

**MEDIATION: AN ALTERNATIVE DISPUTE RESOLUTION IN MEDICAL
NEGLIGENCE CASES**

By

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SUMMARY

Medical negligence is a growing concern within South Africa.¹ The medical environment has great potential for conflict, because even the best trained physicians can commit errors that result in medical disabilities and sometimes in death.² The conflicts that follow from these errors are mostly fuelled by emotions and they can become very expensive and time-consuming to settle using the litigation process.³ There is a growing recognition that alternative dispute resolution (ADR) systems in healthcare may alleviate some of the financial and psychological burdens on doctors and patients involved in medical negligence disputes. Mediation is a method of ADR that is flexible and it permits the parties to the dispute to have control over the resolution.

A typical medical negligence dispute is driven by intensely emotional factors on the part of injured patients. Victims are not merely seeking financial compensation but they are also looking to understand the circumstances that brought on the event at hand. They want closure. A huge issue with regard to medical negligence litigation is the manner in which the claims are resolved. Litigation provides injured patients and caregivers with a traditional platform for addressing medical negligence claims. However, due to many reasons, this system seems not to be adequate for dealing with disputes arising from alleged medical negligence. Mediation offers a promising solution to the problems surrounding redress of medical negligence disputes.

KEY TERMS

Mediation; alternative dispute resolution; medical negligence; conflicts; legislation; litigation; compensation; root cause; insurance premiums; communication; restoration; financial burdens; psychology.

1 Child <http://www.timeslive.co.za/news/2014/01/17/hospital-horrors-costing-sa-plenty> (Date of use: 9 November 2016).

2 Szmania, Johnson and Mulligan 2008 *Conflict Resolution Quarterly* 71-96.

3 Szmania, Johnson and Mulligan 2008 *Conflict Resolution Quarterly* 71.

LIST OF ABBREVIATIONS

ADRJ	Alternative Dispute Resolution Journal
ADR	Alternative Dispute Resolution
BUL Rev	Boston University Law Review
CCMA	Commission for Conciliation, Mediation and Arbitration
CPA	Consumer Protection Act 68 of 2008
HITC	Healing-in-Truth Commission
HPCSA	Health Professions Council of South Africa
IMSSA	Independent Mediation Service of South Africa
JAMA	Journal of the American Medical Association
LRA	Labour Relations Act 66 of 1995
MEC	Member of the Executive Council
MPS	Medical Protection Society
NCA	National Credit Act 34 of 2005
PAIA	Protection of Access to Information Act 2 of 2000
PER	Potchefstroom Electronic Law Journal
RAF	Road Accident Fund
SADJ	South African Dental Journal
SAMJ	South African Medical Journal
SALRC	South African Law Reform Commission
SAJBL	South African Journal of Bioethics and Law
THRHR	Tydskrif vir hedendaagse Romeins-Hollands Reg
TIMC	Truth-in-Medicine Commission
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

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CHAPTER 1: INTRODUCTION, BACKGROUND, AIM, HYPOTHESIS, MODUS OPERANDI AND EXPLANATION OF USE OF SOURCES

“Anybody can become angry – that is easy, but to be angry with the right person and to the right degree and at the right time and for the right purpose, and in the right way – that is not within everybody’s power and is not easy.”⁴

1.1 Introduction

Medical negligence is a growing concern within South Africa.⁵ More and more patients in government hospitals end up being misdiagnosed or left untreated.⁶ When a patient is in a medical facility, there is the hope that he or she will get the best medical care. In 2016, about 1 300 psychiatric patients were moved from a unit of the Life Healthcare Group to unregistered facilities in a cost-cutting bid by the health department of Gauteng.⁷ 94 patients died of negligence as a result of being moved from a licensed home to unregistered facilities.⁸ The patients died from dehydration, diarrhoea, epilepsy and heart attacks, among other causes.⁹

The report from the Health Ombudsman stated that all 27 facilities that the patients were transferred to operated with invalid licences.¹⁰ He also found that the decision was unwise and flawed, with inadequate planning and a chaotic and rushed or hurried implementation process.¹¹

In terms of the National Patients’ Rights Charter, patients have the right to a healthy and safe environment, participation in decision-making, access to healthcare,

4 <https://www.brainyquote.com/authors/aristotle> (Date of use: 10 July 2018).

5 Child <http://www.timeslive.co.za/news/2014/01/17/hospital-horrors-costing-sa-plenty> (Date of use: 9 November 2016).

6 Child <http://www.timeslive.co.za/news/2014/01/17/hospital-horrors-costing-sa-plenty> (Date of use: 9 November 2016).

7 Macharia <http://www.reuters.com/article/us-safrica-health-idUSKBN15G52A> (Date of use: 2 March 2017).

8 Macharia <http://www.reuters.com/article/us-safrica-health-idUSKBN15G52A> (Date of use: 2 March 2017).

9 Makgoba <http://www.politicsweb.co.za/documents/the-life-esidimeni-disaster-the-makgoba-report> (Date of use: 2 March 2017).

10 Makgoba <http://www.politicsweb.co.za/documents/the-life-esidimeni-disaster-the-makgoba-report> (Date of use: 2 March 2017).

11 Makgoba <http://www.politicsweb.co.za/documents/the-life-esidimeni-disaster-the-makgoba-report> (Date of use: 2 March 2017).

knowledge of one's health insurance/medical aid scheme, a choice of health services, to be treated by a named healthcare provider, confidentiality and privacy, informed consent, refusal of treatment, a second opinion, continuity of care and to complain about health services.¹²

South Africa has seen a sharp deterioration in its healthcare system – both in hospitals and clinics around the country. This is marked by shortages of medicine, collapsing infrastructure, broken equipment, inadequate provision of staff and misuse and misallocation of funds. This situation is so dire that constitutionally protected rights such as access to healthcare services and patients' dignity are compromised daily.¹³ This situation creates an opportunity for negligent behaviour, which in turn may result in litigation.

The South African legal system is based on Roman law, which means that in terms of the law of delict, if patients suffer because of failure of a doctor or medical institution to provide reasonable care, compensation can be sought.¹⁴ However, not all failures and errors constitute negligence that justify the institution of a claim. In *Buthlezi v Ndaba*,¹⁵ Brand JA stated that an admission by a surgeon that an injury would not have happened unless something went wrong during the operation does not amount to an admission of negligence, as even with the best in the world, things sometimes go amiss in surgical operations or medical treatment. A doctor is not to be held responsible simply because something went wrong.

There is a huge plea for an alternative to litigation in medical negligence cases.¹⁶ Litigation for medical negligence cases does not only pose financial risks but it is also emotionally draining.¹⁷ It is an undisputed fact that the world of medicine will always

12 Still L "So you want to sue your doctor?" <https://www.iol.co.za/personal-finance/so-you-want-to-sue-your-doctor-2034165> (Date of use: 17 March 2017).

13 <http://www.politicsweb.co.za/documents/the-gauteng-health-system-in-crisis--section27> (Date of use: 17 March 2017).

14 Walters 2014 *S Aft Med J* 717.

15 *Buthlezi v Ndaba* 2013 SA 437 (SCA).

16 Pillay in *M v Member of the Executive Council for Health, KwaZulu-Natal (KZP)* (unreported case no 14275/2014, 14-3-2016).

17 Classen 2016 *SAJBL* 7.

have challenges.¹⁸ The underdevelopment of technology and resource shortages plays a huge role in these challenges.¹⁹ The medical world is fraught with emotions from parties involved.²⁰ Doctors and hospitals often get it wrong and relatives of the victims are left to deal with the devastating consequences.²¹

Alternative dispute resolution (ADR) represents all forms of dispute resolution other than litigation or adjudication through the courts.²² ADR provides an opportunity to resolve disputes and conflict through the utilisation of a process that is best suited to the particular dispute or conflict.²³

Litigation focuses on the rights and wrongs between the parties. The whole process takes a lot of time to reach a decision that will be based on a balance of probabilities.²⁴ This process might even never get to the true root of the initial problem.²⁵ The litigation process might destroy a career, bankrupt the parties involved, make a hostile situation even worse and can become time-consuming.²⁶ ADR conserves relationships, maintains privacy and confidentiality, and gives a voice and control over the process to the parties in dispute.²⁷

During litigation, patients might feel humiliated, angry and frustrated by the outcome of events over and above the financial loss they might have suffered.²⁸ The doctors, on the other hand, may fear the effect of the court case on their professional reputation, the enormous monetary claim they are facing, as well as time wasted on resolving the dispute.²⁹

18 Classen 2016 *SAJBL* 7.

19 Classen 2016 *SAJBL* 7.

20 Classen 2016 *SAJBL* 7.

21 Classen 2016 *SAJBL* 7.

22 SALRC "Alternative Dispute Resolution" 13.

23 SALRC "Alternative Dispute Resolution" 13.

24 Botes 2015 *De Rebus* 28-30.

25 Botes 2015 *De Rebus* 28.

26 Botes 2015 *De Rebus* 28.

27 Botes 2015 *De Rebus* 28.

28 Botes 2015 *De Rebus* 28.

29 Botes 2015 *De Rebus* 28.

In *M v Member of the Executive Council for Health, KwaZulu-Natal*,³⁰ Pillay J stated as follows:

Although they represent as a bipolar dispute between a plaintiff and a defendant with the remedy being findings on liability, compensation and costs the problem of malpractice remains institutional. Malpractice suits are retroactive in the sense that they seek to remedy past wrongs. The litigation resolves the dispute but not the institutional problems. Remedies that are forward-looking, that seek to resolve problems for the future should be considered for long-term sustainable solutions. The court cannot initiate such remedies without the co-operation of the litigants.³¹

1.2 Problem statement

The Honourable Frank Dobson³² summed up the problem faced by the medical world in respect of medical negligence cases, when he said, “keep doctors out of courts and lawyers out of hospitals”. South Africa is experiencing an increase in both the number and value of medical negligence litigation, which is not in line with general trends in medical negligence and malpractice.³³

Medical negligence liability is incurred when there has been a negligent or intentional unlawful conduct on the part of health practitioners or hospital staff.³⁴ A medical negligence claim is governed by the law of obligations and may be on the grounds of either contract and/or delict.³⁵ To be classified as medical negligence, six elements need to be present, namely an action, wrongfulness, negligence, harm, causation and damages.³⁶ According to the Minister of Health in South Africa, obstetrics, gynaecology, neurosurgery, neonatology and orthopaedics are the most targeted fields for medical negligence. He stated that medico-legal litigation has reached a crisis point in South Africa to such an extent that:

30 *M v Member of the Executive Council for Health, KwaZulu-Natal (KZP)* (unreported case no 14275/2014, 14-3-2016).

