussions of the study results.

An aspect that the mediator will discuss in the pre-mediation meeting is the cost of the mediation itself. The cost clause in the mediation agreement reflects the fee the mediator charges, and sets out who will be responsible for paying it. Private mediators charge fees based on their knowledge and experience, thus, the more knowledgeable and experienced the mediator, the higher their fee. Mediation service providers include on their websites a page that displays the profiles of their member mediators and the fees they charge, generally per hour, per half day or per full day. The websites often also contain a code of conduct that stipulates that members must discuss their fees and payment thereof with the participants before mediation commences.[461]

The fees of mediators who are accredited to conduct court-annexed mediation are regulated by statute and, at the time of writing, capped at maximum of R4 500,00 per day for a level 1 mediator and R6 000,00 per day for a level 2 mediator.[462] Participants generally share the costs of mediation equally, unless agreed otherwise.[463] The mediation agreement of medical negligence claims must indicate clearly who will be responsible for payment of the costs of the mediation, because participants to the mediation may act in a representative capacity for indemnity insurers and government hospitals that may be responsible for paying the fees of the mediator. During the pre-mediation meeting, the mediator should obtain from the respective representatives and record fully the details of entities responsible for payment. Having obtained all the information required from the parties, the mediator will arrange for the document to be signed.

6.5.1.3 The venue

In addition to matters finalised and discussed during the pre-mediation meetings and finalisation of the agreement to mediate, the mediator must attend to arrangements related to the venue. These include informing the parties of the physical location of the venue – if it differs from the one used for the pre-mediation meeting – accessibility of

---

[461] See, for example, the Arbitration Foundation of South Africa (arbitration.co.za/mediation); the South African Dispute Settlement Accreditation Council (disac.co.za); Mediation in Motion (mediationinmotion.com); Free State Mediation (fsmediation.co.za).

[462] GN 854 Government Gazette 38163:854. See also the fees for preparation, perusal and traveling contained in the notice.

[463] Boulle & Rycroft 1997:90. The rules governing court-annexed mediation expressly stipulates this.

the venue, seating arrangements, parking, refreshments, etc. The aim is to create a physical environment that is as conducive as possible for the parties to conduct the mediation.[464] Studies have shown that physical aspects related to the venue have subconscious psychological effects on the parties, and may influence their behaviour. Examples are provided in paragraphs 6.5.4.1 to 6.5.4.3.[465] A mediator who is equipped with this knowledge will be empowered to set up the venue, depending on available resources at the particular venue, to achieve maximum efficacy during the mediation.

6.5.1.4 Accessibility, lighting, temperature and colour palette

Accessibility of the venue is particularly important for participants in medical negligence cases, who may still be recovering from injuries that impaired their physical mobility, or use wheelchairs. At least two rooms are needed for the mediation meeting: one for joint sessions and one for individual sessions plus, where possible, a separate area where participants can enjoy refreshments while they wait between individual sessions. To ensure confidentiality, the rooms should be soundproof, or at least not within earshot from one another.[466]

Both light and temperature of the room have psychological effects. A person sitting across from someone who is seated with their back to a large window with a view, or who is "backlit" will be distracted and may struggle to follow. Simply drawing the curtains solves the problem.[467] A room that is too hot or cold affects people's ability to concentrate and may lead to injudicious statements and decisions.[468] The colours in a room either stimulate or calm people. Neutral wall colours (grey, green and blue) have a calming effect, whilst bright colours (red, yellow and orange) tend to stimulate participants who, in a negotiation environment, should focus on the discussions. Where possible, brightly coloured spaces should be avoided.[469]

---

[464] Boulle & Rycroft 1997:90.

[465] See Carruthers 2017:579; Yeend 2015:1 for a comprehensive discussion.

[466] Boulle & Rycroft 1997:90.

[467] Yeend 2015:1.

[468] Carruthers 2017:293; Yeend 2015:1.

[469] Carruthers 2017:588; Yeend 2015:1.

6.5.1.5 Furnishings

The furniture in the room and the seating arrangements (position at the table) influence how parties conduct negotiations.[470] Applying the mind to mundane considerations, such as the type of chair and shape of the table used during the mediation meeting may seem tedious, but if these matters may influence the outcome of the mediation, the mediator must pay attention to them. High-back chairs with arm rests symbolise seats of power, and if one side of the table is provided with such chairs, and the other with chairs with lower backs, people in the latter type may be at a disadvantage.[471] Round or oval-shaped tables stimulate cooperative conduct, as opposed to rectangular tables, which have an opposite effect.[472] Round tables are preferable, but often rectangular tables are all that are available at the venue, simply because they are more practical and fit into most spaces.

6.5.1.6 Seating the parties

The positions of the participants at the table are important for practical and psychological reasons. If the mediator is seated at the head of the table, it signifies their position of power, in the sense that it signifies that the mediator controls the process.[473] Furthermore, it serves the practical aim of enabling the mediator to face and speak to all the participants directly and to observe the demeanour and non-verbal communication of the parties, such as body posture and facial expressions.[474] Placing the clients – in the context of medical negligence cases, normally the patient and the medical professional – on either side of the mediator accomplishes two imperative purposes. Firstly, it symbolises a triangle, which purports stability and shared engagement in a psychological sense. Secondly, it is perceived as a seating position of safety at the negotiation table, which is critical for clients in medical negligence disputes, and even more so when one party is represented and the other not. The

---

[470] Boulle & Rycroft 1997:140.

[471] Yeend 2015:2.

[472] Boulle & Rycroft 1997:140; Yeend 2015:2.

[473] Ater 2019.

[474] Boulle & Rycroft 1997:141; Yeend 2015:2.

clients' representatives should be seated next to them along the long ends of the table.[475] The placement of the chairs should allow sufficient distance between the participants, so as not to intrude in their personal space.[476]

Ultimately, the mediator needs to make practical decisions that are informed by their opinion of what is most suitable for a particular situation and the extent to which the available resources permit. Having dealt with preparatory matters, the discourse in Paragraph 6.5 turns to the mediation phase.

6.5.2 Mediation phase

As a broad outline, the mediation phase involves the following steps:

- Preliminaries**;**
- The opening by the mediator (setting the table);
- The opening statements of the parties in a joint session;
- Private side sessions and joint sessions with the parties;
- Recording and finalising decisions;
- Closing statement and termination of the meeting.[477]

Collectively, the aim of the stages is to construct a space conducive for the mediator to facilitate the negotiations between the parties about their dispute. Each of the individual phases serves different purposes and aids the mediator in the facilitation task; they are discussed separately in the next subsections.

6.5.2.1 Preliminaries

The formal opening by the mediator is preceded by a brief sequence of meeting the parties as they arrive at the venue. It may be that the parties or their representatives have not met, or are unfamiliar with the venue. The mediator will show the parties to the room to be used for the opening session, seat them and do the necessary

[475] Yeend 2015:2.

[476] Ater 2019.

[477] Patelia & Chicktay 2015:30; Brand *et al.* 2012:36; Boulle & Rycroft 1997:91.

introductions.[478] These tasks enable the mediator to set the parties at ease and determine their levels of comfort.[479]

6.5.2.2 Opening by the mediator

The next step in the mediation process is the formal opening by the mediator. This step in the process sets the tone for the rest of the meeting and accomplishes several important objectives. The participants are expected to be nervous at the start of the process. An explanation or a reminder where the mediator has done so during the preparation phase, of the common features of mediation and the proposed sequence of events in the specific meeting may make the parties feel more at ease.[480] Most importantly, the opening statement by the mediator creates or reaffirms trust in the integrity of the mediation process and the mediator.[481]

The literature suggests that the mediator addresses the following in their opening of the first joint session:[482]

1) Formally welcome the parties to the mediation meeting. Typically, a mediator would also commend the parties on their decision to use mediation as a method to resolve their dispute.
2) Confirm that the parties have signed the mediation agreement and the settlement authority of the final decision-makers present at the meeting. In medical negligence mediation, this is particularly important, to avoid unnecessary delays.[483]
3) Explain the aim of mediation as a consensual and collaborative process to resolve the parties' dispute.

---

[478] Because of the informality of the process, the mediator and the parties often address one another by their first names. The mediator should still ask the participants how they prefer to be addressed.

[479] Brand *et al.* 2012:37; Boulle & Rycroft 1997:91.

[480] Bondy & Doyle 2011:43; Patelia & Chicktay 2015:30.

[481] Boulle & Rycroft 1997:93.

[482] Patelia & Chicktay 2015:30; Brand *et al.* 2012:36; Boulle & Rycroft 1997:91. See also UCT Law @ Work 2016:12; Berlin 2021.

[483] See paragraph 6.5.1.1. It is reiterated that the primary participants at the mediation meeting should be the injured patient and the medical professional who treated them. The insurance contract of the medical practitioner may, however, require that the insurers approve all settlements. The prudent mediator would have established this during their preparation. On the day of the mediation meeting, they would confirm that someone is present or readily available to confirm approval.

4) Elucidate the role of the mediator and the parties. The mediator's role is to facilitate discussions directed at joint decision-making by the parties. The mediator should emphasise that the mediator is not an adjudicator, but an impartial third party with no interest in the outcome of the mediation, and is present to ensure that the process is fair and equitable. Additionally, the mediator must discern the different functions of legal representatives in mediation and litigation. Lawyers should support their clients in delineating issues and discovering aspects of mutual agreement.
5) Irrespective of the amount of preparatory work done, explain the characteristics of mediation. The mediator should accentuate that mediation is confidential, without prejudice, non-binding[484] and voluntary.[485]
6) Set basic guidelines for the structure of the mediation meeting. This could include getting agreements from the parties about refraining from interrupting each other and the mediator, and from disrespectful or derogatory comments. What the parties will consider as rude conduct during mediation must be agreed upon. This may include speech and facial expressions, and a total ban on interruptions. The mediator will also inform the parties that the mediation starts with a joint session and will continue with separate sessions with the individual participants, interspersed with further joint sessions, as the need arises. The mediator must reassure the parties that should they (the mediator) spend more time with one party in a separate session, the reason is to gather information, and it should not be perceived as favouritism or partiality in any way.

All mediators develop their own personal style of conducting mediation. It is suggested that mediators use a vernacular approach to communicate with the parties, whilst being mindful about creating an impression of familiarity or favour with either party.[486]

---

[484] Here, the mediator will describe the aspects discussed in paragraph 6.4.2.3. As to confidentiality, the mediator will explain that it operates on two levels. Firstly, that everything said at joint sessions remains confidential between all the parties present. Secondly, that discussions in private sessions remain confidential between the mediator and the particular party, unless the mediator is mandated to communicate specific matters to the other party. Any notes that the mediator takes during sessions must be kept from the view of the participants.

[485] The mediator should get agreement from the participants that, should anyone elect to end the mediation, they grant the mediator the opportunity to, in a private side session, discuss the reasons.

[486] UCT Law @ Work 2016:12.

On the topic of taking notes, the researcher proposes that it should be kept to the minimum. Personal preference and experience levels of mediators determine the extent of note taking. Mediators should guard against getting overinvolved with writing down notes, to the extent that it distracts them from listening to what a party is saying. Lawyers are, by virtue of their training and adversarial habits, prolific note takers. The mediator must ensure that, if lawyers are present during discussions, they remain focussed on the speaker and are not side-tracked by legal representatives taking notes. Lastly, mediators must ensure that they do not reveal the content of their notes to either party, to retain confidentiality. It is suggested that the mediator informs the parties that the mediator will destroy all their notes after the mediation meeting in the parties' presence, if they prefer. The mediator should also request the parties to do the same.

Having set the proverbial table, the mediation meeting proceeds to the first joint session, where the parties have the opportunity to make their opening statements.

6.5.2.3 The parties' opening statements (first joint session)

The first joint session of the mediation presents the parties with the opportunity to make brief opening statements. Normally, the plaintiff/claimant will start with their remarks, followed by the defendant/claimant. The participants direct their account at the mediator, and there is no interaction between them. Where legal practitioners represent parties, the mediator may ask them to add further information that they deem necessary.[487] The objective of an opening statement is to inform the mediator and the other participant/s of the facts that brought them to the mediation table and the nature of their respective claims. Importantly, it allows participants to present an uninterrupted version of events in a secure environment, while having the ear of a conscientious third party.[488] Opening statements also present an opportunity to vent emotions.[489]

---

[487] Boulle & Rycroft 1997:94.

[488] Having heard the versions of both sides and depending on the amount of preparatory work, the mediator should have an adequate impression of the issues for discussion. The participants would have an actual and not perceived appreciation of each other's concerns.

[489] UCT Law @ Work 2016:13; Brand *et al.* 2012:38; Wiese 2016:70; Patelia & Chicktay 2015:31.

Although the mediator does little talking during the first joint session, the mediator needs to manage the process carefully, as it sets the tone for the rest of the mediation session. Mediators are responsible for the fair and equal treatment of the participants and must ensure each participant has an equal amount of time to present their opening statements.[490] During the parties' opening statements, the mediator will ask open-ended questions and clarifying questions, as required. This affords the party leeway when answering and encourages a free flow of information.[491]

Two aspects of opening statements at mediation related to medical negligence require further brief elucidation: firstly, the issue of the role and functions of legal representatives, as it is likely that participants have employed lawyers to assist at the mediation and, secondly, the issue of how the mediator manages the venting of emotions.

On the matter of the role of legal representatives, it remains the choice of a particular party to present the opening statement themselves or have their lawyer speak on their behalf. Where legal representatives make the opening remarks, they must keep in mind that their tone should be neutral and not argumentative or hostile.[492] It is proposed that, in the context of mediating medical negligence claims, this is a sound approach for various reasons. In all likelihood, the parties, through their lawyers, would have exchanged argumentative and accusatorial court papers or correspondence. That, coupled with an aggressive opening statement, viewed by an attorney as the equivalent of persuading a presiding officer of the soundness of their clients' case, may add insult to injury and could damage the success of the mediation meeting.[493] Client participation in opening statements frequently holds considerable advantages. According to Gafni, disputing parties seldom pay enough attention to opening statements by lawyers, but the opposite applies when the client speaks. Moreover, having your client participate may contribute to them feeling satisfied with the

---

[490] UCT Law @ Work 2016:13; Boulle & Rycroft 1997:94. An equal approximation of time may not always be possible. In such instances, the mediator should acknowledge any discomfort a party might have and consider asking a talkative party to note down and reserve further comments for an individual session.

[491] Brand *et al*. 2012:38.

[492] Gafni 2011:1–2.

[493] Gafni 2011:1–2.

procedural and psychological aspects of mediation, as well as the substantive results.[494]

Irrespective of the amount of preparatory work by the mediator before the start of the mediation meeting to familiarise the parties with the process, participants will likely be in a heightened emotional state. Contending with emotional parties may prove to be a challenging task for the mediator. The first joint session may very well be the first time after the incident an injured patient confronts the medical practitioner who caused them harm. Conversely, the medical practitioner will face the patient who is accusing them of negligence. Both parties are likely to foster feelings of anger, disappointment and resentment and their opening statement is the chance to vent those emotions.[495] The task of the mediator during the first joint session, and throughout the process, is to manage these emotions through their facilitation skills. In essence, the mediator must be able to recognise emotions expressed through verbal and nonverbal communication and make judgement calls on strategies to handle the situation. These may involve deciding when it is conducive to the negotiation process to allow venting, and when to prevent the venting from escalating to a point where it threatens the continuation of the process.[496]

Linked to the mediator managing emotions, is the aspect of dealing with disruptive behaviour during joint sessions. Disruptive behaviour often manifests as parties interrupting each other. Because parties are likely to be more emotional at the initial joint session, interruptions are more prevalent at this stage of the proceedings. Because they are more likely to interrupt, it is particularly important for the mediator to control interruptions effectively, as failing to do so could have an adverse effect on the atmosphere of the mediation.[497] The most effective tool for managing interruptions is a reminder by the mediator to the interrupting party of the agreement to refrain from

---

[494] Gafni 2011:2.

[495] Wiese 2016:71; Brand *et al.* 2012:38.

[496] See Chapter 2 paragraphs 2.5.4 and 2.6 for a detailed discussion on the techniques and strategies that a mediator may employ to manage emotional behaviour during the mediation process. For example, the use of reframing to convert negative statements to put a positive connotation on it, expressing empathy, recognising that a party may be emotional, given the particular circumstances, and calling for a break that allows an emotional party to recover from an emotional outburst.

[497] Wiese 2016:81; UCT Law @ Work 2016:14.

interrupting, which was agreed upon at the opening stage of the proceedings.[498] By focussing on this agreement, the mediator achieves a dual purpose. Firstly, by not demanding that parties refrain from interjecting when their co-participant speaks, the mediator affirms that the parties are responsible for their own conduct. Secondly, it verifies that the mediator is committed to constructing the best possible environment for the parties to settle their dispute themselves, by protecting them from abusive behaviour. When the mediator decides how to manage an interruption, they must, however, always treat participants in a nonpartisan fashion and prudently distinguish between potentially intimidating conduct versus someone merely expressing their feelings.[499]

By way of summation, the parties, in their opening statements, provide a summary of their interpretation of the facts and their respective positional stances. Participants are unlikely to deal with their real interests and needs at this early stage of the proceedings. The mediator, by actively listening to the parties, will gain insight into the issues to be addressed, which they will use to gainfully engage with the parties during the separate and further sessions to identify interests and to build an agreement.

A last important feature of the opening statements, amplified by what the mediator learnt during preparation, is that it enables the mediator to recognise and convey initial areas of agreement. The parties may agree on substantive aspects of their dispute such as the quantum of specific amounts claimed for medical expenses already incurred. Understandings reached early in the process provides impetus for the negotiations to come, promotes an atmosphere of consent and reminds highly conflicted parties that there is some common ground between them.[500]

6.5.2.4 Private side sessions and joint sessions

The objective during this stage of the mediation meeting is to progress from the broad outline of the positions of the parties to more detailed discussions. The mediator now

---

[498] See Paragraph 6.5.2.2.

[499] UCT Law @ Work 2016:14. See also Wiese 2016:80-81 for further strategies to manage disruptive behaviour.

[500] Bondy & Doyle 2011:43; Boulle & Rycroft 1997:95.

uses shuttle diplomacy by holding private side sessions and further joint sessions with the participants. During this part of the process, the mediator's focus is on:

- Identifying issues not already discovered during preparation and the opening statements;
- Defining and ordering these issues;
- Finding common ground;
- Developing and exploring options;
- Evaluating and selecting options; and
- Building an agreement.

This the mediator achieves by utilising their skills in communication, facilitation and negotiation, in conjunction with the appropriate mediation model for the particular factual circumstances.[501] The researcher will use the points listed above as the general structure in the discourse that follows.

a) Mediation models

It must be noted at the outset that the description of the models of mediation included here is intended to provide context and a succinct overview of the functions of the different models as described in the literature. Mediators have their own preferences when mediating and the proposition is that mediators should be flexible and adapt their approach as the mediation unfolds, so that it is suitable for the situation. In the context of this study, that would be the most appropriate way to resolve a dispute based on medical negligence.[502]

The literature identifies four mediation models, namely facilitative, settlement, evaluative and transformative mediation.[503] Facilitative mediation involves the mediator arranging the process to assist the parties to create their own solution. The focus is the needs and interests of the parties and the mediator remains neutral. In the

[501] Wiese 2016:74; Boulle & Rycroft 1997:139; Patelia & Chicktay 2015:31.

[502] The discussion is included here, and not earlier in the chapter, because the researcher is of the view that the mediator will only now, at this stage of the process, be able to formulate strategies on the model to use initially and adapt their style as the process evolves.

[503] Wiese 2016:48; Boulle & Rycroft 1997:26; Patelia & Chicktay 2015:31, 37; Brand *et al.* 2012:21. See also Alexander 2008:97 and further for a discussion on the models described above and elaboration on suggested models.

settlement model, the mediator focuses on the parties' positions. The mediator uses the established positions and encourages incremental concessions towards reaching settlement. It is suggested that the settlement model connotes positional negotiations, such as that traditionally used by lawyers in litigation, rather than mediation. The evaluative model of mediation comprises the evaluation of the merits by the mediator, often a subject expert, who then suggests possible solutions to the participants. The emphasis is legal rights rather than interests. Transformative mediation concentrates on the causes of the conflict, with the therapeutic objectives of reconciliation and restoring relationships.

Empirical research conducted in the USA reveals that parties who attended mediation sessions where the mediator used the evaluative model reached agreement more often than where the mediator used facilitative mediation, especially in medical negligence cases.[504] The authors do not advocate for the use of a specific model of mediation, but indicate that the value of the observation study is that it provides valuable information on the effectiveness of mediation strategies.[505] The researcher is of the view that this assumption, although based on data collected from a research group, may be skewed. The source does not indicate who the parties at the mediations were, only that the mediators were attorneys and retired judges.[506] Several studies conducted in the USA found that the patients who litigate claims based on medical negligence often do so for reasons other than monetary compensation, because they view the court process as the only avenue to address their concerns.[507] These reasons include the need for an explanation of what happened, preventing reoccurrence of the same error for other patients in the future, and the need for an apology – reasons the evaluative model of mediation is simply not able to address.[508] Representatives who are not parties promote the use of evaluative mediation, which, in turn, influences the

[504] Wall, Dunne & Chan-Serafin 2011:139. In the source quoted, the authors use the term "neutral" as the equivalent of "facilitative mediation".

[505] Wall *et al.* 2011:139.

[506] Wall *et al*. 2011:134.

[507] Bismarck & Dauer 2006:55; Dauer *et al.* 2000:159; Meruelo 2008:285.

[508] Zonana 2011:20.

choice of mediator by their clients towards someone who prefers the evaluative model.[509]

Facilitative mediation offers a more suitable model to address the concerns and needs that the parties have in addition to purely monetary compensation.[510] It is proposed that the facilitative model of mediation should be the mediator's default orientation in medical negligence claims, with the adaptability to incorporate elements of, for example, transformative mediation, should the need arise.

b) Identifying, defining and ordering issues

The mediator will use private side sessions with the parties to further explore and clarify the issues with the parties that would have become apparent from the positions they revealed in their opening statements.[511] Private meetings provide a safe and confidential platform for a party to disclose matters they would prefer not to raise at joint sessions. A mediator should, thus, start a private session by reminding the party that whatever they express in the session remains confidential unless they direct otherwise.[512] The objective is to develop a list of issues that require decision by the parties; the mediator develops the list in consultation with the parties. Preferably, the mediator should couch the issues as needs, and request the parties to itemise them in order of importance. Devising a list of issues/needs divides the dispute into identifiable questions that serve as an outline for the discussions to follow.[513]

It is suggested that the list of issues in a medical negligence case is likely to be varied and complex. Included might be questions pertaining to the facts of the case, calculation of the quantum of monetary compensation and non-pecuniary matters, such as implementing protocols to prevent future harm to other patients, or the need for an apology. The perceptive mediator will attempt to separate the main issues raised by the parties into a range of interests to be discussed individually.

---

[509] Zonana 2011:33. See also paragraph 6.5.2.4 and the authority cited there.

[510] Badenhorst 2014:30; Zonana 2011:9.

[511] Wiese 2016:71.

[512] Patelia & Chicktay 2015:31; UCT Law @ Work 2016:14.

[513] Brand *et al*. 2012:39; Wiese 2016:71; Boulle & Rycroft 1997:97.

Private meetings may also be used to express empathy with individual participants, relating to the situation they find themselves in, to build rapport and gain trust. Additionally, a party may wish to vent emotions in private, which allows the mediator to steer the conversation towards needs identification by probing the party to reveal the reasons for their anger.[514] An injured patient may, for example, state that they feel frustrated because they have not received an explanation for the cause of their injury. In the same manner, the doctor could express the need to vindicate their reputation by providing an explanation to their patient.

On a procedural note, mediators should inform the parties with whom they will meet first in private – usually the party that presented their opening statement second – to attempt to keep these meetings brief and to ensure the other participants are comfortable.[515] Once the mediator has identified the issues and needs of the parties, the next task is to find common ground, and to develop and explore options.

c) Finding common ground, developing and exploring options

The mediation meeting now progresses to what is probably the most significant part of mediation, the problem-solving phase. During this stage of the mediation, the mediator assists the parties to negotiate constructively towards generating and agreeing on solutions that satisfy their mutual needs.[516] Mediators should encourage the participants to suggest as many options as possible to solve the dispute. The aim of the mediator as part of the facilitation function is to instil a mood where the parties are comfortable to propose options they deem appropriate to resolve the dispute without fear of reactive criticism.[517] Techniques and facilitations skills such as active listening, brainstorming, asking hypothetical questions and identifying areas of mutual agreement enable the mediator to attain this goal.[518]

---

[514] Boulle & Rycroft 1997:98.

[515] Patelia & Chicktay 2015:31.

[516] Brand et al. 2012:41.

[517] Nelson & Joubert 2016:14. These answers may include the cost savings, preserving relationships, getting on with their lives et cetera. See also Braun 2012.

[518] Wiese 2016:72, Patelia & Chicktay 2015: 32; UCT Law @ Work Commercial Mediation Guide 2016:15.

There is no predetermined structure and the conversations with the parties will guide the mediator.[519] The literature suggests that it may be strategically significant to steer clear of commencing with the issue/s on which the parties seem to be furthest apart and rather attempt to find agreement on aspects of the dispute where the parties have indicated they have mutual agreement.[520] By asking a question at the start of an individual session that requires a participant to state what it would mean to them to settle the dispute in a mutually agreeable manner, may very well elicit answers generally indicative of interests that serve to end the conflict.[521] Mediation participants are, mostly, in conflict about their specific interests. Specific interests can be classified conveniently into three categories, a) personal or psychological, b) financial, and c) procedural interests, each with specific subcategories. These subcategories of the interests of parties to medical negligence disputes are presented in Tale 6.1.[522]

[519] Wiese 2016: 72

[520] Bondy & Doyle 2011: 43. See also the comment in paragraph 10.3 above.

[521] Nelson & Joubert 2016:14. These answers may include the saving costs, preserving relationships, getting on with their lives et cetera. See also Braun 2012.

[522] Adapted from Nelson & Joubert 2016:14.

Table 6.1: Subcategories of interests of parties to medical negligence disputes

Personal/psychological interests	Financial interests	Procedural interests
Autonomy Respect Acknowledgement Relationship preservation To be heard Dignity Security Apology Future harm prevention	Medical expenses/care Pain and suffering Loss of income Loss of amenities Legal costs	Fairness Respect Information Participation

The mediator in medical negligence disputes faces a particularly onerous task in this regard, by being confronted with a variety of participants, each with differing interests, that may even be diametrically opposed.[523] Experience has shown that first finding common ground on personal and procedural needs, paves the way for productive negotiations on monetary concerns, which are often more difficult to reach agreement on.[524]

One pertinent example referred to throughout this thesis is the need for an apology and the profound effect such an apology holds not only for the injured patient, but also for the medical professional involved.[525] To expose the need for an apology, the mediator may pose questions to the parties to ascertain what an apology might mean to them personally, or how it may change their attitude towards another party, or the process altogether. Should it become apparent that a party, or both parties, are willing to tender apologies, the mediator must carefully note the exact content of the intended apology before conveying it, or reconvening a joint meeting where the parties may do so personally. Research has shown that an insincere apology may escalate conflict, rather than having the intended effect, and the mediator should ensure that the

[523] See the discussion in paragraph 6.5.2.4.

[524] Nelson & Joubert 2016:15.