31 *M v Member of the Executive Council for Health, KwaZulu-Natal (KZP)* (unreported case no 14275/2014, 14-3-2016) par 27.

32 He is a British Labour Party politician. He was the Member of Parliament (MP) for Holborn and St. Pancras (UK Parliament Constituency) from 1979 to 2015 (<https://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020117/debtext/20117-15.htm>).

33 Mcquoid-Mason and Dada *Medical Law* 263.

34 Mcquoid-Mason and Dada *Medical Law* 263.

35 Van den Heever 2016 *De Rebus* 49.

36 Carstens PA & Pearmain D *Foundational Principles of South African Medical Law* (2007).

... (i)t is the same crisis that engulfed Australia a decade-and-a-half ago when general insurance collapsed, followed immediately by the provisional liquidation of Australia's largest medical defence organization – the United Medical Protection. It is the same crisis that occurred in the United States (US) in the early 1970s which was described as a crisis of insurance availability as many insurers exited. The second in the mid-1980s was a crisis of affordability with price hikes that meant that doctors found they could not afford to pay cover.³⁷

This crisis does not affect doctors only but also the community at large, the state and the insurance industry.³⁸ How did we get here? What can we do to address this? These are some of the questions that need answers for us to be able to retaliate to the crisis.

The difficult and deep-rooted nature of the current medical crisis in South Africa demands solutions of a multidimensional nature, which should involve all parties such as the government, indemnity insurers, healthcare institutions, doctors, and the community. According to Van den Heever and Lawrenson,³⁹ the number of patients who seek compensation for injuries because of medical negligence is far smaller than the number who might be entitled to compensation. It is submitted that the need to find a viable solution in respect of litigation of medical negligence cases is reinforced by the need to ensure that people who are entitled to compensation are afforded an opportunity to institute such claims.

Medical negligence litigation is seen by parties involved to be highly expensive, unbalanced, and an unsatisfactory process. Both the plaintiff and defendant in any medical negligence action must spend excessive amounts of money to prepare for a trial that might not happen at the end.⁴⁰ The litigation process is very long. Participants tend to leave the process emotionally exhausted without gaining anything.⁴¹

Sohn⁴² states that whichever system operates in a country, it should ensure appropriate compensation for medical injury and correctly identify the error and knowledge gained from the adverse effects, as this should help build systems that eliminate errors.

37 Keynote address at the Medico-Legal Summit, St George's Hotel, Pretoria 9-10 March 2015.

38 Walters 2014 *S Afr Med J* 717.

39 Van der Heever and Lawrenson *Expert Evidence* 93.

40 Chesanow https://www.medscape.com/viewarticle/811323_3 (Date of use: 13 June 2017).

41 Natasha and Meruele 2008 *Journal of Legal Medicine* 285-306.

42 Sohn 2013 *Int J Gen Med* 49-56.

Medicine is a practical science that is practiced through relationships.⁴³ It has been suggested that patients usually sue their healthcare providers when there is a communication breakdown between the parties.⁴⁴ The patients may feel that the healthcare provider did not take reasonable care towards them, especially if he or she fails to express genuine concern or give an explanation.⁴⁵ Plaintiffs of medical negligence cases usually institute proceedings to find out whether the healthcare provider should be held accountable for their suffering and to what extent.⁴⁶

Oosthuizen and Carstens⁴⁷ illustrate that money is not always the motivation for injured parties; the reasons for litigating a medical negligence case may be influenced by how the practitioner subsequently managed the situation after the occurrence of the adverse event. The authors encourage practitioners to adjust their behaviour accordingly. They state that “communication is essential; practitioners need to build a rapport with their patients and, in the case of an adverse event, they need to manage the situation sympathetically, whilst keeping in mind that those patients may be immensely affected by such an unfortunate outcome”.⁴⁸

1.2.1 Possible reasons for the increase in medical negligence cases

The circumstances contributing to the rapid increase in medical negligence cases can be attributed to two things, according to Seggie.⁴⁹ The first is amendments to the Road Accident Fund (RAF) legislation. It is suggested that due to these amendments there is a dry-up of earnings by lawyers from the RAF. Seggie states that the amendments made to the RAF made damage claims from personal injury sustained in motor vehicle accidents a less lucrative source of work for lawyers and, according to her, pay-outs are lower and slower. Further to this, the Contingency Fees Act of 1997 permits attorneys to offer clients “free” legal assistance in pursuing a suit against a medical practitioner if the case is expected to have a good chance of succeeding. According to

43 Van der Heever and Lawrenson *Expert Evidence* 93.

44 Van der Heever and Lawrenson *Expert Evidence* 93.

45 Walters 2014 *S Afr Med J* 717.

46 Oosthuizen and Carstens 2015 *THRHR* 269-284.

47 Oosthuizen and Carstens 2015 *THRHR* 269.

48 Oosthuizen and Carstens 2015 *THRHR* 269.

49 Seggie 2013 *SAMJ* 433.

the author, it does not help that that googling “medical malpractice in South Africa” offers you access to lists of law firms suggesting that you “Contact Us” on a “No Win, No Fees Basis” to “Get the Damages You Deserve Now”.⁵⁰

Secondly, Seggie feels that the chaotic state in many of the public sector hospitals contributes to the rapid increase of negligence claims. She highlighted that in many cases in public hospitals there is a mix of too many too sick patients, human resource constraints, lack of equipment, non-functioning equipment and recurring shortages of supplies. Added to this is a lack of experience on the part of interns and community service medical officers, who are all too often left to function unassisted and unadvised by senior personnel.⁵¹

The implementation of the Consumer Protection Act⁵² also means that doctors are now liable even for faulty equipment.⁵³ Patients can be viewed as consumers from a legal perspective. This has various implications on healthcare systems, healthcare providers and the doctor-patient relationship.⁵⁴ This new dispensation has a significant impact on hospitals where an admission form, which usually contains an indemnity clause of some kind, is routinely signed by patients upon admission to the facility.⁵⁵ Section 49(2) of the Consumer Protection Act places a duty on the healthcare facility to draw the patient’s attention to an indemnity clause, where such a clause purports to exclude liability for any activity that could lead to serious injury or the death of a consumer.⁵⁶

Furthermore, this changes the legal position, as was decided in *Afrox Healthcare Bpk v Strydom*⁵⁷ that there is no duty on an admission clerk in a hospital to point out an indemnity clause to a patient, despite the apparent unequal bargaining power between the parties. The court found that there was no evidence of the bargaining power being unequal. There was further no express prohibition against excluding liability for gross

50 Seggie 2013 *SAMJ* 433.

51 Seggie 2013 *SAMJ* 433.

52 Consumer Protection Act 68 of 2008.

53 Seggie 2013 *SAMJ* 433.

54 Rowe and Moodley <http://bmcmethics.biomedcentral.com/articles/10.1186/1472-6939-14-15> (Date of use: 31 May 2017).

55 Pienaar 2016 *PER* 2-22.

56 Pienaar 2016 *PER* 11.

57 *Afrox Healthcare Bpk v Strydom* 2002 4 All SA 125 (SCA).

negligence in an indemnity clause. Section 51(i) of the Consumer Protection Act prohibits the inclusion of an indemnity clause that aims to exclude liability for gross negligence. The provisions of the Consumer Protection Act aim to place patients in a position of control over their decisions and the risks that they are willing to take.

The Health Professions Council of South Africa (HPCSA) reported an increase in complaints from patients and in the number of doctors found guilty of unprofessional conduct such as refusing to treat patients, misdiagnosing, practicing outside their scope of competence, overcharging, or charging for services not rendered.⁵⁸ There have been large pay-outs to patients who deserved it “related to the harm suffered rather than to the degree of negligence”, but the costs must be met by the state.⁵⁹

Most medical negligence cases are brought against obstetricians and gynaecologists for birth-related claims.⁶⁰ Plastic surgeons also often face extremely high claims in value, although they are not sued as frequently as gynaecologists.⁶¹

1.2.2 Financial implications of the increase in medical negligence cases in some provinces

(i) Gauteng

The Gauteng Department of Health has paid out more than R1bn to settle 185 medical negligence cases since January 2015. The Health MEC revealed that there were 51 more cases that are currently in court.⁶² Those cases are expected to claim approximately R414m. Brain-damaged babies made up 76% of the claims, which amounted to R769m from 50 claimants.⁶³

Most of the claims came from the Chris Hani Baragwanath Hospital, which had the highest number of claims and pay-outs. Steve Biko Academic Hospital is the second

58 Seggie 2013 *SAMJ* 433.

59 Seggie 2013 *SAMJ* 433.

60 Pienaar 2016 *PER* 2-22.

61 Pienaar 2016 *PER* 2-22.

62 Raborife <https://www.news24.com/SouthAfrica/News/more-than-r1bn-paid-in-medical-negligence-payouts-by-gauteng-health-da-20170523> (Date of use: 10 November 2017).

63 Raborife <https://www.news24.com/SouthAfrica/News/more-than-r1bn-paid-in-medical-negligence-payouts-by-gauteng-health-da-20170523> (Date of use: 10 November 2017).

highest ranked in the province when it comes to medical negligence claims, with an amount of R151m for 14 cases. Natalspruit Hospital comes in at third place with a pay-out of R54m for 12 cases. Tembisa Hospital paid out R43.5m and Charlotte Maxeke Johannesburg Academic Hospital paid out R26.2m. Both had 10 cases.⁶⁴ Five of the largest pay-outs made over that period were for brain damage or cerebral palsy caused by brain damage during birth.⁶⁵

The department's annual report for 2016/17 set aside R13.4bn for potential medico-legal liability claims. The lawsuit pay-outs took a huge chunk of the department's budget, which could have been better spent making sure hospitals provided quality care.⁶⁶ Money spent on medical negligence claims cannot be spent on improving the provincial health system.

(ii) KwaZulu-Natal

The KwaZulu-Natal Department of Health is also experiencing a staggering rise of medical negligence cases. On 31 March 2013, the closing balance for of all medico-legal claims was R1.78bn. The claims for medico-legal claims and other lawsuits stood at R10.234bn for the period of 2015/16. The amount ballooned from R7bn recorded in 2014/15.⁶⁷

(iii) Eastern Cape

In the financial period of 2009/10, the Eastern Cape Department of Health faced claims of R447m. This amount increased to R715m in the following financial period (2010/11).