[525] See, for example, Chapter 2, paragraphs 2.5.4.2 and 2.6.2; Chapter 3 paragraph 3.2.3.4; Chapter 4 paragraphs 4.2.1 and 4.3 and Chapter 6 paragraph 6.5.2.4 and the authority cited there.

apology is effective.[526] It is suggested that an apology, and for that matter, the need for information on the reasons why a medical error occurred, are interlinked.

Developing and exploring options to find agreement on both these issues may serve to satisfy most of the personal and procedural needs of parties listed in Table 6.1. If a physician explains to an injured patient participating in mediation what caused their injury, it addresses various needs of both parties simultaneously: it is interrelated to autonomy in decision-making, mutual respect and dignity, the opportunity to be heard, participation in and fairness of the process, to name some of the needs of both parties.

It is, furthermore, proposed that the mediator uses similar techniques to elicit an apology when guiding the conversation in the direction of an explanation of what caused the injury. A basis for an apology to come may well be a statement/question from the mediator such as, *"I am sure that everyone involved regrets that this has happened?"* Having the patient and the medical professional present at the mediation is, thus, crucial to developing options for settlement on personal and procedural needs. Legal representatives will often advise their clients to refrain from expressing apologies or disclosing what they consider "too much" information that may indicate legal liability.[527] Should the mediator detect that parties are apprehensive about disclosing information of this kind, it may be necessary to request a side meeting without legal representatives present. Parties should be reminded of the confidentiality of the discussions and that suggesting multiple options broadens the scope for finding common ground from which a settlement may emerge. The possibility exists that the parties may settle the dispute upon the basis of apologies or honest disclosures of medical errors, hence, the importance of steering negotiations in that direction.[528]

Disputes in medical negligence claims that are not settled by way of an explanation or apology necessitate that the financial needs of the parties are addressed next. The

---

[526] See Hyman *et al.* 2010:822; Regis & Poitras 2010:36; Robbennolt 2005:1009. The research also shows that, only after an apology will parties be able to engage in negotiations on the other issues or needs. It also suggests that apologies tendered by representatives or lawyers hold less significance for the recipient than those offered by the doctor or the patient.

[527] Regis & Poitras 2010:40. See also Hyman *et al.* 2010:822. who confirm the confidentiality and without prejudice characteristics of mediation.

[528] See Kaufman 2007:258; Robbennolt 2009:1016; Bismarck & Dauer 2006:56 for empirical confirmation that patients value honest disclosures and apologies. Their research also indicates that patients are less likely to institute claims when medical service providers offer this information when a medical error occurs.

payment of compensation in litigation depends upon the plaintiff first proving the liability of the defendant, based on fault in the form of negligence on the facts. Mediation, by its nature, is non-adjudicative and the fault of any party is not the issue. In fact, mediators using the facilitative model of mediation actively attempt to steer discussions away from positional fault-finding.[529] Nevertheless, it is highly unlikely that discussions will turn to financial needs, and option generation needs to be undertaken to solve the dispute on that level without a party conceding liability. It may happen that a party concedes the merits or decides to settle because they do not want to engage in arduous litigation.[530] It is proposed that such concessions would be exceptions rather than the norm.

When the negotiations do turn to the financial needs of the parties, the mediator should take special heed of positional proposals and the adversarial culture of legal representatives. The mediator must manage the negotiations carefully and encourage creative thinking to create options. As indicated in Chapter 3, the South African case law presents litigants with the opportunity to, where pleaded properly and if a high court decides to develop the common law, obtain an order for compensation other than a lump sum payment.[531] Mediation has always offered this option and the task of the mediator is to use their negotiation skills to produce such a result in conjunction with the parties. Active listening, reframing, emphasising common ground, increasing issues and brainstorming different options are some the techniques mediators use to assist the participants to reach agreement.[532]

A typical scenario in a medical negligence claim may be that the injured patient is a family's sole breadwinner, and after spending a significant amount of time in hospital and incurring tremendous medical expenses, will, in the future, need extensive further care and recovery time before they can resume working again, or they have, due to

[529] Nelson & Joubert 2016:21. The aim is to help the parties realise what the outcome could be.

[530] Peté *et al.* 2016:412.

[531] See paragraph 3.2.3.4 and the authority cited there.

[532] Patelia & Chicktay 2015:32; Nelson & Joubert 2016:15; Brand *et al.* 2012:41; Boulle & Rycroft 1997:148. See also Braun 2012.

their extended absence, lost their employment and will now find it difficult to take care of their family.

A sensible point of departure for the mediator would be to get to know the parties better by exploring aspects of their family life. Both parties may value spending time playing sports with their children. A mutual realisation of a shared value might cultivate better understanding of emotional issues that, in turn, advance productive negotiations on substantive financial issues. To encourage alternatives to the payment of money, it is advised that the mediator reminds the parties that the solutions they create do not have to be the same as what a court would order. In negotiating financial needs, it may appear that only a single resolution exists, being compensation sounding in money and the amount thereof. The provision of a wheelchair or prostheses may be obtained much more readily and probably cheaper by the medical disputant providing some option. Hospitals may have special fee agreements with a host of service providers, such as physiotherapists, psychologists and so on, whose services they may offer to the patient disputant as part of a relief package.

An agreement between the parties on an expert opinion about the potential amount of compensation, with substantiated reasons, during the preparatory phase provides a platform for exploring options. Here, the mediator is counselled to direct the parties to consider a multiplicity of options. For example, if a private hospital has accepted liability for the injuries of the patient, the mediator could enquire from the hospital representative at the mediation about the network of medical practitioners with practices at the hospital that could provide future care for the patient. The hospital could, then, consider entering into agreements with these practitioners to provide the required care at reduced fees for the hospital’s account, or even reducing the rental paid by these practices. Such an option may drastically reduce the capital outlay for the hospital and ensure better cash flow for the organisation. Along the same lines, the mediator could explore options with the patient regarding the acceptability of being paid instalments, rather than lump sum payments or lump sum payments, into a trust

investment account to secure a future income. Using a visual medium such as whiteboard or flipchart to list the options may be helpful during option generation.[533]

Once the parties have set about constructing various possible solutions, the next stage of the negotiations involves narrowing down the options and starting to build an agreement on the most practicable results.

6.5.2.5 Selecting options and building an agreement

During this stage of the mediation process, the mediator assists the parties to narrow down the list of proposed solutions to the various issues identified in previous phases. The mediator facilitates the negotiations through cooperative problem-solving. The mediator encourages the parties to evaluate the proposed alternative solutions against their mutual needs and interests, measured against objective criteria.[534] Parties must contemplate whether their choices are fair, reasonable and practical. In the process, it may be necessary to refer to expert advice, consider their BATNA, and make trade-offs. The mediator could also suggest that the parties agree in principle on certain options and refine the detail later.[535] In the event that a party or the parties struggle to come to an agreement on a specific facet of the dispute, the mediator should suggest that the participants, in separate meetings, brainstorm, without any criticism or initial evaluation, as many creative options as possible to solve the issue. The rationale is that multiple options simplify the process of discovering a solution that meets the needs of all the parties. A mediator who is experienced in the field of medical negligence matters will be in an ideal position to act as devil's advocate when the parties evaluate the options. The mediator merely acts as a sounding board and does not commit to or indicate preference for any of the solutions suggested.[536]

Parties to mediation might enter the process with unrealistic expectations. In medical negligence claims, these expectations may be informed by advice from legal counsel, financial pressure, and psychological issues, among others. The mediator may use

[533] Nelson & Joubert 2016:21

[534] Brand *et al.* 2012:40; Wiese 2016:73.

[535] Boulle & Rycroft 1997:97; Patelia & Chicktay 2015:34.

[536] Braun 2012; Nelson & Joubert 2016:29.

reality checking to overcome obstacles during negotiation occasioned by intractable beliefs held by participants about the strength of their case (also referred to as overconfidence bias).[537] Mediators must approach reality testing with tact. The aim is to help the parties reframe their prospects to ones that are more reasonable. Questions such as *"are you aware that a court may not give you what you want"* preserves the trust and neutrality that mediators work hard to establish.[538] It is suggested that reality checking should be considered as a last resort, and only if it is apparent to the mediator that it may be the only technique that will ensure continued, constructive negotiations. It would be far better to remind the parties why they agreed to mediate in the first place. Implicit in such a reminder is the huge cost and time advantages of mediation.

Once the parties have agreed on the terms of their settlement, it is the task of the mediator to assist the parties to draft a written settlement agreement.[539] Parties to medical negligence disputes are likely to have legal representation. Should the parties decide to have the settlement agreement drafted by their lawyers, the mediator still fulfils an important supervisory function.[540] Mediated settlement agreements, as a rule, and particularly those related to medico-legal claims, must be detailed and practical. The mediator must ensure that the parties understand the terms of the agreement and, where necessary, explain them to a party in a side session.[541]

Mediation does not guarantee settlement. Should parties to a dispute reach a deadlock, documenting the matters agreed upon will reduce the issues at litigation that a court needs to adjudicate.[542] For parties involved in medical negligence claims, this has cost and time savings at litigation. More importantly, mediation provides the parties with the opportunity to attend to emotional and non-patrimonial needs that litigation does not cater for.

---

[537] Morrow 2016.

[538] Nelson & Joubert:29; Morrow 2016.

[539] The researcher includes as Appendix "C" a proposed model settlement agreement.

[540] Wiese 2016:73; Boulle & Rycroft 1997:102.

[541] Bondy & Doyle 2011:44; Brand *et al.* 2012:42; Patelia & Chicktay 2015:38.

[542] Wiese 2016:73; Boulle & Rycroft 1997:103; Patelia & Chicktay 2015:35.

6.5.3 Post-mediation activities

These activities commonly include, amongst others, ratification and review of the agreement and monitoring.[543] It is proposed that ratification and review of settlement agreements by external parties in medical negligence disputes is unnecessary. A prudent mediator would have ensured that everyone required to finalise the agreement is at the meeting or on standby.[544] Mediators may consent to the post-mediation monitoring of the execution of the settlement agreement to sustain the momentum of the mediation meeting and assure the parties that the mediator is available to resolve any possible disputes arising from the agreement.[545] The researcher proposes that including such a clause in the settlement agreement would be sensible, specifically where the agreement involves future medical care to be provided by external parties.

6.6 CONCLUSION

This chapter referred extensively to the practice of mediation. For context and as a point of departure, the researcher included a concise description of the conventional alternative dispute resolution methods, as well as administrative and statutory interventions aimed at resolving medical negligence matters. Although all of these dispute resolution approaches represent potentially viable alternatives to litigation in medico-legal cases, it was concluded that none are more suitable than mediation, for reasons mentioned in the respective analyses. In the main, these reasons relate to concerns about costs and time efficiency, along with bureaucratic processes and the political will required to implement administrative and statutory enactments.

Negotiation and the negotiation skills of the mediator are central to the mediation process itself. The mediator, therefore, has to be well versed in the various techniques and tactical approaches that parties may take to negotiation at the mediation session. Such knowledge enables the mediator to facilitate the negotiations between the parties effectively and to adapt their own style, as the circumstances require. The principles

---

[543] Boulle & Rycroft 1997:103.

[544] See the discussion in paragraph 6.5.1.1.

[545] Boulle & Rycroft 1997:104; Wiese 2016:73.

of interest-based negotiation closely resemble that of mediation, and this is, therefore, the most suitable default approach to negotiations for mediators to employ during mediation. The nature of medical negligence claims and the associated trauma necessitates that a mediator is capable of separating the people from the problem. This propagates discussions on resolving the actual issues between the parties and meeting their needs, as opposed to futile positional posturing.

The detailed discussion of the practice of mediation indicates the multitude of skills mediators must acquire and competently harness to excel at supporting parties to resolve their differences. This chapter illustrated the interconnectedness of all the themes examined in previous chapters, and illuminated their practical applicability to the mediation process. The mediator in medical negligence claims dare not underestimate the value of comprehensive preparation before the face-to-face mediation commences. Participants who elect to mediate their dispute are motivated by, amongst others, the promise of an effective process, and a lack of preparation should never cause diminished expectations in that regard. It is, furthermore, clear that, during the discussions with the parties, a mediator will need to make split-second decisions based on information gleaned from verbal and non-verbal cues received from more than one party simultaneously. Experience is invaluable here, and ever the more reason for inexperienced mediators to hone their skills through a meticulous study of the theoretical underpinnings of these skills.

In Chapter 7, the thesis conclusions will be drawn and recommendations made.

CHAPTER 7: CONCLUSIONS

Chapter 1 of this thesis introduced the topic of the study, set out the research questions, methodology and the outline of the main topics that the researcher investigated. This study departed from two premises. The first is that the South African healthcare system is in crisis due to increased medical negligence claims. The second is the contention that mediation potentially offers a feasible alternative method of resolving medical negligence disputes – as opposed to conventional civil litigation through the courts. The main research question, informed by the second premise, was whether mediation offers a practicable alternative to conventional civil litigation. In order to answer this question, an investigation of subsidiary issues was undertaken. These included an examination of the psychological components of disputes, the unsuitability of litigation for resolving medico-legal matters, and the normative framework provided by mediation to resolve medical negligence claims.

South Africa's healthcare predicament and the influence of increased medical negligence claims on, especially, government-funded healthcare, is common cause.[546] It follows that the established method of resolving claims based on negligence through civil litigation is not optimal, and this emphasises the need for legal reform. The reform argued for in this thesis is using mediation as the preferred method to determine medico-legal disputes.[547]

Theoretically, mediation may seem to be a relatively uncomplicated process. It is suggested that a skilled mediator may even be able to make it appear uncomplicated. This study, however, found that it is not necessarily the case. The complexities associated with medical negligence claims demand that a mediator possesses a thorough theoretical knowledge base, as well the innate ability to apply that information practically during the mediation process.