64 Raborife <https://www.news24.com/SouthAfrica/News/more-than-r1bn-paid-in-medical-negligence-payouts-by-gauteng-health-da-20170523> (Date of use: 10 November 2017).

65 Raborife <https://www.news24.com/SouthAfrica/News/more-than-r1bn-paid-in-medical-negligence-payouts-by-gauteng-health-da-20170523> (Date of use: 10 November 2017).

66 Raborife <https://www.news24.com/SouthAfrica/News/more-than-r1bn-paid-in-medical-negligence-payouts-by-gauteng-health-da-20170523> (Date of use: 10 November 2017).

67 Maqhina <https://www.iol.co.za/news/politics/kzn-health-departments-r106bn-negligence-shame-2082091> (Date of use: 10 November 2017).

Most recent reports indicate that the Eastern Cape's health department is currently facing R17bn worth of claims.⁶⁸

(iv) Mpumalanga

In the 2013/14 financial year, the Mpumalanga Department of Health had a total of 151 claims for alleged medical negligence to the value of R387.3m. That is R725 000 more than the previous year, when claims amounted to R314.8m.⁶⁹

(v) Western Cape

In the 2011/12 financial year, the Western Cape Department of Health faced R87m of medical negligence claims. In 2012/13 the amount increased to R118m.⁷⁰

(vi) Free State

In the 2010/11 financial year, the Free State Department of Health was facing claims totalling R40m. In 2011/12, the amount hiked to R106m. In 2015, the Free State Department of Health was facing 184 malpractice cases to the value of R700m.⁷¹

(vii) North West

According to the North West Department of Health's annual report, in 2010/11 the department faced medical negligence amounting to R13m. In November 2013, the

68 Tiso Blackstar Group <http://www.heraldlive.co.za/news/top-news/2017/07/12/east-cape-ousource-medical-case-defence/> (Date of use: 10 November 2017).

69 Smalman <https://lowvelder.co.za/259336/medical-negligence-claims-against-department-totals-millions/> (Date of use: 20 November 2017).

70 Oosthuizen and Carstens 2015 *THRHR* 273.

71 Lotriet <https://www.news24.com/SouthAfrica/News/Free-State-hospitals-swamped-by-malpractice-cases-20150520> (Date of use: 20 November 2017).

department had to pay out R13.3m in damages in a single case, after negligent conduct resulted in an infant going blind.⁷²

At the 2015 Medico-Legal Summit, the acting chief litigation officer of the Department of Justice and Constitutional Development presented amounts that the state attorney paid out for litigation on behalf of the Department of Health during the years 2010/11 to 2013/14.⁷³

Table 1: Amounts paid out for litigation⁷⁴

Province	2010/11	2011/12	2012/13	2013/14
Gauteng	R 8 291 000.00	R 30 930 758.24	R 124 846 892.	R 153 612 355.49
Eastern Cape	R 10 260 049.00	R 25 336 038.35	R 44 743 495.84	R 49 513 108.93
Northern Cape	R 6 810 428.00	R 705 000.00	R -	R 7 107 000.00
KwaZulu-Natal	R 22 695 078.06	R 10 762 367.72	R 14 767 477.56	R 205 312 356.94
Western Cape	R 9 210 000.00	R 15 860 000.00	R 11 710 000.00	R 15 680 000.00
North West	R 12 550 000.00	R 753 602.57	R 7 899 232.50	R 698 940.17
Limpopo	R 8 229 068.81	R 3 457 954.27	R 6 844 259.18	R 21 959 395.55
Free State	R 256 081.57	R 988 604.43	R 327 192.00	R 673 373.00
Mpumalanga	R 17 229 427.00	R 13 252 319.44	R 13 252 319.44	R 44 408 386.64
Total	R 95 531 132.44	R 102 046 645.02	R 222 448 608.19	R 498 964 916.72

The consequence of all this money paid out from public funds to settle claims is dreadful. A lawsuit is usually instituted against the Member of the Executive Council (MEC) for Health in the province, but the money to pay the claim is in most cases derived from the budget of the hospital concerned.⁷⁵ The document of the South African Law Reform Commission (SALRC) illustrates the consequences of the situation clearly:

The more damages to be paid, the less money is available for service delivery, the poorer the quality of the service rendered by the hospital, the more room for negligence and error, the more the claims. It is a vicious circle and if it not addressed, the entire public health system could implode.⁷⁶

72 Oosthuizen and Carstens 2015 *THRHR* 273.

73 SALRC "Alternative dispute resolution" 33; SALRC "Medico-legal claims" 16.

74 SALRC "Alternative dispute resolution" 41; SALRC "Medico-legal claims" 16.

75 SALRC "Medico-legal claims" 16.

76 SALRC "Medico-legal claims" 16.

Medical negligence claims have a dire effect on the public health sector.⁷⁷ There are other factors too that contribute to this dire state of affairs leading to medical negligence litigation. There is a lack of accountability; and poor policy and budget decisions lead to increased workload for inexperienced personnel. The interns are expected to deal with a huge number of patients in the public service.⁷⁸ The claims and legal costs have a direct effect on the ability of government to provide adequate healthcare for the nation.

Table 2: Contingent liabilities for medical malpractice⁷⁹

Department of Health	Annual report for the year ending	Contingent liability at year end
Eastern Cape	31/03/2016	R13 421 136 000
Western Cape	31/03/2016	R182 025 000
KwaZulu-Natal	31/03/2016	R9 957 126 000
Mpumalanga	31/03/2015	R1 459 497 000
North West	31/03/2015	R36 157 000
Limpopo	31/03/2015	R1 356 921 000
Northern Cape	31/03/2015	R118 064 000
Free State	31/03/2016	R940 545 000
Gauteng	31/03/2016	R13 452 064 000
Total		R40 923 535 000

1.2.3 Private sector

The increase of medico-legal claims is not unique to the public sector; the private sector has also been severely affected. The Medical Protection Society (MPS), the largest indemnity financier of healthcare professionals in South Africa, projected that the long-term average claim occurrence for doctors in 2015 was around 27% higher than in 2009.⁸⁰ The MPS illustrated that the value of settling their five highest claims between 2006 and 2010 was more than twice the value of settling their five highest claims between 2001 and 2005.

77 Oosthuizen and Carstens 2015 *THRHR* 273.

78 Oosthuizen and Carstens 2015 *THRHR* 273.

79 SALRC "Medico-legal claims" 17.

80 SALRC "Medico-legal claims" 17.

According to the information provided by the MPS, one of the key factors for this growth in value was the increased size of awards for catastrophic neurological damages. Technological advances and improved life expectancy means that the cost of care for affected patients has escalated; in turn increasing the financial awards in negligence cases.⁸¹ The overall number of claims against members in South Africa has also increased, with the number reported to MPS in 2010 at 30% higher than the number reported in 2006, just four years previously.⁸²

1.2.4 Cost of indemnity insurance

The increase in both the number and value of claims has resulted in an increase in the cost of indemnity insurance for medical practitioners.⁸³ An alarming consequence of the rise in indemnity insurance is that some practitioners may at some point simply no longer be able to afford the premium and will be forced to stop practising.⁸⁴ The escalating cost of medical insurance for private practitioners may bring about even more unwanted consequences.

1.3 The aim of the study

This research aims to suggest a workable alternative to the current litigation system in respect of disputes in medical negligence cases.

1.4 Limitations of the study

This research focuses on an acceptable and workable dispute resolution method that can be utilised in South Africa to curb the cost of litigation. It is limited to mediation and does not include arbitration or conciliation.

1.5 Research question

Can mediation be an alternative option to litigation in respect of medical negligence cases?

81 Pienaar 2016 *PER* 5.

82 Pienaar 2016 *PER* 6.

83 Malherbe 2013 *SAMJ* 83-84.

84 Malherbe 2013 *SAMJ* 83.

1.6 Hypothesis

The current method of dispute resolution is costly, tiresome and ineffective. It is proposed that a suitable alternative dispute resolution mechanism be found.

1.7 Methodology

This study is a theoretical assessment to determine whether mediation is a better route for medical negligence cases as compared to litigation. The research is a normative study which relies on desk top and library based research.

Qualitative data is composed largely by means of document analyses. For the purpose of the analyses, different sources were consulted and compared to heighten validity of this study. The data collected includes publications produced by international organisations, governments and by experts in the field.

A literature review is the tool used to study and review the relevant South African law. The review includes an analysis of statutes and other legislation, international instruments, case law, common law, textbooks and journal articles, as well as electronic material obtained from various internet sites.

1.8 The scope of the study

The dissertation has five chapters, which have been divided into various topics in the following manner:

- (a) Chapter 1: Introduction: background, aim, hypothesis, modus operandi and explanation of use of sources.
- (b) Chapter 2: Historical overview of medical negligence in South Africa, as well as a discussion on what medical negligence is all about.
- (c) Chapter 3: The chapter discusses litigating medical negligence in South Africa. It looks at the structure as well as the adversarial nature of the country's civil justice system and identifies shortcomings in the litigation system in respect of medical negligence.
- (d) Chapter 4 focusses on the mediation process, the advantages of such a process and the possible disadvantages. The chapter also used other

jurisdictions, namely experiences in Wisconsin in the United States of America, Germany and Thailand to indicate how mediation as a dispute resolution mechanism could be used effectively.

- (e) Chapter 5: Conclusion and recommendations. This chapter answers the research question, which is whether mediation could be an alternative option to litigation in respect of medical negligence cases. The chapter summarises the discussion and makes recommendations.

CHAPTER 2: HISTORICAL OVERVIEW OF MEDICAL NEGLIGENCE AND MEDIATION IN SOUTH AFRICA

“The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.”⁸⁵

2.1 Introduction

Medicine and law usually interact due to cases involving medical negligence. The relationship between medicine and the law is quite strange as it is more of a love-hate relationship. It is acknowledged that a healthy pressure between the legal and medical practitioners probably serves to improve the quality of care for patients and helps to strengthen and possibly define standards of care that are evidence-based. Medical negligence is not a new occurrence. Doctors have long been accountable for their medical outcomes.

This chapter does not attempt to give a detailed history of the occurrence of medical negligence in South Africa, nor does it intend to give a comprehensive account of the history of mediation in South Africa. However, it intends to look at how the development of both concepts occurred in history. It should be noted that the development took place across a spectrum. The purpose of this chapter is not to be comprehensive but merely to illustrate the development. The ultimate goal of the research is to show the background of medical negligence and mediation principles, which were obtained from a rich history.