Chapter 2 explored the psychological thought processes of individuals involved in conflict. The main objective was to illustrate the significance of the way people behave

---

[546] See, for example, Dhai 2015:2; Malherbe 2013:83; South African Law Reform Commission 2017; Ellis 2019; Broughton 2019.

[547] It must be pointed out here that mediation cannot be considered a magical cure for all the ills of the healthcare system.

in conflict situations and how that is relevant in mediation. Individuals involved in medical negligence are often traumatised and emotional. The injured patients and the medical professionals involved confront feelings of anger, disappointment, fear and numerous other emotions, which influence how they manage conflict. Consequently, parties may hold intractable positions and present unreasonable demands founded on psychological attitudes, rather than the rational merits of their cases. Mediators must, therefore, understand the causes of conflict and its effect on a particular individual's method of coping with it. In addition, the mediator has to be aware of the conflicting parties' psychological orientations towards conflict. The totality of this knowledge enables the mediator to identify verbal and non-verbal indicators that may lead to an escalation of the conflict. Effective communication in a heightened emotional state is onerous, if not impossible. The ability to formulate tactics swiftly and effectively to negate potential conflict escalation is an essential skill mediators need to facilitate negotiations between the participants during mediation.

Chapter 3 provided a contextual overview of the civil dispute resolution process through litigation. The civil litigation process in itself is intricate and formalistic. Complexities associated with formulating and proving medical negligence claims compound the issue further. Enforcing medical negligence claims through conventional court processes necessitate employing legal teams and other experts. This alone makes obtaining redress beyond the means of many South Africans, often without even initiating the formal process. This conclusion does not serve as a negation of the civil justice process. It should be acknowledged that, sometimes, litigation is the only feasible method to resolve a dispute. The value of court precedents, in a context where it relates to healthcare issues of public importance, are invaluable for ensuring legal certainty. It would, however, be short-sighted to fail to advocate for active participation in alternative means, such as mediation, which exploits less obfuscated means to resolve disputes.

The intent of the thesis was to contend that mediation is, generally, better suited for resolving medical negligence claims than litigation. It was established that medico-legal claims are inherently intricate, and even convoluted. Moreover, lawsuits are expensive, time consuming and mentally arduous to pursue. Mediation proffers solutions on all three counts. National and international academic opinion referred to

throughout this thesis concur in this respect.[548] In addition to the likely benefits listed above, the research effort demonstrates that mediation holds the further potential to advance the constitutional imperatives of increased access to justice, social justice and transformation – this was the subject matter of Chapter 4.

Procedural justice is enhanced when medico-legal cases are resolved effectively through mediation. Congested court rolls can be unclogged and parties can save time and money. Substantively, parties realise psychological needs, such as getting an explanation of the cause of the injury they suffered from the person who treated them, or an apology – matters litigation are not concerned with. Social justice is achieved by directing cost savings achieved by avoiding litigating cases towards primary healthcare – the purpose the money was intended for in the first place.

The constitutional guarantees of the supremacy of the rule of law and rights, such as dignity, equality, access to healthcare, all have the potential to remain normative ideals if they are not actually realised. It is submitted that, to fulfil these constitutional ideals in the context of medical negligence issues specifically, and civil justice generally, demands transformation. Pro-mediation civil justice reforms by the legislature via statutory enactments, and the judiciary by way of precedent, indicate transformative trends. These efforts are founded, so it is submitted, on the realisation that adversarial litigation is not always the optimal method to resolve disputes, and neither does it always promote the normative constitutional framework.[549] However, more is needed. For mediation to achieve the potential to contribute to transformation, not only in the sphere of medical negligence litigation, but general legal transformation, disputants must elect to mediate their disputes. The major driving force behind transformation in this sense would be a wholesale change of the prevailing adversarial legal culture. Legal practitioners specifically, as well as the public, will have to transform their confrontational beliefs and embrace a non-adversarial way of thinking about dispute

[548] Unfortunately, very little empirical data on mediation in South Africa exists. For empirical data from the USA, see, for example, the authority cited in footnote 459.

[549] The amendment of the Magistrates Court Rules to provide for court-annexed mediation, the insertion of Uniform Rule 41A and decisions such as *MB v NB* and *PE Municipality v Various Occupiers* serve as examples.

resolution.[550] Suggestions for possible ways to encourage transformation of legal culture through legal education were discussed in Chapter 5.

Chapter 5 focussed on the changed environment related to medical negligence claims in South Africa. It indicated that the causes of increased medical negligence claims largely relate directly to this changed environment. The reasons for the increase in these claims are interrelated with the mental and emotional needs of the parties to medical negligence disputes. The reasons further amplify the importance of transformative practices for resolving conflicts of this nature, and the potential of mediation to assist in the attainment of constitutional imperatives.

Medical errors caused by resource-related systemic failures may be reduced by early intervention mediation. Apart from cost savings, which would mean that financial resources can be channelled to their intended purpose, effective dispute resolution proliferates trust in the rule of law. Legislation enacted to promote constitutional rights seems to increase negligence claims, rather than achieve the intended purpose of reducing claims. This is due to a failure to promote non-adversarial alternatives to deciding disputes, rather than because of theoretical errors. Blaming increased medical negligence claims on legal practitioners, who are accused of opportunism, is misplaced. Unscrupulous behaviour by lawyers cannot be excluded completely, but it is submitted that the intense competition for work imposes upon legal practitioners the need to be resourceful in sourcing work. It is argued that the adversarial culture of lawyers will lead them to seek opportunities to litigate, bluntly put, because that is what they know and that is what they are good at. The challenge is to convert lawyers' way of thinking, so that they use non-adversarial and more humanistic methods to resolve issues; these methods may yield results far superior to that of litigation.

In Chapter 6, the researcher conducted an in-depth enquiry of the mediation process. The conventional alternative dispute resolution mechanisms discussed in this study and considered relevant in the medico-legal context, namely arbitration, ombudsman

[550] The importance of a change in legal culture is illustrated by the recent publication of a practice directive in the Limpopo High Court that reprimands legal practitioners about non-compliance with Uniform Rule 41A almost a year after its implementation. It states, furthermore, that the court will not hear matters where practitioners did not comply with the rule. The directive is available from https://www.lssa.org.za/wp-content/uploads/2021/08/Practice-directive-rule-41A-JP.pdf

and negotiation, may offer alternatives to litigation. It was, however, submitted that mediation is the superior method of resolving these types of disputes, in terms of process and outcome. Arbitration, even though it offers a degree of procedural flexibility, remains adversarial in nature, could be as expensive than litigation, and culminates in a winner/loser decision the parties may not be satisfied with. The Office of the Health Ombud, as it functions at present, simply does not offer solutions to medical negligence claims. The researcher hopes that the work it does to ensure safety at healthcare facilities will assist in reducing the number of claims associated with non-compliance with industry standards. Traditional settlement negotiations in medical negligence claims conducted by lawyers on behalf of clients may produce outcomes involving the injured patient receiving monetary compensation. Positional haggling over money, important as receiving compensation may be, takes no cognisance of the other needs, for example, making and receiving apologies. The administrative and statutory interventions referred to in Chapter 5, due to the bureaucratic constraints related to implementation, cannot offer an immediate solution to the crisis occasioned by the rise in medical negligence claims.

The key features of the mediation process and the advantages they hold for the parties confronted with medical negligence, as explained in this study, are, in the view of the researcher, self-evident. In addition, the potential of mediation to enhance constitutional imperatives should make selecting mediation as the dispute resolution method of choice in medical negligence cases rational, even with consideration of the potential obstacles.

The discussion of the mediation phases as they unfold in the medical negligence milieu illustrated the range of knowledge and skills a mediator in these complex cases must possess and exhibit. The researcher is of the view that the emotional environment parties to medical negligence claims grapple with distinguishes mediating these claims from, for example, commercial disputes between large companies. The argument here is not that one type of matter is “easier” to mediate. It merely serves to illustrate that the mediator in medical negligence claims, from start to finish, must continuously be cognisant of and manage emotional aspects during the mediation. It is argued that the pre-mediation phase is crucial in this respect. Early engagement with the parties, a thorough understanding of the issues, properly worded

documentation and continuous reminders of why the parties elected to mediate their dispute serves to prime the parties towards an attitude of mutual respect and open communication.

The key features of mediation align perfectly with constitutional rights and ideals, such as dignity, equality, autonomy, fairness and access to justice. Although it may be argued that these norms ought to be the framework within which any civil justice system should function, this study has shown that, in the context of medical negligence claims litigation, at least, it is not the case. Delivery of medical treatment, at its core, rests on the principle of party autonomy and informed consent. Patients choose a particular treatment because they believe it is the best available option to resolve their ailment. In the event that a dispute arises in relation to the chosen treatment, the disputants should elect to mediate the matter.

This research also found that the nature of a civil dispute, especially when the facts relate to a claim based on medical negligence, is much more convoluted than purely deciding the matter based on facts, legal rules and the probative value of evidence. It was evidenced by this study that patients who suffered an injury due to the medical treatment they received often require more than financial recompense. Claimants may, for example, expect that their emotions are recognised, empathy, an explanation of what happened to them in plain language, and an apology. The medical professional confronting such a claim may have similar psychological needs. This could include, for example, the opportunity to explain that they did everything humanly possible with the resources available to provide the best possible treatment, that the medical error was beyond their control, and they understand that the claimant is upset. These are fundamental human expectations related to a civil wrong that adjudication through civil litigation does not and cannot meet.

The foundational underpinning of the mediation process is facilitated negotiation. It is true that many civil claims settle outside of court and, quite regularly, “at the doors of the court”. It follows, further, that facilitation and negotiation is part of the litigation process. Moreover, it means that lawyers are, or at least ought to be, skilled negotiators. How mediation incorporates these settled forms of alternative dispute resolution is what sets it apart from conventional negotiation. The non-adversarial, principled style of negotiation promoted by mediation, combined with the holistic

approach of the mediator, directed at facilitating a mutually satisfactory and not positionally motivated outcome is the crucial distinguishing factor.

In summary, it is evident that the mediator has to keep focus on various aspects simultaneously when facilitating the mediation process. The key to achieve this is proper training, preparation and, most importantly, an incorruptible belief in and passion for the process. It is concluded that mediation offers the most appropriate and effective dispute resolution mechanism for resolving medical negligence claims, as opposed to conventional litigation. The conclusion is founded on the reason enumerated in the main text of this thesis and summarised in this chapter. Mediation ought to be the preferred method for resolving medical negligence matters, because it is not only procedurally superior to litigation, but also promotes normative constitutional ideals.

In Chapter 8, the researcher will make recommendations that may contribute to promote the cause of mediation as the favoured dispute resolution method in medical negligence cases.

CHAPTER 8: RECOMMENDATIONS

8.1 INTRODUCTION

The central conclusion of this study is that mediation offers a feasible alternative dispute resolution method to litigation in medical negligence matters. Moreover, it is advocated that mediation should be the preferred mode of alternative dispute resolution to resolve these claims for the reasons described in this study. In this chapter, the researcher will proceed to formulate recommendations that emanate from the research undertaken and the conclusions drawn by this study. The recommendations address the following issues. First, the challenge relating to the necessity of a culture change, towards mediation through the use of education and legal reform related to the institutionalisation and regulation of the mediation profession. Second, an articulation of best practices for mediating medical negligence claims. As part of the latter recommendation, a model pre-mediation agreement, a mediation agreement and a settlement agreement will be presented.

8.2 EDUCATION

It is proposed that education will be the most effective way to inculcate a non-adversarial culture amongst all the role players in medical negligence and other mediation-suitable cases, including the general public. The medico-legal crisis in South Africa demands solutions of an immediate nature. Lasting change can only be achieved by instilling a non-combative ethos in the lawyers of the future. To achieve this, the legal profession, law faculties, law students, the medical profession, medical faculties and medical students must be educated on the practical virtues and value of the alternative dispute resolution methodology, underscored by practical mock mediation, supplementary to the theoretical bases of alternative dispute resolution.

8.2.1 Basic education

At the level of basic education, the researcher suggests that all learners at secondary school level must be educated in the fundamental mechanisms of the justice system

in social sciences subjects.[551] The proposition is that learners should have at least an elementary comprehension of the functioning of the civil and criminal justice systems, and of alternative dispute resolution methods for resolving disputes in ways other than through the courts. This knowledge would sensitise learners to the existence of alternatives to litigation and should, ideally, create awareness that other methods exist to realise fundamental human rights.

The Department of Justice and Constitutional Development, in conjunction with the University of Pretoria and the Foundation for Human Rights, annually host the National Schools Moot Court Competition. This competition aims to promote an understanding of and respect for constitutional values, encourage harmony in diversity through human rights values, and allow learners the opportunity to understand how the constitution and the law functions.[552]

If anything, this study has shown that litigation is not always the ideal dispute resolution method, and neither does it promote constitutional norms. Mediation fundamentally underscores normative values such as fairness, respect, dignity, autonomy, harmony and freedom of choice. The suggestion is that a mediation moot is presented concurrently with the court moot. The infrastructure already exists and it is likely that qualified mediators would be willing to assist with training and evaluation of teams.

8.2.2 Tertiary legal education

Tertiary education is the second level at which the culture change, towards more cooperative means of dispute resolution, must be inculcated. Preferably, every faculty at universities should inform their students of the possibility of resolving disputes through alternative dispute resolution, and students should consider these methods when they start practicing in their professions in the future. In the context of this study, the proposition is that the law curriculum should contain a core module on alternative dispute resolution, and all health sciences students should attend a number of lectures

[551] The researcher consulted the website of the Department of Basic Education on the curriculum for secondary school learners. It contains no mention that any module incorporates law-specific aspects. It is assumed that learners are, at least, made aware of constitutional principles.

[552] See justice.gov.za/events/NSMCC.html for further information.

on alternative dispute resolution. The focus of these lectures should be to illustrate the potential mediation holds as a dispute resolution mechanism for medico-legal matters.

Most law faculties in South Africa currently offer courses on alternative dispute resolution as an elective in the final year of undergraduate study for the LLB degree.[553] To be effective as an instrument to change the adversarial legal culture, universities must be encouraged to offer such a module as part of the core curriculum. At the very least, aspects of alternative dispute resolution should form part of civil procedure modules. Although not statutorily required by the legislation that regulates tertiary education, the trend at some Australian universities is to include an alternative dispute resolution module as part of the core undergraduate curriculum, rather than presenting it as an elective module.[554] It does, therefore, seem that where mediation is inculcated in the civil dispute resolution culture of a country, the law tends to present alternative dispute resolution modules as part of the core curriculum. Intervarsity mediation moot competitions could serve as further motivation to reinforce in students the value of mediation as a dispute resolution method. Students who elect to participate in such competitions could, as motivation, receive academic credit for internal rounds in lieu of other assessments, where appropriate.

As an aside, it would be interesting to see how students and learners evaluate the experience of moot competitions running concurrently and using the same set of facts to argue the matter in court and mediating the same dispute simultaneously.

8.2.3 Continuous professional development

As far as the legal profession is concerned, the immediate challenge to propagating a mind-shift towards the use of mediation, especially in medical negligence matters, is changing the adversarial thinking of legal practitioners. It must be pointed out that all legal practitioners are bound to act in the best interests of their clients by the code of professional conduct they subscribe to, in addition to general ethical and moral

---

[553] The researcher consulted the curricula of the Universities of Pretoria, Johannesburg, Witwatersrand, Cape Town, Zululand, Fort Hare, Limpopo ,Western Cape and KwaZulu-Natal, North West University, Rhodes University, Nelson Mandela University and Walter Sisulu University, and only North West University offers a core alternative dispute resolution module.

[554] See, for example, the websites of the Universities of Melbourne, Adelaide, Victoria and Southern Queensland.

standards. Where viable alternatives to resolving disputes, such as mediation, exists, practitioners must advise clients to pursue these alternatives as opposed to litigation. It follows, then, that lawyers must be knowledgeable about the merits of engaging in mediation if they are to advise their clients accordingly. The researcher suggests that the best possible long-term solution would be for the Legal Practice Council to introduce a continuous professional development (CPD) programme for the profession. A CPD programme requires practitioners to accumulate a minimum number of CPD points per year to retain their professional registration. Amongst other development opportunities, practitioners receive points for attending CPD events, where subject experts present talks on practice developments, which would include mediation. Additionally, data gained from empirical research on matters related to mediation, at present almost non-existent, could serve as authoritative means to promote the cause of mediation amongst practitioners. For the immediate future, practicing mediator lawyers should consistently remind their colleagues that mediation is an effective and financially viable prospect for assisting clients to resolve disputes. Where academics and legal practitioners are invited to speak at CPD events for medical practitioners, promoting the use of mediation should, as a rule, form part of the presentation.

8.3 INSTITUTIONALISING AND REGULATING MEDIATION

The suggestions made here are not an attempt to argue for the introduction of mandatory mediation in civil disputes through legislative means. Such an intervention may be the most effective way to institutionalise mediation in the civil dispute resolution system in South Africa. However, as this study has indicated, before the prevailing adversarial tradition transforms to one that accepts mediation as the favoured method to resolve civil disputes, statutory interventions of this kind are likely to be opposed.

The inclination of the judiciary and legislator to promote the use of mediation as a means to resolve civil disputes, combined with the required change in legal culture, should, so it is argued, lead to the institutionalised use of mediation in the civil justice system.

As alluded to in Chapter 6, there is no statute regulating mediation in South Africa, except for the court rules associated with court-annexed mediation in the lower courts. The Qualification and Standards for Accreditation of Mediators in accordance with Rule 86 of the Magistrates Court Rules contains standards of conduct and requires a certificate of good standing from a professional body or mediation training provider approved by the minister.[555] The sanction for non-compliance with the prescribed standards is possible removal from the panel of accredited court-annexed mediators.[556] Noticeably, the standards do not include complaint procedures and apply only to court-annexed mediators. A certificate of good standing from a professional body, such as the Legal Practice Council in the case of a lawyer-mediator, does not suggest that the conduct rules and sanctions for misconduct of that organisation applies to the mediator. A possible solution in this context that will provide protection for mediation users would be to amend the standards, in conjunction with the relevant professional bodies, to the extent that mediators are bound by the conduct rules of the organisation, similar to the position of solicitors in Australia.[557]

The suggested ideal way to institutionalise and regulate mediation as a profession is by promulgating legislation. It is not practicable to formulate comprehensive recommendations in this thesis and it would require further research. Mindful of the bureaucratic processes to promulgate legislation, enacting a regulatory statute will be a long-term solution, albeit an indispensable one, in the view of the researcher. To that end, it is proposed that government enters into a public–private partnership with, for example, the Dispute Settlement Accreditation Council to facilitate the process. An organisation with experience of regulating mediators is equipped to assist with drafting the legislation and, ultimately, even acting as the professional regulatory body. The act itself should be concise, contain the necessary definition, describe the aims and main features of mediation and provide for the establishment of a regulatory body and its functions. Formulating a code of conduct and accreditation standards adapted from existing literature should expedite the process further. To ensure that mediators

[555] GK 854/2014 paras 5, 7, 8 and 9.

[556] GK 854/2014 par. 6.2.

[557] See footnote 258.

remain up to date with recent developments, the recommendation is that continued accreditation is dependent on a CPD system, as suggested in paragraph 8.2.3.

The value of a wholesale institutionalisation of mediation serves several purposes. Users of mediation services will be confident that the mediator they choose to assist them to resolve their dispute is properly trained, accredited and accountable. Mediators will know that they are in control of regulating their own profession. The legislature should, furthermore, include reference to the proposed legislation in all the various statutes that provide for the use of mediation as a dispute resolution mechanism. Including a provision that mediation, as referred to in these statutes, denotes a mediation process as described in the "Mediation Act" would alleviate the issues regarding the omission of a description of how to use mediation. Fundamentally, the institutionalisation of mediation would endorse the aim of establishing mediation as a sustainable method of dispute resolution further.

8.4 BEST PRACTICES IN MEDIATION

The discussion in this paragraph centres around proposals for best practices in medical negligence mediation. Before discussing best practices in mediation, parties to medical negligence disputes must get to the mediation table, preferably as soon as possible after the adverse medical event occurred. To that end, the recommendation is that medical service providers in the public and private sectors include a clause in their agreements to treat patients that, should a dispute arise, the matter will be referred to mediation.[558] These clauses should be clear and unequivocally state that disputes will be referred to mediation first, before parties institute litigation, and comprehensively indicate the procedure to get the matter to mediation. An agreement to consider mediation as an option is not sufficient. These procedures should include a timeline for the progression stages to get to the mediation meeting itself. It would, furthermore, be advisable to agree on a mediator or a mediator service provider who will facilitate the process.[559] The proposal emphasises the significance that all stakeholders in medico-legal affairs must be educated on the virtues of mediation, so

[558] See Boulle & Rycroft 1997:226–236 for a comprehensive discussion on mediation clauses.

[559] The researcher includes as Appendix "D" a proposed clause of this kind.

that they insist on including such a clause in patient care documentation. Having a mediator on call to engage with the parties immediately and to set the mediation process in motion where disputes do arise, is advised.[560]

Parties who elect to mediate also choose who will mediate their dispute. Both subjective and objective factors influence the selection.[561] The training of the mediator influences not only the choice of the parties, but is also the first step towards the mediator developing a reputation as a proficient mediator. Basic mediator training for court-annexed mediation currently consists of a 40-hour course that includes theory, practical exercises and assessment on a simulated mediation.[562] Due to the complex nature of medical negligence claims, the recommendation is that the basic training must be augmented by context-specific training, including information on legal and non-legal topics. As a next step towards the full institutionalisation of mediation, the Law Society of South Africa ought to take the lead in preparing legislative change for qualification, accreditation and ethical conduct of mediators.

It is proposed that mediators must have a basic knowledge of civil procedure generally and receive specific training on aspects of medical law, the law of contract, delict and damages. Under the leadership of the Legal Practice Council, a system of accreditation of mediators outside the ranks of legal practitioners may be a pragmatic way to regulate the mediation industry. Instructing mediators on aspects of medical law, such as informed consent, patient autonomy and the legislative framework that governs the provision of medical services and the medical profession in South Africa, is suggested. Knowledge of the basic tenets of the law of contract and delict, the interplay between these concepts as they relate to medical negligence, and the calculation of the quantum of claims should be a further requirement.

---

[560] Hospitals in South Africa may also consider employing professional "patient advocates", also called "patient navigators", similar to the ones employed in the USA. A professional navigator assists patients to identify challenges in their care and brainstorm solutions in conjunction with other members of staff at the hospital. A person trained to recognise issues that may lead to a claim for negligence would then immediately enquire from the patient if they may initiate mediation. See, for example, https://www.ownyourhealthwa.org/caring-for-others/professional-patient-advocates-what-they-do-and-how-it-works/.

[561] See Chapter 6, paragraph 6.4.5.

[562] Various training providers offer mediation training. See, for example, the website of DiSAC for a list of accredited mediation training providers accredited by the organisation.

In addition to topics related to the law, mediators must gain understanding of psychological thought processes and how parties confronted with conflict due to a medical negligence claim react to it. Recognising and managing emotional disputants and developing techniques and strategies to de-escalate conflict are essential skills for any mediator. The amalgamation of insight into legal theory, and the mental factors that influence the decision-making process of a disputant enables the mediator to facilitate the discussions between the parties better. Considering the potential influence of legal representatives and/or claims advisors of medical indemnity insurers on the negotiation process, and comprehending the theoretical and psychological dynamics that influence their advice to their clients would enable mediators to level the negotiation playing field. It would also enable the mediator to provide informed suggestions on, for example, the need for expert reports. The proposal is not that mediators of medical negligence claims should be subject experts, merely that they should be well trained.

In Chapter 6, the researcher stressed the importance of preparation for the actual mediation session. Part of that preparation should include gathering and perusing medical records and legal documents to identify potential issues for discussion at the mediation. Mediators, despite thorough training, may not be able to comprehend and interpret the content of these texts. Mediators are advised to, when attending training, build and maintain a network of possible subject experts from the training facilitators and co-attendees who may be able to advise, or know of experts who may be able to advise on understanding technical content. When a mediator then consults with disputants they are empowered to engage with them on defining points for discussion related to their needs that are devoid of pedantic positional demands.

In relation to conducting the mediation session, the researcher recommends that the mediator avoid a “one size fits all” approach. Due to the complexity of medical negligence disputes, the mediator must be able to adapt their approach continuously. The various techniques in mediation all have merits in their own right and all of them may find application, to varying degrees, in multifaceted medico-legal disputes. The astute mediator will be able to adapt according to the needs of the parties as the mediation process unfolds. Mediators should perpetually remind themselves that their purpose is to facilitate and enable the parties to resolve their dispute themselves. The

researcher, in closing, advises that a successful mediation is not necessarily tantamount to an outright settlement. That is the ideal, but if the outcome is that a relationship is restored or the questions to be decided in litigation are crystallised, then it should be considered a positive outcome.

Lastly, the lack of empirical research on the perceptions of participants in mediation, and quantitative issues such as success rates warrant future research. In the field of medical negligence cases, this information would have a significant impact on the way these disputes are resolved. Testing the perceptions of all the actors in the field of medical negligence claims on the mediation process may serve to convince the general public, lawyers, the government and insurance providers to change the adversarial legal culture. In addition, statistical proof of success rates and savings on time and costs would serve as further motivation to engage in mediation as the preferred method of dispute resolution in medical negligence issues.

References

AIYEDUN A & ORDOR A

2016. Integrating the traditional with the contemporary in dispute resolution in Africa. *Law Democracy and Development* 20:154–173. http://dx.doi.org/10.4314/ldd.v20i1.8

ALEXANDER N

2008. The mediation metamodel: Understanding practice. *Conflict Resolution Quarterly* 2008 26(1):97–123.

ALTER C

1990. An explanatory study of conflict and coordination interorganizational service delivery system. *Academy of Management Journal* 33:197–204.

ATER S

2019 *Mediation and sitting protocol.* Mediate.com June. http://www.mediate.com/articles/ater-mediation-sitting.cfm (accessed on 13 May 2021).

ANSTEY M

2006. *Managing change negotiating conflict.* 3rd edition. Cape Town: Juta & Co.

AUSBERGER DW

1992. *Conflict mediation across cultures: Pathways and patterns*. Louisville: Westminster.

BADENHORST L

2014. Facilitative mediation. Seeing more than the tip of the iceberg. *De Rebus* 3:30–31.

BADER EE

2010. The psychology of mediation: Issues of self and identity and the IDR cycle. *Pepperdine Dispute Resolution Law Journal* 10(2):1–32.

BALCIK PY & CAKMAK C

2018. The evaluation of malpractice cases arising from aesthetic intervention In Turkey based on Supreme Court case law. *International Journal on Health Planning Management* 1-11.

BARON RA

1988. Attributions and organizational conflict: The mediating role of apparent sincerity. *Organizational Behavior and Human Decision Process* 69:272–279.

BARON RA

1990. Countering the effects of destructive criticism. The relative efficacy of four interventions. *Journal of Applied Psychology* 75:235–245.

BARRET JT

2004. *A history of alternative dispute resolution*. San Francisco: Jossey-Bass.

BERLIN BA

2021. *Sample mediator's opening statement.* Mediate.com. https://doi.org/://www.mediate.com/articles/berlinB1.cfm (accessed on 26 May 2021).