2.2 The origins of medical negligence cases

Medical negligence cases and the problems associated with them remain an important issue for the South African medical community. However, relatively little information regarding the origins of this phenomenon can be found in literature. Finding answers to questions, such as when and why medical negligence litigation commenced in South Africa and what historical principles best explain its subsequent development will assist in understanding how to best curb the evolution.⁸⁶

85 <http://www.wiseoldsayings.com/law-quotes/> (Date of use: 7 July 2018).

86 Mohr 2000 *Jama* 1655-1778.

A brief historical overview of medical negligence claims in ancient times is vital to understanding the development of medical negligence in the current era. As early as 2250 BC there were codes governing the world of medicine when it came to medical negligence.⁸⁷ Numerous laws provided penalties for medical negligence regarding various aspects of the work of a physician.⁸⁸ It also dealt specifically with the liability of doctors who caused injury or death while performing surgical procedures. An example is the Code of King Hammurabi of Mesopotamia, which stated that, “should a physician operate with a bronze lancet on a man for a severe wound and causes the man’s death, or opens an abscess with a bronze lancet and destroys the man’s eye; his fingers shall be cut off”.⁸⁹

The practice of medicine in ancient Greece originated around 500 BC.⁹⁰ It could be argued that this is the period where medicine was made more scientific. The work of Hippocrates⁹¹ in formulating the ethical medical code for physicians is the greatest contribution to the science of medicine. The Hippocratic Oath was the first rule that obliged physicians to refrain from all forms of medical malpractice.⁹²

The medical profession in ancient Greece was mostly unregulated. A medical practitioner would be sentenced to death if a patient died under his care as a result of the use of unorthodox medical practices.⁹³ If a patient lost the use of a limb after an operation, the medical practitioner’s hands were often cut off.⁹⁴ A classic example of a medical negligence case in Greece was when Alexander the Great had his physician, Glaukos, executed for failing to attend to Hephaestion, a great friend and his field marshal. It is told that Glaukos – instead of attending to Hephaestion – went to see a play at a nearby theatre, knowing that Hephaestion was in urgent need of medical treatment.⁹⁵

87 Carstens 1988 *De Rebus* 345-348; McNeil 1967 *American Bar Association Journal* 444-446.

88 Scharf *Medico-legal pitfalls*.

89 Carstens 1988 *De Rebus* 345; McNeil 1967 *American Bar Association Journal* 444-446; Johns, Edinburcht and Clark http://codesproject.asu.edu/sites/default/files/code_pdfs/Hammurabi.pdf (Date of use: 25 May 2018).

90 Carstens and Pearmain *Foundational principles* 609.

91 He is largely known as the father of medical science.

92 Carstens and Pearmain *Foundational principles* 609.

93 Pienaar 2016 *PER* 3.

94 Pienaar 2016 *PER* 4.

95 Carstens 1988 *De Rebus* 345.

The Romans', unlike the Greeks' contribution to the world of medicine, was minimal.⁹⁶ The profession of a physician was regarded as being low in status for Roman citizens; therefore, the Greeks were mostly employed as physicians while the Romans that practised as physicians were ridiculed and criticised. The profession was unrestricted until Antonius Pius rose to power.⁹⁷

According to the Romans, medical malpractice consisted of intentional malpractice; negligent malpractice and ignorant malpractice.⁹⁸ Where a physician intentionally caused injury or death to a patient it would be regarded as intentional malpractice.⁹⁹ This was prevalent among people of high social standing or with political influence where the services of physicians were used to poison them.¹⁰⁰ Negligent malpractice and ignorant malpractice were classified under *culpa*.¹⁰¹ Negligent malpractice denotes the absence of intention but the presence of gross negligence, while ignorant malpractice denotes incompetence on the part of the physician, causing injury or death to the patient.¹⁰² *Culpa* means negligence, which in turn means the failure to comply with a standard or conduct required by law.¹⁰³ The presence of *culpa* indicates that the physician did not act like a reasonable physician would act in similar circumstances. Where a citizen suffered injury due to ignorant medical negligence, the *pater familias* could institute action against the medical practitioner with the *actio lex aquiliae* for the patient's loss of the ability to work and the medical expenses incurred.¹⁰⁴

In the Germanic empire, the governance of medical negligence was governed by legislation that provided for a medical practitioner who may have caused the death of a patient to be handed to the family of the patient to do with him or her as they pleased.¹⁰⁵ Where the patient survived but suffered injury, the medical practitioner

96 Carstens and Pearmain *Foundational principles* 609.

97 Carstens and Pearmain *Foundational principles* 609.

98 Freckelton and Mendelson *Causation* 58.

99 Freckelton and Mendelson *Causation* 67.

100 Carstens and Pearmain *Foundational principles* 609.

101 Freckelton and Mendelson *Causation* 77.

102 Freckelton and Mendelson *Causation* 78.

103 Carstens and Pearmain *Foundational principles* 609.

104 Pienaar 2016 *PER* 4.

105 Pienaar 2016 *PER* 4.

had to pay a fine to the family.¹⁰⁶ The position in Roman-Dutch law was fairly similar.¹⁰⁷

2.3 Medical negligence in South Africa

The first reported medical negligence case in South Africa was *Lee v Schönberg*.¹⁰⁸ This case was heard in 1877. In this case, the plaintiff lost both his legs in an accident and went to consult the defendant, who was a physician. The plaintiff later alleged that the defendant was negligent in the medical treatment that was administered to him. The court held as follows:

There can be no doubt that a medical practitioner, like any professional man, is called upon to bring bear a reasonable amount of skill and care in any case to which he has to attend; and that where it is shown that he has not exercised such skill and care, he will be liable in damages.¹⁰⁹

The *Lee v Schönberg* case was later followed by *Kovalsky v Krige*.¹¹⁰ In this case, the physician was called upon to treat a baby of nine months who was suffering from bleeding due to a circumcision performed at a religious ceremony. The baby contracted gangrene to his penis, resulting in permanent damage. A medical negligence claim was instituted against the physician on the basis that he abandoned the patient before the bleeding was stopped and that he also failed to follow up on the patient. The court ruled as follows:

The principles there laid down have been applied in this court, and with them I entirely agree. As to capacity, Chief Justice Tindall said that every person who enters into a learned profession undertakes to bring to it the exercise of reasonable care and skill. Speaking of a surgeon, he says he does not undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill ... he undertakes to bring fair, reasonable and competent degree of skill to his case.¹¹¹

The plaintiff's case failed; however, what is clear in this case is that a physician's negligence should be measured by the yardstick of a reasonable physician. This principle was confirmed in subsequent cases dealing with medical negligence. In *R*

106 Pienaar 2016 PER 4.

107 Pienaar 2016 PER 4.

108 *Lee v Schonberg* (1877) 7 Buch 136; Carstens and Pearmain *Foundational principles* 619.

109 *Lee v Schonberg* (1877) 7 Buch 136.

110 *Kovalsky v Krige* (1910) 20 CTR 822; Carstens and Pearmain *Foundational principles* 619.

111 *Kovalsky v Krige* (1910) 20 CTR 822.

*v Van Schoor*¹¹² the position was defined in more detail when the court made the following ruling:

Coming to the case of a man required to do work of an expert as e.g. a doctor dealing with life or death of his patient, he too must conform to the acts of a reasonable man, but the reasonable man is now viewed in the light of the expert; and even such expert doctor in the treatment of patients, would be required to exercise in certain circumstances a greater degree of care and caution than in other circumstances.¹¹³

In *R v Van der Merwe*,¹¹⁴ Roper J observed as follows:

Negligence ... has a somewhat special application in the case of a member of a skilled profession such as a doctor, because a man who practices a profession which requires skill holds himself out as possessing the necessary skill and he undertakes to perform the services required from him with reasonable skill and ability. That is what is expected of him and that is what he undertakes, and therefore he is expected to possess a degree of skill which corresponds to the ordinary level of skill in the profession to which he belongs.¹¹⁵

2.4 Defining and understanding medical negligence

According to Pepper and Slabbert,¹¹⁶ historically it seemed like South Africa was spared the rapidly intensifying global trend towards increasing litigation for medical negligence cases, until lately. Recent research indicates South Africa has seen a sharp increase in the cost of liability insurance for doctors since 2005 due to medical negligence litigation.¹¹⁷ This indicates that the country may be on the verge of a medical negligence litigation crisis, as the value, size and number of claims appears to be increasing rapidly.¹¹⁸ This occurrence is trending in both the private and public sectors.¹¹⁹

Medical negligence is distinguishable from medical malpractice. Medical malpractice comprises of both negligent and intentional wrongful acts.¹²⁰ When medical practitioners fail to exercise the reasonable competency of skill and care in

112 *R v Van Schoor* 1948 (4) SA 349 (C).

113 *R v Van Schoor* 1948 (4) SA 349 (C) at 350.

114 *R v Van der Merwe* 1953 (2) PH H124 (W); Carstens and Pearmain *Foundational principles* 620.

115 *R v Van der Merwe* 1953 (2) PH H124 (W).

116 Pepper and Slabbert 2011 *SAJBL* 29-35.

117 Erasmus <http://www.health24.com/lifestyle/woman/your-life/suing-doctors-in-sa-20120721> (Date of use: 13 April 2017).