BETTENCOURT BA, BREWER MB, ROGERS CROAK M & MILLER N

1992. Cooperation and the reduction of intergroup bias: The role of reward structure and social orientation. *Journal of Experimental Social Psychology* 28(4):301–319. https://doi.org/:10.1016/0022-1031(92)90048-O

BISMARCK M & DAUER EA

2006. Motivations for medico-legal action. *The Journal of Legal Medicine* 27:55–70.

BJÖRKMAN A, ENGSTRÖM M, WINBLAD U & HOLMSTRÖM I

2018. Malpractice claimed calls within the Swedish Healthcare Direct: A descriptive-comparative case study. *BMC Nursing* 20(21). https://doi.org/10.1186/s12912-021-00540-3

BLALOCK HM

1989. *Power and conflict: Toward a general theory.* Newbury Park: Sage.

BONDY V & DOYLE M

2011. *Mediation in judicial review: A practical handbook for lawyers*. London: The Public Law Project.

BODTKER AM & JAMESON JK

2001. Emotion in conflict formation and its transformation: Application to organizational management. *The International Journal of Conflict Management* 12(3):259–275.

BONIFACE A

2012. African-style mediation and western-style divorce and family mediation: Reflections for the South-African context. *Potchefstroom Electronic Law Journal* 15(5): 378–401.

BOTES M

2015. Mediation: A perfect solution to health care disputes. *De Rebus* 4: 28–32.

BOULLE L

2012. Promoting rights through court-based ADR? *South African Journal on Human Rights* 28:1-17.

BOULLE L & RYCROFT A

1997. *Mediation: Principles, process, practice*. Durban: Butterworths.

BRAND J, STEADMAN F & TODD C

2012. *Commercial mediation. A user's guide to court referred and voluntary mediation in South Africa*. Cape Town: Juta & Co.

BRAUN D

2012. *Keys to mediator success: Issue Identification, exploring options, and brainstorming*. Mediate.com Aughttps://doi.org/https://www.mediate.com/articles/BraunD4.cfm (accessed on 21 June 2021).

BRICKHILL J & VAN LEEVE J

2015. Transformative constitutionalism – Guiding light or empty slogan. *Acta Juridica* 2015:141-171.

BROCKNER J, NATHANSON S, FRIEND A, HARBECK J, SAMUELSON C, HOUSER R, BAZERBAN MH & RUBIN JZ

1984. The role of modelling processes in the "Knee deep in the big muddy" phenomenon. *Organizational Behaviour and Human Performance* 33:77-79.

BROUGHTON T

2019. Gauteng to make doctors, nurses pay out of own pockets for liability claims. *Sunday Times Daily* 3 September. http//www.select.timeslive.co.za/news/2019-09-03-gauteng-to-make-doctors-nurses-pay-out-of-own-pockets-for-liability-claims/ (accessed on 3 September 2019).

BUZZACCHI L, SCELLATO G & UGHETTO E

2016. Frequency of medical malpractice claims: The effects of volumes and specialities. *Social Science & Medicine* 170:152-160. https://doi.org/10.1016/j.socscimed.2016.10.021

CAPPELLETTI M

1992. Access to justice as a theoretical approach to law and a practical programme for reform. *South African Law Journal* 109(1): 22–39.

CARRUTHERS A

2017. The impact of psychological priming in the context of commercial law mediation. *Monash University Law Review* 42(3):579–607.

CARSTENS P & PEARMAIN D

2007. *The foundational principles of South African medical law*. Durban: Lexis Nexis.

CASSIM F & MABEKA NQ

2019. The Africanisation of South African civil procedure: The way forward. *Journal of Law, Society and Development* 6(1):1-17.

COETZEE LC & CARSTENS P

2011. Medical malpractice and compensation in South Africa. *Chicago-Kent Law Review* 86(3):1263–1301.

CLAASSEN N

2016. Mediation as an alternative solution to medical malpractice court claims. *South African Journal of Biomedical Ethics and Law* 9(1):7–10.

COSIER RA, DALTON DR & TAYLOR LA

1991. Positive effects of cognitive conflict and employee voice. *Employee Responsibility and Rights Journal* 4:7–11.

COSIER RA & RUBIE TL

1981. Research on conflict-handling behavior: An experimental approach. *Academy of Management Journal* 24:816–831.

CROUS AJ

2009. Keuringspanele ('Screening Panels') as gepaste geskilsbeslegtingsmetode ter oplossing van mediese wanpraktyksgeskille [Screening panels as a suitable mediation method to solve medical malpractice disputes]. *Potchefstroom Electronic Law Journal* 12(3):97–134.

DAUER EA

2003. A therapeutic jurisprudence perspective on legal response to medical error. *The Journal of Legal Medicine* 24:37–50.

DAUER EA, MARCUS LJ & PAYNE SM

2000. Prometheus and the litigators. *The Journal of Legal Medicine* 21:159-186.

DAVIS DM & KLARE KE

2010. Transformative constitutionalism and common and customary law. *South Journal on Human Rights* 26(3):403–509. https://doi.org/10.1080/19962126.2010.11864997

DE DREU CKW & VAN KNIPPENBERG D

2005. The possessive self as a barrier to conflict resolution: Effects of mere ownership, process, accountability and self-concept clarity on competitive cognitions and behaviour. *Journal of Personality and Social Psychology* 89(3):345-357.

DE JONG M

2010. A pragmatic look at mediation as an alternative to divorce litigation. *Journal of South African Law* 3:515–531.

DE KLERK W (ed.)

2016. *Clinical law in South Africa*. LexisNexis.

DENDY M

2019. *The law of South Africa.* 3rd edition. Durban: Lexis Nexis.

DEUTSCH M

1990. Sixty years of conflict. *International Journal of Conflict Management* 1:237-263.

DEUTSCH M

1993. Educating for a peaceful world. *American Psychologist* 48(5):510–517. https://doi.org/10.1037/0003-066X.48.5.510

DE VOS Le RW

1993. Alternative dispute resolution from an access-to justice perspective. *Journal of South African Law* 1:155–158.

DE VOS Le RW

2000. Developments in South African civil procedural law over the last fifty years. *Stellenbosch Law Review* 11(3):343–357.

DE VOS WLR & BROODRYK T

2018. Managerial judging and alternative dispute resolution in Australia: an example for South Africa to emulate? *Journal of South African Law* 2:18-35.

DHAI A

2015. Medico-legal litigation: Balancing spiralling costs with fair compensation. *South African Journal of Biomedical Ethics and Law* 8(1):2–3.

DRUCKMAN D & BROOME BJ

1991. Value differences and conflict resolution: Familiarity or liking? *Journal of Conflict Resolution* 35:571–593.

DUGARD J

2008. Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice. *South African Journal on Human Rights* 24(2):214–238.

EISEMAN JW

1978. Reconciling "incompatible" positions. *Journal of Applied Behavioral Sciences* 14:133–150.

EMBER CR & EMBER M

1994. War, socialization, and interpersonal violence: A cross-cultural study. *Journal of Conflict Resolution* 38:620-646.

ELLIS E

2019. Move to fight spiralling medico-legal costs. *HeraldLIVE* 29 August. http//www.herald.newspaperdirect.com/epaper/showarticle.aspx?article (accessed on 29 September 2019).

FARIS J

2015. Rethinking restorative justice for the South African context. Paper delivered at the *Lawyers as Peacemakers Conference*:5.

FONAGY P, GERGELY G, JURIST E & TARGET M

2004. *Affect regulation, mentalization, and the development of the self.* New York: Other Press.

FOURIE E

2016. Constitutional values, therapeutic jurisprudence, and legal education in South Africa: Shaping our legal order. *Potchefstroom Electronic Law Journal* 2016*(*19). http://dx.doi.org/10.17159/1727-3781/2016/v19i0a732

GAFNI AJ

2011. Considering how to approach opening statements in mediation. *The Legal Intelligencer* 244(118):1–2.

GALLAGHER TH, GARBUTT JM, WATERMAN AD, FLUM DR, LARSON EB, WATERMAN BM, DUNAGAN WC, FRASER VJ & LEVINSON W

2006. Choosing your words carefully: How physicians would disclose harmful medical errors to patients. *Archives of Internal Medicine* 166(15) 1585-1593. https://doi.org/ 10.1001/archinte.166.15.1585.

GORTON KB

2005. *Attribution theory & de-escalation: Transforming concrete into abstract as a method of conflict management.* Mediate.chttps://doi.org/rch. https://www.mediate.com/articles/gortonK1.cfm (accessed on 18 February 2021).

GOUNDEN F

2007. *Hundreds caught in RAF scams. IOL* 16https://doi.org/. https://www.iol.co.za/news/south-africa/hundreds-caught-for-raf-scams-357894 (accessed on 18 May 2021).

GRAUBERGER J, KEREZOUDIS P, CHOUDHRY AJ, ALVI MA, NASSR A, CURRIER B & BYDON M

2017. Allegations of failure to obtain informed consent in spinal surgery medical malpractice claims. *Journal of American Medical Associat*https://doi.org/56(2):E1-E7. https://doi.org/10.1001/jamasurg.2017.0544

GRAY G

1985. Conditions facilitating interorganizational collaboration. *Human Relations* 38:911–936.

GÜNSOY . C, CROSS SE UKSUL AK

2015. Avoid or fight back? Cultural differences in responses to conflict and the role of collectivism, horror, and enemy perception. *Journal of Cross-Cultural Psychology* 46(8):1081-1102.

HAHLO HR & KHAN E

1973. The South African legal system and its background. Wynberg: Juta & Co.

HALPERN A

1997. *Negotiation skills.* Durban: Butterworths.

HARMS LTC

2018. *Amler's precedents of pleadings.* 9th edition. Johannesburg: Lexis Nexis.

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

2020. *HPCSA annual report 2019/2020*. hpcsa.co.za/Uploads/Publications%202019/Annual%20Report/HPCSA%20_ANNUAL_REPORT_20192020.pdf (accessed on 3 February 2021).

HEYNS A

2014. The inoperative community of law students: rethinking the foundations of legal culture. *Acta Academica* 46(3):77–103.

HEYWOOD M & HASSIM A

2008. Remedying the maladies of 'lesser men or women': The personal, political and constitutional imperatives for improved access to justice. *South African Journal on Human Rights* 24(2):263–280.

HOEXTER C

2008. Judicial policy revisited: Transformative adjudication in administrative law. *South African Journal of Human Rights* 24:281–299.

HOFFMAN DA & WOLMAN RN

2013. The psychology of mediation. *Cardozo Journal of Conflict Resolution* 14:759–806.

HORNSTEIN HA

1965. Effects of different magnitudes of threat upon interpersonal bargaining. *Journal of Experimental Social Phttps://doi.org/logy* 1(3):282–293. https://doi.org/10.1016/0022-1031(65)90032-6

HOWARTH G & CARSTENS P

2014. Can obstetric care be saved in South Africa? *South African Journal of Biomedical Ethics and Law* 7(2):69–73.

HUMBY T-L & KOTZÉ LJ (EDS)

2012. *Introduction to law and legal skills.* Cape Town: Oxford University Press.

HURTER E

2007. Seeking truth or seeking justice: Reflections on the changing face of the adversarial process of civil litigation. *Journal of South African Law* 2:240-262

HURTER E

2011. Access to justice: To dream the impossible dream. *Comparative and International Law Journal of Southern Africa* 44(3):408-428.

HYMAN CS, LIEBMAN CB, SCHECHTER, CB & SAGE WM

2010. Interest-based mediation of medical malpractice lawsuits: A route to improved patient safety. *Journal of Health Politics, Polhttps://doi.org/ and Law* 35(5):798–828. https://doi.org/ 10.1215/03616878-2010-028

HYMAN C & SCHECHTER B

2006. Mediating medical malpractice lawsuits against hospitals: New York City's pilot project. *Health Affairs* 25(5):1394–1399.

JOHNSON SM

2000. The case for medical malpractice mediation. *Journal for Medicine and Law* 5(21):21–31.

JOLOWICZ JA

2003. Adversarial and inquisitorial models of civil procedure. *The International and Comparative Law Quarterly* 52(2):281–295.

JONES TS

1994. *A dialectical reframing of the mediation process: Communication research and perspectives.* Thousand Oaks: Sage.

JONES TS

2000. Emotional communication in conflict: Essence and impact. In WF Eadie & PE Nelson (eds) *The language of conflict and resolution,* 81–104. Sage. http://dx.doi.org/10.4135/9781452205496.n6

JOUBERT J

2020. Mediation Rule 41A of the High Court. *LexisNexis* 12 May. http://www.LexisNexis.co.za/news-and-insights/covid-19-resource-centre/practiceareas/mediation-and-arbitration/mediation-rule-4la-of-the-high-court (accessed on 12 May 2020).

KAPLOWITZ N

1984. Psychopolitical dimensions of international relations. *International Studies Quarterly* 28:373–409.

KAUFMAN NL

2007. The demise of medical malpractice screening panels and alternative solutions based on trust and history. *The Journal of Legal Medicine* 28:247–262.

KEATOR TD

2011. *Dispute or conflict? The Importance of knowing thttps://doi.org/fference* Mediate.com August. https://www.mediate.com/articles/keatorTI.CFM (accessed on 1 December 2019).

KHAMPEPE S

2016. Meaningful participation as transformative process: The challenges of institutional change in South Africa's constitutional democracy. *Stellenbosch Law Review* 3:441–453.

KIM K & MARKAM B

2013. Individual differences, cultural differences, and dialectic conflict description and resolution. *International Journal of Psychology* 48(5)797–808.

KLARE KE

1998. Legal culture and transformative constitutionalism. *South African Https://doi.org/al of Human Rights* 14(1):146–188. https://doi.org/10.1080/02587203.1998.11834974

KRIESBERG L

1992. *De-escalation and transformation of international conflicts*. New Haven: Yale University Press.

KRUGER A

2020. SA's problem of a narrow tahttps://doi.org/e and high taxes. *Moneyweb* 1 February. https://www.moneyweb.co.za/news/south-africa/sas-problem-of-a-narrow-tax-base-and-high-taxes/20200108 (accessed on 18 May 2021).