118 Pepper and Slabbert 2011 *SAJBL* 29-35.

119 Pepper and Slabbert 2011 *SAJBL* 29-35.

120 Hookman *Medical malpractice* 283.

their profession it leads to medical negligence.¹²¹ Negligence is associated with behaviour as opposed to a state of mind.¹²²

Historically, English common law imposed liability for all (unjust) wrongful acts. However, negligence as a concept began as an independent body of knowledge in the eighteenth century, when the concept of legal liability for a “failure to act” emerged.¹²³ This concept came after it was levied to practitioners who failed to carry out their duties with due care and skill. The concept of “duty” comes from the direct or indirect breach of a promise to undertake care. Negligence is one of the most common transgressions, which incorporates most forms of overt or unintentional wrongful conduct leading to others being injured. Laws governing negligence differ from country to country; however, the fundamental meaning and values are the same. “Reasonable person” remains one of the most significant arguments used in negligence law, which sets the conditions to adjudicate their conduct.¹²⁴

Professional negligence is said to be different from ‘medical malpractice’, which incorporates intentional or negligent acts, breach of confidentiality and fiduciary doctor-patient relationships. Sir William Blackstone is said to be the first scholar to use the phrase medical negligence in 1768, when he wrote about how trust is broken between the patient and the practitioner.¹²⁵

According to Neethling, Potgieter and Visser,¹²⁶ the concept of negligence refers to the blameworthy attitude or conduct of someone who has acted wrongfully. For the purposes of negligence, a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions, he failed to adhere to the standard of care legally required of him.¹²⁷ An allegation of negligence will only succeed if the plaintiff can satisfy the court on a balance of probabilities that all three of the following conditions apply:¹²⁸

1. The plaintiff was owed a duty of care by the defendant.

121 Hookman *Medical malpractice* 283.

122 Mcquoid-Mason 2010 *SA Heart* 248-251.

123 Mcquoid-Mason 2010 *SA Heart* 248-251.

124 Sykes, Evans and Dullah 2017 *SADJ* 430-432.

125 Patel 2008 *SAJBL* 57.

126 Neethling, Potgieter and Visser *Law of delict* 133-134.

127 Neethling, Potgieter and Visser *Law of delict* 133-134.

128 <https://www.medicalprotection.org/southafrica/advice-booklets/common-problems-managing-the-risks-in-general-practice-in-south-africa/case-law> (Date of use: 13 April 2017).

2. The duty of care was breached.
3. Harm resulted from the breach (causation).

If the first criterion is established (which is usually the case), the plaintiff must then present convincing evidence that the healthcare professional concerned could reasonably have foreseen the consequences of his or her action and did not guard against such an eventuality. Moreover, it must be demonstrated that the practitioner's actions fell short of the standards the law considers reasonable.

The test of medical negligence was first articulated in *Mitchell v Dixon*¹²⁹ where it was observed that:

A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill and care, he is bound to employ reasonable skill and care; and he is liable for the consequences if he does not.¹³⁰

In *Van Wyk v Lewis*¹³¹ it was held that a medical practitioner does not need to have the highest possible degree of professional skill, but he is bound to employ reasonable skill and care. This means that, if a doctor's management of a patient is considered reasonable by a responsible body of his or her peers, a court would be unlikely to find him or her guilty of negligence.

The common law principles of liability for negligence also apply to doctors. A doctor is expected to exercise the same degree of skill and care as a reasonably competent person in his or her branch of the profession.¹³² Failure to measure up to such a standard of skill and care may result in action for negligence. In deciding reasonableness, the court will have to regard but is not bound by the general level of skill and care exercised by members of the branch of the profession to which the practitioner belongs.¹³³ A doctor will not be liable for an error in diagnosis if it is the type of error that a reasonable competent doctor would also have made.¹³⁴ However, a doctor may be liable for failing to warn a patient about the meaning of certain symptoms.¹³⁵ A greater degree of skill and care is expected of a specialist

129 1914 AD 519.

130 *Mitchell v Dixon* 1914 AD 519 at 525.

131 *Van Wyk v Lewis* 1924 AD 438 at 444.

132 *Mitchell v Dixon* 1914 AD 519; *Castell v De Greef* 1993 (3) SA 501 (C).

133 *Van Wyk v Lewis* 124 AD 438.

134 *Buls v Tsatsarolakis* 1976 (2) SA 8921 (T).

135 *Dube v Administrator, Transvaal* 1963 (4) SA 260 (T).

than a general practitioner, and the more complicated the procedure, the greater the degree of skill and care required.¹³⁶

In an attempt to further understand the concept of medical negligence, the utterance in the well-known English case of *Roe v Ministry o/Health*¹³⁷ by Lord Denning is relevant. He stated:

It is easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors like the rest of us have to learn by experience and experience often teaches in a hard way the basis of medical malpractice litigation is based on a negligent act. Negligence is an element of a delict thus it is empirical that the development of the law of delict and its element are evaluated to get a clear understanding of the concept being discussed.¹³⁸

2.5 Historical overview of mediation in South Africa

Mediation is defined as the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options to solve the dispute.¹³⁹

The use of alternative dispute resolution (ADR) has a long history in South Africa. ADR was part of the culture and customs of the traditional African communities that populated South Africa before its colonialization.¹⁴⁰ In traditional communities, being in breach of customary law rarely invoked a sanction; instead an agreement would be reached for corrective mechanisms to resolve the conflict.¹⁴¹ The concept of *ubuntu*,¹⁴² which emphasises that a person is a person through other people, is the

136 *Collins v Administrator, Cape* 1995 (4) SA 73 (C).

137 1954 (2) All ER 131.

138 *Roe v Ministry o/Health* 1954 (2) All ER 131 at 137E-F, 139D-E.

139 Court-Annexed Mediation Rules of the Magistrates' Courts 2014.

140 Aiyedun A & Ordor A " Integrating the traditional with the contemporary in dispute resolution in Africa." <https://dx.doi.org/10.4314/idd.v20i1.8> (Date of use: 29 January 2018).

141 Brand, Steadman and Todd *Commercial mediation* 1.

142 Ubuntu is a word used in Xhosa and IsiZulu. In Sotho, the word used is "batho"; In the case of *Afriforum and Another v Malema and Others* 2011 (6) SA 240, the court referred to the definition of ubuntu as a recognised source of law within the background of strained or broken relationships among individuals and communities; *in S v Makwanyane* 1995 3 SA 391 (CC) para 307 Mokgoro J asserted that: While [ubuntu] envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation

core of African ADR.¹⁴³ The concept of *ubuntu* emphasises community building, respect, sharing, empathy, tolerance, the common good, acts of kindness, and communication, consultation, compromise, cooperation, camaraderie, conscientious-ness and compassion.¹⁴⁴

Because of the settlement of the Dutch in the Cape in 1652, Western dispute resolutions, which preferred adjudicative outcomes over consensual ones, became the dominant method of dispute resolution in South Africa.¹⁴⁵ The formal Roman Dutch legal system soon ingrained itself in South Africa.¹⁴⁶ The focus was now on winning and losing within the clear and defined structures of the courts.¹⁴⁷ Koopman¹⁴⁸ illustrates the methods clearly when he states:

Whites, by and large, are individualistic exclusivists. When managing conflict, therefore, we prefer to apply win/lose tactics, clear cut and defined structures and procedures. Mostly we alienate ourselves within conflict situations leading us to enter into 'negotiations' in order to control an outcome of 'rightness' and 'wrongness'. Africans by and large, are communal inclusivists. Managing conflict becomes an 'open' sum process involving immediate family, supervisors, elders, etc. within the framework of morals. This necessitates entering into a 'dialogue' from which sense of 'fairness' and 'unfairness' towards other members in society can emerge.¹⁴⁹

Adjudication was further entrenched in the civil justice system with the English settling in South Africa.¹⁵⁰ The English contribution to South African law re-enforced the adversarial character and adjudicative principles of the Roman Dutch law.¹⁵¹ This ensured that the Western method of dispute resolution was undeniably supreme to the ones found in the traditional communities.¹⁵²

In 1961 South African gained independence from the English rule. However, the apartheid government used courts to enforce their legislation, which entrenched the

143 Brand, Steadman and Todd *Commercial mediation* 1.

144 Brand, Steadman and Todd *Commercial mediation* 1.

145 Edwards *History of South African law* 65.

146 Du Toit 2014 *Ars Aequi* 278-285.

147 <https://dx.doi.org/10.4314/idd.v20i1.8f> (Date of use: 29 January 2018).

148 In Brand, Steadman and Todd *Commercial mediation* 2.

149 As quoted in Brand, Steadman and Todd *Commercial mediation* 2.

150 <https://dx.doi.org/10.4314/idd.v20i1.8> (Date of use: 29 January 2018).

151 <https://dx.doi.org/10.4314/idd.v20i1.8> (Date of use: 29 January 2018).

152 <https://dx.doi.org/10.4314/idd.v20i1.8> (Date of use: 29 January 2018).

culture of resolving disputes through courts.¹⁵³ Minimal attention was given to other alternative dispute resolution methods save for arbitration.

In 1984 the Independent Mediation Service of South Africa (IMSSA) was established. One can perhaps argue that this establishment was the turning point from adjudication to mediation. This body was established by a group of trade unionists, employers, academics and lawyers. The aim of the body is to provide a credible dispute resolution institution that could offer services directed at the mediation and arbitration of employment disputes.¹⁵⁴ During this period, the statutory institutions of the apartheid state lacked credibility and effectiveness; therefore, the IMSSA was created as a substitute for those institutions.¹⁵⁵ Due to its success, in the 1980s the IMSSA branched out to community mediation and handled a lot of community disputes during the late 1980s and 1990s.¹⁵⁶

The recognition of mediation by government was mostly pronounced in the promulgation of the Mediation in Certain Divorce Matters Act 24 of 1987, which entered into force in 1990.¹⁵⁷ This Act provides for mediation in certain divorce proceedings in which the interests of minor or dependent children are at stake.¹⁵⁸ The Act created the office of the Family Advocate, which states that any party to a divorce action or an application for the variation, rescission or suspension of an order with regard to the custody or guardianship of or access to a child can request the assistance of the Family Advocate.

Apart from the above, between the years of 1985 and 1990, more than 6 000 people died in South Africa under the apartheid regime due to political violence.¹⁵⁹ During this period, initiatives were taken by non-government officials to mediate the situation between the African National Congress and the National Party.¹⁶⁰ The

153 <https://dx.doi.org/10.4314/idd.v20i1.8> (Date of use: 29 January 2018).

154 Brand, Steadman and Todd *Commercial mediation* 2.

155 Brand, Steadman and Todd *Commercial mediation* 3.

156 Brand, Steadman and Todd *Commercial mediation* 3.

157 <https://dx.doi.org/10.4314/idd.v20i1.8> (Date of use: 29 January 2018).

158 <https://dx.doi.org/10.4314/idd.v20i1.8> (Date of use: 29 January 2018).

159 <https://dx.doi.org/10.4314/idd.v20i1.8> (Date of use: 29 January 2018).

160 <https://dx.doi.org/10.4314/idd.v20i1.8> (Date of use: 29 January 2018).

peace accord that came from the mediation helped to deliver a democratic South Africa peacefully.¹⁶¹

2.6 Renaissance of modern mediation

Labour and employment disputes had by far been the area of most widespread modern mediation in South Africa.¹⁶² One of the first post-apartheid statutes passed into law was the Labour Relations Act 66 of 1995.¹⁶³ The Commission for Conciliation, Mediation and Arbitration (CCMA) was established by this Act.¹⁶⁴ The Act makes it mandatory for parties to refer employment disputes to mediation before lodging an industrial dispute.