LANGA P

2006. Transformative constitutionalism. *Stellenbosch Law Review* 17(3):351–360.

LEBED MR & MCCAULEY JJ

2005. Mediation within the health care industry: Hurdles and opportunities. *Georgia State University Law Review* 21:911–930.

LIEBMAN CB

2011. Medical malpractice mediation: Benefits gained, opportunities lost. *Law and Contemporary Problems* 74:135–149.

MABUSELA TL

2019. *Complementarity of civil litigation and court-annexed mediation in South Africa: Empirical investigation of implications and challenges*. Unpublished dissertation. University of South Africa.

MADONDO MI

2019. The role of the legal sector in developing a legally-conscious society. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 82(3):353–362.

MAIESE M & BURGESS H

2020. Limiting escalation/de-escalation. *Beyond Intractability* September. http://www.beyondintractibility.org/essay/limiting-escalation (accessed on 18 February 2021).

MALAN K

2015. Deliberating the rule of law and constitutional supremacy from the perspective of the factual dimension of law. *Potchefstroom Electronic Law Journal* 18(4):1206–1250.

MALHERBE J

2013. Counting the cost: The consequences of increased medical malpractice litigation in South Africa. *South African Medical Journal* 103(2):83–84.

MARNEWICK C

2007. *Litigation Sills for South African lawyers*. 2nd edition. Durban: Lexis Nexis.

MARNEWICK C

2015. Mediation practice in the magistrate's court. Durban: Lexis Nexis.

MASHEGO A

2019. Gauteng health faces R1.1https://doi.org/ claims for alleged negligence. *City Press.* https://city.press.news.24.com/News/gauteng-health-faces-r11bn-in-claims--for-alleged-negligence-20190706 (accessed on 7 July 2019).

MCMULLEN A

1990. Mediation and medical malpractice disputes: Potential obstacles in the traditional lawyer's perspective. *Journal of Dispute Resolution* 1990(2):1–16.

MCQUOID-MASON DJ

2000. The delivery of civil legal aid in South Africa. *Fordham International Law Journal* 24:115–142.

MEDICALBRIEF

2020. State medical negligence claims and payouts almoshttps://doi.org/druple over four years. *MedicalBrief* January 29. https://www.medicalbrief.co.za/archives/state-medical-negligence-claims-and-payouts-almost-quadruple-over-four-years (accessed on 4 February 2021).

MENKEL-MEADOW C

1996. The trouble with the adversary system in a postmodern, multicultural world. *William & Mary Law Review* 38(1):5–44.

MERUELO NC

2008. Mediation and medical malpractice. The need to understand why patients sue and a proposal for a specific model of mediation. *The Journal of Legal Medicine* 29:285-306.

METZLOFF TB, PEEPLES RA & HARRIS CT

1997. Empirical perspectives on mediation and https://doi.org/actice. *Law and Contemporary Problems* 60(1): 107–152. https://doi.org/10.2307/1191997

MOORE W & NÖTHLING SLABBERT M

2013. Medical information therapy and medical malpractice litigation in South Africa. *South African Journal of Biomedical Ethics and Law* 6(2):60–63.

MORLEY DD & SHOCKLEY-ZALABAK P

1986. Conflict avoiders and compromisers: Towards an understanding of their organizational commuhttps://doi.org/ion style. *Group and Organizational Behaviour* 11:387–402. https://doi.org/ 10.1177/0364108286114006

MORRIL C

1991. The customs of conflict management amongst corporate executives. *American Anthropologist* 93:871-893.

MORRIL C & THOMAS CK

1992. Organizational conflict management as disputing process. *Human Communication Research* 18:400–428.

MORRISON G & ROBSON R

2003. *Alternative dispute resolution in healthcare: The last big alternative dispute resolution frontier.* Mediate.com November. http:www.mediate.com/pfriendly.cfm?id=1416 (accessed on 8 August 2018).

MORROW B

2016. *Reality testing: The right dose at the right time.* Mediate.com. https://www.mediate.com/articles/MorrowB2.cfm (accessed on 8 July 2021).

MOTSOALEDI A

2015. Doctors call for lawyers to get out of hospitals. Keynote address at the Medico-Legal Summit. *South African Journal of Bioethics and Law* 8(1). https://doi.org/ 10.7196/sajbl.409

MULCAHY L

2001. Can leopards change their spots? An evaluation of the role of lawyers in medical negligence mediation. *International Journal of the Legal Profession* 2001 8(3):203-224.

NCALA M

2020. X-ray. The critical state of the health sector in SA. *Corruption Watch.* http:www.corutionwatch.org.za/*the-critical-state-of-the-health-sector-in-SA/* (accessed on 26 August 2020).

NEETHLING J, POTGIETER J & KNOBEL, JC

2015. *Law of delict.* 7th edition. Lexis Nexis.

NELSON A

2017. Healthcare crisis is not fault of lawyers but wasteful litigation – expert. *MedicalBrief.* http:www.medicalbrief.co.za/archives/healthcare-crisis-not-fault-of-lawyers-but-wasteful-litigation-expert/ (accessed on 23 May 2019).

NELSON A & JOUBERT J

2016. UCT Law@Work. Commercial mediation guide.

NOLL D

2005. *De-escalation: The key to peace.* Mediate.com September. https://www.mediate.com/articles/noll22.cfm (accessed on 11 February 2021).

NOONE MA & OJELABI LA

2017. Ensuring access to justice in mediation within the civil justice system. *Monash University Law Review* 40(2):527–563.

NUSSBAUM L

2017. Trial and error: Legislating alternative dispute resolution for medical malpractice reform. *Maryland Law Review* 76(2):247–307.

NYENTI M

2013. Access to justice in the South African social security system: Towards a conceptual approach. *De Jure* 46(4):901-916.

OOSTHUIZEN WT & CARSTENS PA

2015. Medical malpractice: The extent, consequences and causes of the problem. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 78:269–284.

O'REGAN C

1999. The best of both worlds? Some reflections on the interaction between the common law and the Bill of Rights in our new Constitution. *Potchefstroom Electronic Law Journal* 2(1):1–20.

ORENSTEIN A

1999. Apology expected: Incorporating a feminist analysis into evidence policy where you would least expect it*. Southwestern University Law Review* 28:257–258.

PATELIA E & CHICKTAY MA

2015. *Appropriate dispute resolution: A practical guide to negotiation, mediation and arbitration.* Durban: Lexis Nexis.

PEEPLES R, HARRIS C & METZLOFF T

2007. Following the script: An empirical analysis of court-ordered mediation of medical malpractice cases. *Journal of Dispute Resolution* 2007:101–118.

PEPPER MS & SLABBERT NM

2011. Is South Africa on the verge of a medical malpractice litigation storm? *South African Journal of Biomedical Ethics and Law* 4(1):29-35.

PETÉ S, HULME S, DU PLESSIS M, PALMER R, SIBANDA O & PALMER T

2016. *Civil procedure a practical guide.* 3rd edition. Cape Town: Oxford University Press.

PHALANE MO

2015. Paper presented at the March 2015 Medico-Legal Summit. Office of the Chief Litigation Officer: Department of Health Medical Negligence Summit. Pretoria.

PIENAAR L

2016. Investigating the reasons behind the increase in medical negligence claims. *Potchefstroom Electronic Law Journal* 19:1–21.

PINKLEY RL

1990. Dimensions of conflict frame: Mediator and disputant interpretations of conflict. *Journal of Applied Psychology* 75:117–131.

PINKLEY RL

1992. Dimensions of conflict frame: Relation to disputant perceptions and expectation. *The Journal of International Conflict Management* 2:95–113.

PINKLEY RL & NORTHCRAFT GB

1994. Conflict frames of reference. Implication of dispute processes and outcomes. *Academy of Management Journal* 37:193–205.

PLUMBLEE LL

2012. Pandora's panacea: The pre-suit mediation requirement in medical malpractice Actions. *Resolved Journal of Alternative Dispute Resolution* (2):1-14.

POLLEY R

1988. Intervention and cultural context: Mediation in the US and Norway. *Journal of Management* 14:193–205.

PONDY LR

1967. Organizational conflict. Concepts and models. *Administrative Science Quarterly* 12:296–230.

PREIN H

1984. A contingency approach for conflict interventions. *Group and Organization Studies* 9:81–102.

PUTNAM LL & FOLGER JP

1988. Communication, conflict and dispute resolution. *Communication Research* 15:349–359.

PUTNAM LL & POOLE MS

1987. Conflict and negotiation. In FN Jablin, LL Putnam, K Roberts & L Porter (eds.) *Handbook of organizational communication. An interdisciplinary perspective*, 549–599. Sage.

PUTNAM LL & WILSON SR

1982. Communication strategies in organizational conflicts. Reliability and validity of a measurement scale. *Annals of the International Communication Association* 6(1):629-652. https://doi.org/10.1080/23808985.1982.11678515

QUINOT G

2012. Transformative legal education. *The South African Law Journal* 2012(129):411-433.

RAHIM MA

1983. A measure of styles of handling interpersonal conflict. *Academy of Management Journal* 26:368–376.

REGIS C & POITRAS J

2010. Healthcare mediation and the need for apologies. *Health Law Journal* 18:31–49.

RETZINGER SM

1991. Shame, anger and conflict. Case study of emotional violence. *Journal of Family Violence* 6:37–59.

ROBBENNOLT JK

2005. What we know and don't know about the role of apologies in resolving health care disputes. *Georgia State University Law Review* 21(1009). https://ssrn.com/abstract=2310192

ROODT C

2004. A historical perspective on the accusatory and inquisitorial systems. *Fundamina* 10:137–158.

RYCROFT A

2011. Mediation a key to alternative dispute resolution. *University of Cape Town News* 4 April. https//www.news.uct.ac.za/article/-2011-04-04 (accessed 23 May 2019).

SANDOLE DJD & VAN DER MERWE H (EDS)

1993. *Conflict resolution theory and practice: Integration and application*. Manchester: Manchester University Press.

SALEH N

2021. The top causes of medical malpractice. *MDLinx* 17 July. https://www.mdlinx.com/article/top-causes-of-medical-malpractice/lfc-3889 (accessed on 28 January 2021).

SHEPPARD BH

1992. Conflict research as schizophrenia. The many faces of organizational conflict. *Journal of Organizational Behavior* 13:325–334.

SOUTH AFRICAN LAW REFORM COMMISSION

2017. Medico-legal claims. *Issue paper 33 Project 141.* South African Law Reform Commission. https://www.justice.gov.za/salrc/ipapers/ip33_prj141_Medico-legal.pdf

SPANGLER BM

2012. Heads I win, tails you lose: The psychological barriers to economically efficient civil settlement and a case for third-party mediation. *Wisconsin Law Review* 2012(6):1436–1463.

SPANGLER B & BURGESS H

2017. Conflicts and disputes. *Beyond Intractability* March. https://www.beyondintractability.org/essay/conflicts-disputes (accessed on 2 December 2019)

STROMSETH JE

2007. Pursuing accountability for atrocities after conflict: What impact on building the rule of law? *Georgetown Journal of International Law* 38:251-322.

SWANEPOEL CF

2014. The judicial application of the “interest” requirement for standing in constitutional cases: “A radical and deliberate departure from common law”. *De Jure* 47(1): 63-84.

TAN H

2009. Minimising medical litigation: a review of key tort and legal reforms. *International Journal of Law in Context* 5(2):179–233.

TARANTINO U, VIA AG, MACRÍ E, ERAMO A, MARINO V & MARSELLA LT

2013. Professional liability in orthopaedics and traumatology in Italy. *Clinical Orthopaedics and Related Research* 471(10):3349–3357.

THEOPHILOPOULOS C

2016. Constitutional transformation and fundamental reform of civil procedure. *Journal of South African Law* 216(1): 68-93. https://hdl.handle.net/10520/EJC-61a4d9c5c

THOMAS KW

1976. Conflict and conflict management. In S Zedeck (ed.) *Handbook of industrial and organizational psychology*, 889–935. American Psychological Association.

THOMAS KW & PONDY LR

1977. Toward an intent model of conflict management amongst principal parties. *Human Relations* 30:1089–1102.

THOMPSON L

1990. Negotiation behaviour and outcomes. Empirical evidence and theoretical issues. *Psychological Bulletin* 3:515-532.

TSJOVELD D, DANN V & WONG LC

1992. Managing conflict between departments to serve customers. *Human Relations* 45:1035–1054.

URY WL, BRETT JM & GOLDBERG SB

1995. *Getting disputes resolved. Designing systems to cut the costs of conflict.* Cambridge: PON Books.

VAN DER HEEVER P

2016. Medical malpractice: The other side. *De Rebus* 10:49–51.

VAN DER MERWE FICK CP

1994. *'n Vergelyking tussen die akkusatoriese en inkwisitoriese strafverhoorstelsels [A comparison of the accusatory and inquisitorial criminal trial systems*]. Unpublished LLD thesis. University of the Free State.

VAN DER VLIERT E & PREIN HCM

1989. The difference in meaning and forcing in the conflict management of actors and observers. *International Journal of Conflict Management* 1:51-63.

VAN DER WALT AJ

2006. Legal history, legal culture and transformation in a constitutional democracy. *Fundamina* 12(1). https://hdl.handle.net/10520/AJA1021545X_120

VAN DER WESTHUIZEN CS

2015. The solution to demands made on parent's decision-making in the neonatal intensive care unit. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 78(1):63–79.

VAN LOGGERENBERG DE

2012. *Jones & Buckle: The Civil Practice of the Magistrates' Court in South Africa.* 10th edition Cape Town: Juta.

WALL JA & CALLISTER RR

1995. Conflict and its management. *Journal of Management* 21(3):515–558.

WALL JA, DUNNE TC & CHAN-SERAFIN S

2011. The effects of neutral, evaluative and pressing mediator strategies. *Conflict Resolution Quarterly* 29(2):127–150.