There are many statutes that have been enacted after 1994 that provide for mediation in one way or another. The new Companies Act,¹⁶⁵ which came into effect in 2011, is one example. This Act requires that, instead of applying to court or filing a complaint with the Companies' Commission, an individual may refer a matter to either the Companies Tribunal or to an agency or person to resolve the dispute by mediation, conciliation or arbitration.¹⁶⁶ Another example could be the National Credit Act (NCA).¹⁶⁷ The NCA regulates the credit industry in South Africa. One of the objectives of the NCA is to prevent and remedy over-indebtedness of consumers. A procedure of debt review was put in place by the Act.¹⁶⁸ In terms of this procedure a consumer who is in financial difficulty can ask for a neutral and independent debt counsellor to investigate his financial position and mediate an agreement between the debtor and all his or her creditors in terms of which his or her debts are restructured.¹⁶⁹ If an agreement is reached it may be made an order of court.¹⁷⁰ If not, the normal procedures may be taken by the creditors to enforce

161 Brand, Steadman and Todd *Commercial mediation* 3.

162 <https://dx.doi.org/10.4314/idd.v20i1.8> (Date of use: 29 January 2018).

163 <https://dx.doi.org/10.4314/idd.v20i1.8> (Date of use: 29 January 2018).

164 Labour Relations Act 66 of 1995 s 112.

165 Companies Act 71 of 2008.

166 Companies Act 71 of 2008 s 166.

167 National Credit Act 34 of 2005.

168 <https://dx.doi.org/10.4314/idd.v20i1.8>(Date of use: 29 January 2018); section 86 of the National Credit Act.

169 National Credit Act s 86.

170 National Credit Act s 86.

their rights. At present, there are more than 2 000 registered debt counsellors and more than 6 000 applications for debt review are made per month.¹⁷¹

Mediation has received important encouragement from the judiciary. In *Port Elizabeth Municipality v Various Occupiers*,¹⁷² the Constitutional Court held as follows:

One of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried. In appropriate circumstances, the court themselves order that mediation be tried.¹⁷³

In *MB v NB*¹⁷⁴ the High Court found that the failure by attorneys representing the parties to advise their clients about the availability of mediation as a process that could be used to resolve their dispute should be visited with the court's displeasure. The court prohibited the attorneys from recovering their full fees, and restricted them to charging fees on the party and party scale. In reaching this decision, the court referred to the rules of the High Court, which requires that one of the matters that must be considered at a pre-trial conference is whether a dispute should be referred for mediation.

It is an undisputed fact that mediation has a long history in South Africa – a history stemming from the roots of the traditional African communities. More than that, the mediation process was very pivotal to the peace process that led to the demise of apartheid. Despite its significance, at present, there is no overarching legislation regulating mediation in general or that lays down rules or principles that mediation must comply with.¹⁷⁵ As it stands, the mediation process is fragmented and it is referred to in various pieces of legislation, many of which create their own rules and peculiarities.¹⁷⁶

2.7 Conclusion

The long history of both medical negligence as a concept and mediation illustrates that there is a great need for change in the South Africa. Mediation is not a new

171 <https://dx.doi.org/10.4314/idd.v20i1.8> (Date of use: 7 May 2018).

172 [2004] ZACC.

173 *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7.

174 2010 (3) SA 220.

175 Brand, Steadman and Todd *Commercial mediation* 3.

176 Brand, Steadman and Todd *Commercial mediation* 3.

concept in our country; one can argue and say that due to the fact that historically the people of this country utilised mediation to it optimum, it will not be difficult to incorporate mediation as an alternative dispute resolution. Chapter 3 looks at the challenges of litigating medical negligence cases in South Africa.

CHAPTER 3: LITIGATING MEDICAL NEGLIGENCE IN SOUTH AFRICA

“The power of the lawyer is in the uncertainty of the law.”¹⁷⁷

3.1 Introduction

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.¹⁷⁸ This section in the Constitution of the Republic of South Africa, 1996 (“the Constitution”) permits for a dispute to be resolved in either a formal setting (such as a court of law) or in a less formal setting (such as mediation or arbitration done outside a court room).

The main function of a system for civil actions should be to provide a platform where disputes are resolved in a just, impartial, efficient and cost-effective manner.¹⁷⁹ Civil litigation has two dimensions, namely procedural and substantive fairness.¹⁸⁰ Civil litigation procedures are used to create a balance between the parties by restricting unnecessary delays through prescribing time periods for the filing of papers.¹⁸¹

The substantive aspect of civil litigation focuses on the rights or interests of the parties.¹⁸² This process is usually achieved by weighing facts against established principles of law to determine who is right and who is wrong. The approach by the courts usually involves applying a set of known rules and legal

principles to the issue at hand.¹⁸³ The outcomes are determined by a perceived objective application of the law and established norms of general application.¹⁸⁴ The process is often fraught with ambiguities due to the differences in the interpretation

177 https://www.brainyquote.com/quotes/jeremy_bentham_382557?src=t_law (Date of use: 10 July 2018).

178 The Constitution s 34.

179 <https://hsf.org.za/publications/justice-symposiumseries/Justice%20Symposium%20web.pdf> (Date of use: 10 July 2018).

180 Lever 1999 *Int and Comp Law Quarterly* 285-301.

181 Jordaan 2012 *De Rebus* 20. Most of the periods mentioned in the High Courts and Magistrates' Courts Acts and Rules require things to be done within a certain period. For example, the defendant is generally given 10 business days in which to deliver a notice indicating his intention to defend the action after the issuing and service of a summons. A statement of defence to the plaintiff's summons must be delivered within 20 days after the defendant has delivered his/her notice of intention to defend.

182 Lever 1999 *Int and Comp Law Quarterly* 285.

183 Allen 1991 *Cardozo Law Review* 373-422.

184 Allen 1991 *Cardozo Law Review* 373.

of legal principles and there are often conflicts of legal norms and rules.¹⁸⁵ The court processes are also complicated by legal formalism, technicalities and rituals that need to be observed in the court environment.¹⁸⁶

Few people can comfortably afford civil litigation through the court system and those that can afford it are rarely on par with all the legal jargon. This is specifically relevant for a medical scenario, as the occurrences of medical negligence happen mostly in the public sector. These patients could not afford medical aid from the start and were therefore compelled to use state facilities. When things go wrong they do not have the means to take the alleged offender to court. They also do not understand the working of the legal system. If they do get advice to seek legal aid, attorneys usually accept the cases on contingency.¹⁸⁷

Cases of medical negligence can take years to be adjudicated. If successful, the patient who suffered the damages will receive an amount of money. A question might arise as to how to prevent patients that are taken on contingency by attorneys to not be used for the attorney's pocket? This question is quite relevant, as most patients might not fully understand the process. Most of the time patients sue to get answers to what happened with them while in hospital – that is all that they want. A few medical negligence cases will be discussed in this thesis to illustrate the above allegation, but before this is done it is necessary to explain the South African health system as well as the legal framework of healthcare in the country.

185 Jordaan 2012 *De Rebus* 20.

186 Peters 2015 *Comparative Perspectives on Law and Justice* 23-43. Courts are a very formal place and there is an expectation that you must behave in a certain manner. If you do not comply with the rules, you can be found in "contempt of court", e.g. when a judge enters the courtroom you must stand up and do not sit down until he/she does.

187 In terms section 2 of the Contingency Fees Act 66 of 1997, "a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed –

- (a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;
- (b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement."

3.2 The South African health system

The National Health Act 61 of 2003 (NHA) defines the “national health system” as the system within the Republic, whether within the public or private sector, in which the individual components are concerned with financing, provision or delivery of health services.

The South African healthcare system is a pluralistic and transitional system. The two-tiered healthcare system has separate public and private streams.¹⁸⁸ The public sector, funded by general tax, is based on a district health system approach, which emphasises primary healthcare. There is a portion of individuals that can afford out-of-pocket primary healthcare in the private sector; however, these individuals rely on the state for secondary and tertiary care, and 68% of the population depends entirely on the public health sector.¹⁸⁹ Very few citizens can afford private medical scheme cover and are able to access private healthcare exclusively. The public healthcare system thus services the majority of the people in South Africa. The private health system renders services to those who are members of medical schemes and the people that can afford to pay for such services directly from their own pockets.¹⁹⁰

The NHA governs all institutions pertaining to health services, including the public and private sectors. The Act provides for comprehensive standards on numerous matters touching health service delivery prescribed by the Minister of Health.¹⁹¹ State hospitals and medical services are owned and controlled by the provincial government in each province.¹⁹² The national Department of Health does not render health services itself.¹⁹³ The fundamental difference between health service delivery in the public and private sectors is that medical practitioners are employees within the public sector and self-employed within the private sector.¹⁹⁴ This distinction is important from a litigation perspective as there should be clarity who should be sued

188 Carstens and Pearmain *Foundational principles* 229.

189 Carstens and Pearmain *Foundational principles* 229.

190 Carstens and Pearmain *Foundational principles* 229.

191 Carstens and Pearmain *Foundational principles* 229.

192 Carstens and Pearmain *Foundational principles* 229. The Constitution allocates government functions on either an exclusive or concurrent basis (i.e. schedule 4 or schedule 5 of the Constitution). The bulk of social services is shared competencies between national and provincial government, and include health services.

193 Carstens and Pearmain *Foundational principles* 229.

194 Carstens and Pearmain *Foundational principles* 229.

– the individual practitioner or the employer, which makes the doctrine of vicarious liability come into play. Before this aspect is dealt with in more detail, it is necessary to highlight the specific pieces of legislation applicable when litigation concerning medical cases is contemplated.