WALTERS J

2014. Mediation – an alternative to litigation in medical malpractice. *South African Medical Journal* 104(11):717-718.

WIESE T

2016. Alternative dispute resolution in South Africa. Negotiation, mediation, arbitration and ombudsman. Cape Town: Juta & Co.

WOMACK DF

1988. A review of conflict instruments in organizational settings. *Management Communication Quarterly* 1(3):437–455. https://doi.org/10.1177/0893318988001003010

WONG CL, TSJOVELD D & LEE F

1992. Managing conflict in a diverse work force. *Small Group Research* 23:302–321.

WOOLF H

1996. *Access to justice*. Final Report. http://webarchive.nationalarchives.gov.uk/20060213205513/http://www.dca.gov.uk/civil/final/contents.htm (accessed on 8 November 2019).

YEEND NN

2015. *Psychogeaography and mediation. Plaintiff* September. http://www.plaintiffmagazine.com (accessed on 13 May 2021).

ZARTMAN IW

2001. *Preventative negotiation.* Lanham: Rowman & Littlefield.

ZONANA E

2011. Getting healthier: A proposal for improving medical malpractice mediation. *American Journal of Mediation* 5(9):9–33.

Case Register

AB & ID vs. MEC for Health and Social Development, Western Cape Provincial Government, unreported, Case Number 27428/10 Western Cape High Court

Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC).

FS v JJ & Another 2011(3) SA 126 (SCA)

MB v NB 2010 (3) SA220 (GSJ).

MEC for Health, Gauteng Provincial Government v PN [2021] ZACC 6.

MEC for Health and Social Development, Gauteng v DZ obo WZ 2017(12) BCLR 1528 (CC)

Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza 2001 (4) SA 1184 (SCA)

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 CC

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)

Van Wyk v Lewis 1924 AD 438.

Appendix “A”

Model Pre-mediation Questionnaire

PRE-MEDIATION QUESTIONAIRE

Mediation is confidential. The mediator may only disclose information provided in this questionnaire to other participants with the express consent of the participant who completed this questionnaire.

Completing this document is voluntary. Participants are, however, strongly encouraged to complete it. The information provides the mediator with a better understanding of the concerns, interests and expectations of the participants.

1. Was there mutual trust between you and the other participant(s) before you started to disagree? Have you settled disputes between you and the other participants before? If so, briefly explain how.

2. If there was mutual trust before, do you wish to restore the trust or is it more important to have a clean break with the other participant(s)? Y/N

3. Are there things the other participant(s) might say that would cause you distress or cause you to lose your temper, including aspects related to cultural practices?

4. Did you feel betrayed, taken advantage of or ignored?

5. What would it mean to you if you were able to settle your dispute in a manner acceptable to you?

6. List your concerns, interests and/or expectations that need to be addressed by any settlement reached at mediation?

7. Do you have any suggestions on how the other participant(s) may address your concerns, interests and/or expectations in a settlement?

8. List the concerns, interests and/or expectations, if any, which the other participants may wish you to address in a settlement?

9. How, if at all, do you propose to address the concerns, interests and/or expectations of the other participants?

10. What would the ideal solution of the dispute you have with the other participant(s) look like?

11. Is a settlement without an apology acceptable?

12. Is an apology without payment of money acceptable?

13 Please indicate which of each of the following four statements are most important to you:

a) an immediate solution even if it less than you would like

or

b) a big win even if you have to wait a few years
c) financial satisfaction

or

d) emotional satisfaction
e) ending the dispute quickly

or

f) getting even

14. Have you considered the following potential consequences if the dispute between you and the other participant(s) is/are not settled:

14.1 The potential cost of litigation. Y/N

14.2 The potential duration to finalise a court case. Y/N

14.3 The possibility that even if you win the court case, you may not be able to recover your costs from the other participant(s). Y/N

14.4 The time (personal and productive) taken up by preparation, consultation, and attendances during litigation. Y/N

14.5 The effect that litigation may have on your relationship with the other participants.

14.6 The effect of litigation on your or your organisations reputation. Y/N

14.7 The anxiety and stress caused by the uncertainty over the court's final decision. Y/N

Appendix “B”

Model Mediation Agreement

MEDIATION AGREEMENT

In the mediation between:

XXXXX

and

XXXXX

The above participants acknowledge that a dispute exists between them, and having agreed to enter into mediation to resolve their differences, agree to the terms and conditions as set out in this agreement.

1. The mediator

The parties appoint xxx as their mediator who accepts the appointment.

2. The nature of the dispute

2.1 The parties record that their differences are medico-legal in nature. The parties acknowledge that such a dispute may involve dealing with traumatic emotions and agree to respect the feelings of their co-participants.

2.2 The parties agree to use reasonable attempts to settle their dispute and act in good faith before and during the mediation.

3. The nature of mediation

The parties understand and accept that:

3.1 Mediation is a confidential and without prejudice process in which the mediator assist the parties to reach an agreement through joint problem solving.

3.2 Mediation is voluntary and any participant may at any stage terminate the mediation, without having to provide any reasons for the termination.

3.3 Mediation is non-binding until everything is agreed, reduced to writing and signed by both parties.

3.4 The participants retain all their legal rights and legal remedies if the mediation is not successful.

4. The role of the mediator

4.1 The mediator will:

4.1.1 Contact the parties to discuss their preparation for the mediation.

4.1.2 Read before the mediation all documents received.

4.1.3 Chair and determine the procedure for the mediation in consultation with the parties.

4.1.4 Assist the parties to generate settlement options, but does not impose their views or solutions on them, nor does the mediator give legal advice.

4.2 The mediator confirms that he has no interest in the dispute or the outcome of the mediation and has no undisclosed prior dealing with the parties in relation to the dispute.

4.3 The mediator has an ethical duty to work equally hard on behalf of all participants during the mediation.

5. Exchange of information

The parties agree to exchange with each other, under the supervision of the mediator, all documents relevant to the dispute and provide these documents to the mediator.

6. Authority to settle

The participants who appear on behalf of principles will have settlement authority, or have a person with settlement authority on standby, telephonically during the mediation. The parties will inform the mediator before the mediation of the names of their respective representatives and the mediator will covey the names to the respective participants before the mediation.

7. The roles of representatives

The parties accept the importance of personal participation of the patient and medical professional at the mediation meeting due to the nature of the dispute to enhance the negotiation process and possible outcomes of the mediation. With this in mind, the parties agree as follows on the roles of their representatives:

7.1 Party A is represented by XXX and party B by XXX.

7.2 The representatives will act in an advisory capacity only and will not directly participate in the discussions between the parties and the mediator.

7.3 The parties are free to consult with their representatives during the mediation meeting in private caucus as and when required.

8. Mediator's fees

8.1 The mediator's fee will be R xxx per hour for time spent with the participants and for time required studying documents, researching issues, corresponding, drafting and finalising agreements, an all-inclusive half-day rate of R xxx or an all-inclusive full day rate of R xxx.

8.2 The participants will each be liable to pay 50% of the mediator's fee, as per the invoice payable on presentation.

OR

The parties agree that participant xxx is liable to pay x% of the mediator's fee and participant xxx is liable to pay x%, as per the invoice payable on presentation.

8.3 Any participant who cancels without giving the mediator at least 24 hours' notice of cancellation prior to the agreed date of the mediation will be liable to pay for three hours at the hourly rate of R x stipulated above. If both participants cancel without at least 24 hours' notice, they will be jointly and individually liable for the mediator's fee for three hours at the above stated rate.

8.4 If a daily rate has been negotiated, any participant who cancels without giving the mediator at least 24 hours' notice of cancellation before the agreed date for the mediation will be liable to pay 50% of the daily rate. If both participants cancel without at least 24 hours' notice, they will be jointly and individually liable to pay 50% of the mediator's fee.

8.5 Each party will be individually liable for legal costs associated with the mediation.

8.6 Each party acting in a representative capacity for an entity who is liable to pay the mediator's fees at the rates agreed to above will provide the mediator with the full particulars of such entity together with a written undertaking to pay the fees.

9. Date, time and venue

The mediation will take place at xxx on (date) and will start at xxhxx.

Signed at xxx on xxx.

Participant details:(Complete for each participant)

Full names

Surname

Residential address

Business name and address

Telephone No.

Cellular No.

E-mail

Representative capacity.

Appendix “C”

Model Settlement Agreement

SETTLEMENT AGREEMENT

Settlement agreement between:

XXXXX

and

XXXXX

The parties acknowledge that they have settled the dispute between them. The parties agree to the terms of that settlement as set out in this agreement.

1. Interpretation

1.1 If any of the terms of this agreement is in conflict or inconsistent with any law, the invalidity the invalidity of the term(s) will not affect the validity of the remainder of the terms of this agreement.

1.2 Any number of days prescribed in this agreement is calculated exclusively of the first and inclusively of the last day.

1.3 Day(s) refers to work days (Monday to Friday excluding public holidays).

1.4 Pay/payment means in cash or via electronic funds transfer into the nominated account of the particular party.

2. Settlement authority

Each person signing this agreement warrants that they have the necessary authority to sign this agreement. A person signing this agreement in a representative capacity furthermore warrants that they have the full authority to bind their principal.

3. Confidentiality

3.1 The parties acknowledge that the mediation between hem and the mediator is confidential and without prejudice.

3.2 Mediation discussions, written and oral communications, any draft resolutions and any unsigned mediated agreements will not be admissible in any court proceeding unless the court rules normally render it discoverable.

3.3 The parties agree not to call the mediator to testify concerning the mediation or to provide any materials from the mediation in any court proceeding between the parties.

4. Entire agreement

This agreement is and its annexures, if any, is the entire agreement between the parties, and replaces any previous agreements between them.

5. Non-variation and waiver

5.1 The parties may amend this agreement only by way of written document signed by all the parties.

5.2 A waiver of a breach of any term of this agreement will not be considered (i) a waiver of a further breach of the same term, or (ii) a waiver of a breach of any other term, or (iii) a waiver of a party's right to declare an immediate or subsequent default.

6. Full and final settlement

This agreement is the full and final settlement of all causes of action the parties have against each other.

7. Breach

7.1 If either party commits a remediable breach of this agreement then the aggrieved party must notify the party in breach in writing to remedy the breach within ten days from the date of delivery of the breach notice. If the party in breach fails to remedy the breach within ten days, the aggrieved party may (i) cancel, or (ii) enforce, (iii) and/or claim damages, or (iv) notify the mediator who facilitated this agreement that a dispute has arisen. If the mediator fails to resolve the dispute within five days of receipt of the dispute notice, or any longer period mutually agreed in writing by the parties, the aggrieved party may (i) cancel, or (ii) enforce and/or (iii) claim damages for breach of contract.

7.2 Any irremediable breach, including the breach of the confidentiality clause entitles the aggrieved party to immediately cancel the contract and claim damages.

7.3 If this agreement is validly cancelled the aggrieved party may reinstate the original cause(s) of action in which event any stay of legal proceedings is lifted, as if this agreement had not been reached.

8. Court proceedings

8.1 If action proceedings were instituted prior to this agreement, the parties agree that any of the parties may, at any stage, have the terms of this agreement made an order of court under the relevant case number.

8.2 The parties agree that the action proceedings with case number xxxx instituted at the (indicate court) will be withdrawn by the plaintiff with each party liable to pay their own costs or the parties agree to stay the proceedings subject to paragraph 7.3 above.

9. Notices

9.1 All notices in terms of this agreement must be in writing and is considered given when delivered (i) personally to the recipient, or (ii) by e-mail on the day that the recipient directly or indirectly confirmed by return e-mail, the receipt of the notice, or (iii) by registered mail on the 7th day after posting to the following service address:

9.1.1If to part A:_____

9.1.2 If to party B:_____

9.2 The parties may change their service addresses by giving notice to the other party of a new address for the service of notices. The change will be effective after the expiry of ten days from the day on which the notice was given.

9.3 The parties must keep this agreement confidential, and must not disclose either the existence or the terms of this agreement to third parties, unless such disclosure is necessary to enforce their rights in terms of this agreement in a court of law.

10. Terms of settlement

Here set out the terms of the agreement.

Be specific and clear. Use plain language.

Payment of money:

1. What for? For eg. Past medical cost, future medical cost, loss of income (past/future), pain and suffering, loss of amenities etc.

2. Amount, date of payment, method of payment, lump sum, instalment, interest, account etc.

3. Who will pay? Remember that the payment may come from the indemnity insurer of the medical practitioner. Ensure that the insurance company is properly named and sign the agreement.

Future treatment:

Where, when, what, by who, arrangements regarding payment of the account of the service provider etc.

Monitoring:

If the mediator has agreed to monitor the implementation of the agreement set out the terms, fees payable to the mediator etc.

Apology:

If the parties have agreed on a written apology, confirm the exact wording with the parties as this may be a sensitive matter.

Signed at xxx on xxx.

_____

Party A Witness

_____

Party B Witness

Participant details:(Complete for each participant)

Full names

Surname

Residential address

Business name and address

Telephone No.

Cellular No.

E-mail

Representative capacity.

Appendix “D”

Model Mediation Clause

The patient agrees that it is in everyone’s interest for health related claims and disputes to be resolved expeditiously in a fair and cost effective way.

In the event of any such claim or dispute arising from treatment at this hospital, the doctor, the patient and the hospital representative hereby agree to refer the dispute to mediation before any party institutes legal action.

The parties agree to refer the dispute to mediation within XX days of the patient declaring the dispute.

The parties agree to appoint a qualified and independent medical negligence mediator from *(insert name of mediation service provider)* or *(insert name of mediator)* to mediate the dispute. The parties further agree to attend any pre-mediation meeting/s scheduled by their appointed mediator to facilitate the finalization of the mediation process.

The parties acknowledge that this agreement does in no way violate the parties’ constitutional rights in terms of section 34 of the Constitution.