3.3 The legislative framework for medical negligence claims

3.3.1 *The Constitution of the Republic of South Africa, 1996*

The adoption of the Universal Declaration of Human Rights in 1948 brought about an era of human rights for the world. This happened after World War II, during which gross violations of human rights were committed by the Nazis in Germany.¹⁹⁵ The principles of human rights gained huge ground in South Africa during the abolishment of the apartheid regime and the drafting of the new Constitution of South Africa, containing the Bill of Rights (chapter 2).¹⁹⁶ The Constitution's Bill of Rights aims to protect freedom of choice and individual rights.¹⁹⁷

Section 2 of the Constitution provides that it is the supreme law of the Republic of South Africa and that any law or conduct inconsistent with it is invalid. There are certain rights in the Bill of Rights which, when viewed collectively, could be said to constitute the right to health.¹⁹⁸ These rights are the right to life;¹⁹⁹ the right to dignity;²⁰⁰ the right to bodily and psychological integrity;²⁰¹ the right to privacy;²⁰² the right to an environment that is not harmful to health or wellbeing;²⁰³ the right to emergency medical treatment;²⁰⁴ and the right of access to healthcare services.²⁰⁵

The abovementioned rights are usually the basis of most medical negligence claims and are thus of particular significance in the medical context. To illustrate: where a

195 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018).

196 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018).

197 Chapter 2 of the Constitution of the Republic of South Africa 1996.

198 Carstens and Pearmain *Foundational principles* 26.

199 The Constitution s 11.

200 The Constitution s 10.

201 The Constitution s 12(2).

202 The Constitution s 14.

203 S 24(a).

204 S 27(3).

205 S 27(1)(a).

medical practitioner performed a procedure on a patient without the patient's or his or her guardian's informed consent, a case could be made that such a procedure constituted an infringement of the patient's bodily integrity and dignity. Where medical records are disclosed to the public without the patient's consent, it could be construed as a violation of a patient's right to privacy.

When preparing a possible medical negligence case, the lawyer will start with the constitutional rights to see whether any of these have been violated before he or she proceeds to analyse the specific legal principles applicable to the case. It is not the aim of this research to discuss cases that were argued on a violation of constitutional rights, but it is important to indicate that the Constitution is always the starting point when something in a medical context goes wrong, whether the issue ends up in court or whether it is mediated.²⁰⁶

3.3.2 *National Health Act 61 of 2003*

The NHA aims to recognise the rights set out in the Constitution by creating a framework for a regulated and superior as well as a uniformed health system in the country.²⁰⁷ It outlines the laws that govern national, provincial and local government about health services.²⁰⁸ The objectives of this Act are to regulate national health and to provide uniformity in respect of health services across the nation by establishing a national health system that encompasses public and private providers of health services; to provide in an equitable manner the population of the Republic with the best possible health services that available resources can afford; setting out the rights and duties of healthcare providers, health workers, health establishments and users; and protecting, respecting, promoting and fulfilling the rights of the people of South Africa to the progressive realisation of the constitutional rights of access to healthcare services, including reproductive healthcare.

Sections 6 and 7 of the Act confirm the patient's right to be informed. These sections emphasise a patient's autonomy. Included in the right to give informed consent is

206 Not all claims go as far as the Constitutional Court. The following are some claims that have proceeded to the Constitutional Court: *Links v MEC for Health, Northern Cape* [2016] ZACC 10; *MEC for Health, Gauteng v Lushaba* [2015] ZACC 16; *H v Fetal Assessment Centre* [2014] ZACC 34.

207 See NHA preamble

208 https://ossafrica.com/esst/index.php?title=Summary_of_the_National_Health_Act%2C_no._61_of_2003 (Date of use: 31 May 2015).

the express right to refuse treatment.²⁰⁹ Section 8 confirms patients' right to participate in their own healthcare decisions. This section further emphasises and reinforces patient autonomy.²¹⁰ Section 14 of the Act confirms the confidentiality of healthcare information. It states that such information may only be disclosed with the written consent of the patient, by an order of court or where any other law authorises such disclosure, or if non-disclosure would pose a threat to public health.

With the enactment of the NHA, patients were placed in a stronger position to litigate against medical practitioners than they were before, since the Act expressly set out rights that the patient can enforce through litigation.²¹¹ To illustrate, an aggrieved individual may take an opportunity to institute action where he or she was not informed or requested to participate in decisions regarding his/her health, thus invoking sections 6 and 8 of the Act.²¹² It is also important to note that the NHA authorises the Minister of Health to promulgate regulations in terms of the Act. When faced with a possible medical negligence case, the applicable regulations to the specific issue should also be consulted as the regulations have the same significance as the Act itself.

3.3.3 *Promotion of Access to Information Act 2 of 2000*

The Promotion of Access to information Act (PAIA) is based on section 32 of the Constitution. Its premise is that everyone is entitled to access to any information held by the state and to any information that is held by a private person and that is required to allow one to exercise or protect one's right. The promulgation of the PAIA can be seen as a breakthrough for many patients, as it allows medical records to be inspected before legal proceedings are instituted.²¹³

The right of access to information broadens the spectrum of disclosure, as a patient and/or his or her next of kin, representative or any other party concerned, company or employer, may request access to information (the disclosure of reasons for adverse events) that is held by a private medical practitioner or hospital (a private body) and/or a public hospital or clinic (a public body) in the exercise or protection

209 Pienaar 2016 *PER* 9.

210 Pienaar 2016 *PER* 9.

211 Pienaar 2016 *PER* 9.

212 Pienaar 2016 *PER* 9.

213 Van den Heever and Carstens *Res Ipsa Loquitur* 168.

of any right afforded to them in terms of the Constitution. This may also be considered where a patient or his or her family, representative and/or a company or employer desire to access information (specifically for reasons of adverse consequences) pertaining to a patient, but the private practitioner or hospital or public hospital or clinic unjustifiably refuse such disclosure. In this regard, the provisions of the PAIA become relevant. It is also immediately clear that issues pertaining to maintaining the privacy and confidentiality of a patient may not be relevant to this enquiry.²¹⁴ Van den Heever and Carstens highlight that the request for an explanation about the reasons for a personal injury sustained by a patient at the hands of a health professional forms part of the “personal information” as defined by the PAIA.²¹⁵ The PAIA does not apply to medical records requested for civil or criminal proceedings after commencement of such proceedings.²¹⁶

In *Unitas Hospital v Van Wyk*,²¹⁷ the appellant appealed against an order of the Pretoria High Court in terms of which it was ordered to furnish the respondent with the information sought under section 50 of the PAIA. The basis of the respondent’s application was that she “required” a report relating to a survey regarding the general nursing conditions in ICU at the hospital during 2002 to determine the

214 Van den Heever and Carstens *Res Ipsa Loquitur* 168.

215 “Personal information” means information about an identifiable individual, including but not limited to –

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;
- (b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
- (c) any identifying number, symbol or other particular assigned to the individual;
- (d) the address, fingerprints or blood type of the individual;
- (e) the personal opinions, views or preferences of the individual, except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual;
- (f) correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- (g) the views or opinions of another individual about the individual;
- (h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual, but excluding the name of the other individual where it appears with the views or opinions of the other individual; and
- (i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but excludes information about an individual who has been dead for more than 20 years.

216 PAIA s 7.

217 2006 (4) SA 436 (SCA).

prospects of success of a proposed damages claim against the hospital. It was clear from the papers that the respondent could obtain the information contained in the report from other sources already available to her, including the author of the report. The majority of the court held in this regard that the respondent had failed to make out a case that she “required” this information as envisaged by section 50 of the PAIA and concluded that the high court should have dismissed the application with cost.

This case portrays a classic example of cases that should be mediated. The applicant in the case just required information from the respondent – there was no question of law that needed to be determined. Had the case been mediated, the outcome would most likely have been different as the parties would be in control of the proceedings and could give clarification as well as ask questions where necessary. The parties would also have saved a lot of money and time.

3.3.4 *The Consumer Protection Act 68 of 2008*

The Consumer Protection Act (CPA) applies to every transaction in South Africa except for transactions that are specifically exempted by section 5 of the Act.²¹⁸ The provisions of the Act apply to the healthcare sector as a whole.²¹⁹ Section 49(1)(a) stipulates that any provision of a consumer agreement that purports to limit the liability of the supplier, or which imposes an obligation on the patient to indemnify the supplier for any cause, must be brought to the attention of the patient in a conspicuous manner and form that is likely to attract the attention of any ordinary alert patient, having due regard for the circumstances of each case.²²⁰ Such a term or clause must be written in plain language and the plaintiff must be given adequate opportunity to clarify the meaning of such term or clause.²²¹

The patient must be given an adequate opportunity in each circumstance to receive and comprehend the provision or notice. Applying these provisions in a medical context will thus mean that they will have a direct impact on the standard exemption

218 Van den Heever and Lawrenson *Expert evidence* 7.

219 Van den Heever and Lawrenson *Expert evidence* 7.

220 Van den Heever and Lawrenson *Expert evidence* 7.

221 Van den Heever and Lawrenson *Expert evidence* 7.

clauses that exclude, limit or alter the liability that normally flows from the contractual relationship between the patient and the healthcare establishment.²²²

Section 51(1)(c) states the following:

- [T]hat a supplier must not make a transaction or agreement subject to any term or condition if it purports to –
- (i) (l)imit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier; (or)
 - (ii) (c)onstitute an assumption of risk or liability by the consumer for a loss contemplated in subparagraph ...

Exemptions of liability for loss or damages due to gross negligence are no longer legitimate in the South African law of contract and such prohibited terms are void and unenforceable. The scope of defining “gross negligence” in the medical context is wide because the CPA does not define this phrase and does not make it clear when conduct will be regarded as grossly negligent or when conduct will constitute ordinary negligence.²²³

The Act provides, in section 61, that the producer or importer, distributor or retailer of any goods is liable for any harm (e.g. death, injury or illness) caused wholly or partly as a consequence of supplying unsafe goods; a product failure, hazard or defect in any goods; or inadequate instructions or warnings provided to a consumer in respect of any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer. If more than one person is liable for the harm or loss, they may be jointly and severally held liable. Pepper and Slabbert illustrate the effect of this provision in a medical context by giving a practical example that introduced strict or no-fault liability: a cardiologist correctly fits a pacemaker into a patient’s heart (e.g. an endocardial implantation) but the pacemaker fails prematurely.²²⁴ Where a patient previously had to prove that the premature failure of the pacemaker was the result of negligence on the part of the manufacturer of the pacemaker, he or she now only needs to prove that the pacemaker failed prematurely and that he or she suffered harm or loss as a result. Moreover, the

222 Van den Heever and Lawrenson *Expert evidence* 7.

223 Van den Heever and Lawrenson *Expert evidence* 7.

224 Pepper and Slabbert 2011 *SAJBL* 32.

patient need not institute a claim against the manufacturer of the pacemaker, but may claim damages from anyone in the supply chain, which includes the cardiologist (as the person who supplied the pacemaker to the patient). The no-fault provisions of this Act might lead to an increase in medico-legal litigation. Since the claimant can sue anyone in the supply chain and hold them liable for harm and cost, and since the health professional who delivered the care is the most easily (and usually only) identifiable person in the supply chain, he or she can strictly be held liable for the cost of the damages that may follow. This applies, among other things, to defective prostheses, blood products, implants, pacemakers and medication for which a claim may be brought if damage results.

3.4 The nature of litigation

Civil litigation is the process of referring an issue or dispute to a court for a judge or magistrate to make a decision that will resolve the dispute.²²⁵ The adversary nature of the civil litigation system requires parties to challenge each other's versions of events before an impartial judicial officer.²²⁶ Litigation processes consist of both an application and action procedure.²²⁷ When a summons or application is issued, as well as when pleadings and notices are exchanged between parties, the process is considered to be civil litigious in nature.²²⁸ It is essential for the parties to determine what relief is sought before embarking on a process in the courts.²²⁹ *Locus standi* is a requirement for instituting a lawsuit, meaning the right person who has the capacity to litigate must be the one suing.²³⁰ The litigation process requires that parties must religiously observe the times prescribed by legislation and the court rules, as well as take note of the court days and calendar days.²³¹

In civil litigation it is crucial to decide whether to proceed by way of action or by way of an application.²³² In determining whether the appropriate way is action or

225 Nortje <https://www.schoemanlaw.co.za/understanding-civil-litigation-south-africa/> (Date of use: 18 June 2018).

226 Chamisa *Alternative dispute resolution mechanisms*.

227 Peté *et al Civil procedure* 112.

228 Peté *et al Civil procedure* 112.

229 Nortje <https://www.schoemanlaw.co.za/understanding-civil-litigation-south-africa/> (Date of use: 18 June 2018)

230 Peté *et al Civil procedure* 13.

231 Peté *et al Civil procedure* 128-142.

232 Peté *et al Civil procedure* 101.

application, one should ask whether a material dispute is in fact anticipated or not.²³³ If a dispute of fact is anticipated, it is generally best to proceed with an action.²³⁴ In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,²³⁵ the court stated that if there is a real dispute of facts between the parties on any material question of fact, it will be necessary to proceed by way of action to properly test and challenge the evidence.

The burden of proof is placed upon a party in a trial. He or she has to prove or disprove contested facts.²³⁶ In civil litigation, the balance of proof is centred upon a balance of probabilities.²³⁷ Balance of probability evidence implies that one party in the contested issue has more convincing evidence than the other party.²³⁸ In *St Augustine's Hospital (Pty) Ltd v Le Breton*,²³⁹ the court stated that the one who avers has the burden of proof.

At present, medical negligence claims in South Africa are dealt with in terms of the common law. Carstens and Pearmain state that the legal basis for health service delivery as a theme in South Africa is largely accommodated under the law of obligations – either in law of contract or law of delict.²⁴⁰ The relationship between the doctor and patient or hospital and patient is usually a contractual relationship. However, cases that have been decided recently regarding health services by the courts have been decided based on the law of delict.²⁴¹

To succeed with a claim in South African private law, a plaintiff has to prove the elements of a delict, which are voluntary conduct, wrongfulness, capacity, fault, causation and loss.²⁴² Voluntary conduct for purposes of delictual liability arises when the conduct of the defendant is voluntary in the sense that it is controlled by conscious will.²⁴³ Wrongfulness is present if the act or omission infringes a right

233 Nortje <https://www.schoemanlaw.co.za/understanding-civil-litigation-south-africa/> (Date of use: 18 June 2018).

234 Nortje <https://www.schoemanlaw.co.za/understanding-civil-litigation-south-africa/> (Date of use: 18 June 2018).

235 1949 (3) SA 1155 (T).

236 Chamisa *Alternative dispute resolution mechanisms* 32.

237 Chamisa *Alternative dispute resolution mechanisms* 32.

238 Chamisa *Alternative dispute resolution mechanisms* 32.

239 1975 (2) SA 530.

240 Carstens and Pearmain *Foundational principles* 283.

241 Carstens and Pearmain *Foundational principles* 283.

242 Burchell *Principles of delict* 23.

243 Burchell *Principles of delict* 23.

protected by law or breaches a legal duty owed by one person to another.²⁴⁴ Adult, sane and sober persons are presumed to have the capacity to appreciate the wrongfulness of their conduct and to act in accordance with that appreciation.²⁴⁵ Fault in the form of negligence is the most commonly encountered form of fault in the context of medical services. It is determined by examining the defendant's state of mind, mental disposition, or the degree of care the defendant exhibited in his/her conduct towards the plaintiff.²⁴⁶ The plaintiff must prove that the loss resulted from the wrongful conduct of the defendant and that the plaintiff had suffered a loss that can be compensated in monetary terms.²⁴⁷

Causation arises when there is a causal link between the defendant's conduct and the harm suffered by the plaintiff.²⁴⁸ In *Muller v Mutual and Federal Insurance Co Ltd*²⁴⁹ the court observed that:

...the problem of causation in delict involves two distinct enquires. The first is whether the defendant's wrongful act was a cause of the plaintiff's loss ('factual causation'); the second is whether the wrongful act is linked sufficiently to the loss for legal liability to ensue ('legal causation' or remoteness).²⁵⁰

3.5 The journey of medical negligence claims in South Africa

A claim flowing from alleged medical negligence has to be taken through the normal legal processes.²⁵¹ The implications are that the claimant must be aware of the possibility of legal recourse, obtain legal representation, institute proceedings in the appropriate court, prove that he or she has a cause for action, and prove damages in a field that requires specific and specialised technical expertise.²⁵² The problem with the South African civil justice system is that it is not just costly, but it is also complicated. Below is an illustration of the process that must be embarked on for claiming medical negligence.²⁵³

244 Carstens and Pearmain *Foundational principles* 496; SALRC "Medico-legal claims" 28.

245 Burchell *Principles of delict* 23.

246 SALRC "Medico-legal claims" 28.

247 Burchell *Principles of delict* 23.

248 Carstens and Pearmain *Foundational principles* 509.

249 1994 (2) SA 425.

250 *Muller v Mutual and Federal Insurance Co Ltd* 1994 (2) SA 425 p 449.

251 SALRC "Medico-legal claims" 28.

252 SALRC "Medico-legal claims" 28.

253 <https://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018).

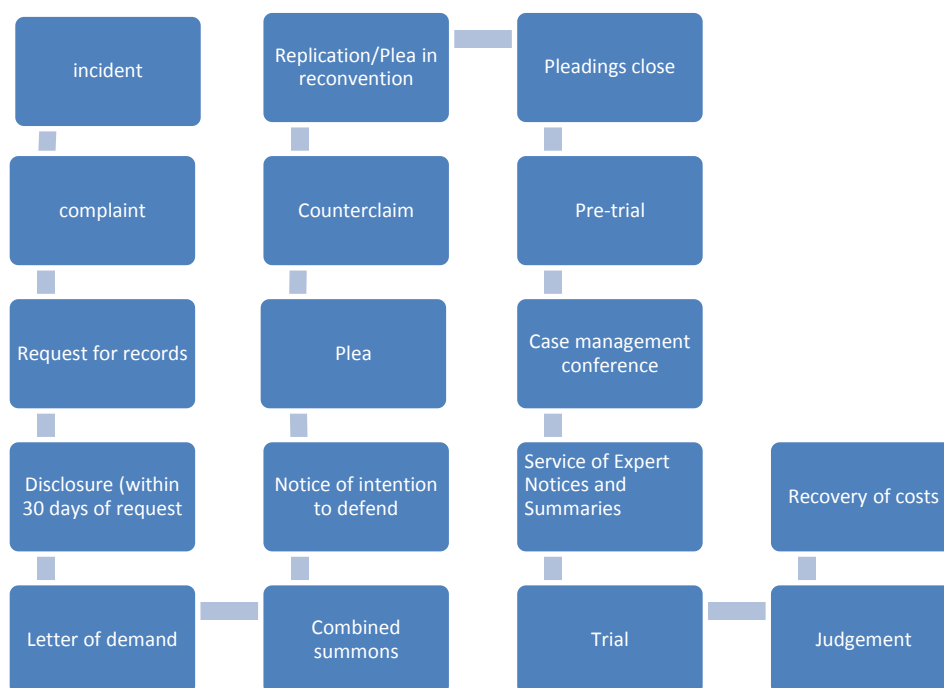


Figure 1: The journey of medical negligence claims in South Africa²⁵⁴

According to the Medical Protection Society (MPS), the claim process is made arduous due to incidents not being reported when they occur, late investigation of claims, court procedural systems that can be inefficient and a lack of opportunity to resolve cases early.²⁵⁵ The MPS further highlights that the system lacks transparency, and there is no pre-litigation framework, which leaves the defendant at a disadvantage in the pre-litigation stage. This is due to the fact that they are wholly reliant on the plaintiff's cooperation to begin investigating the merits of a potential claim prior to formal proceedings being issued.²⁵⁶ From what has been experienced by the MPS, it is clear that when litigation begins, the plaintiffs and

254 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018).

255 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018)

256 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018)

defendants are faced with delays and costs as there are few procedural mechanisms in place to avoid this.²⁵⁷

The MPS argues that because there is no requirement for advance notification of a claim for private practitioners like claims made against the state,²⁵⁸ the plaintiff is given an unfair advantage from the beginning.²⁵⁹ Being notified early about a looming case permits the parties to reserve experts from a limited pool timeously and further gives them the advantage of investigating the claim in a timeframe that is convenient for them.²⁶⁰ If notified early, a defendant will be able to understand the plaintiff's claim and they can decide whether to settle or defend the claim before formal action commences.²⁶¹ The lack of pre-litigation procedures that mandates the plaintiff and defendant to seek and provide information to each other about a looming case in an open and transparent way hurdles the desire by both parties to resolve the case efficiently without resorting to litigation.²⁶²

Once the claim gets to the litigation stage, the process also delays the results. Often, the particulars of claim do not contain enough information about the occurrence of events for an early assessment of the claim.²⁶³ Due to this, the defendant is compelled to pay the costs of an application to compel, which further results in a

257 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018).

258 Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 requires that, before legal proceedings for recovery of a debt be instituted against an organ of state, the creditor must give the organ of state in question notice in writing of his or her intention to institute the legal proceedings the notice must be served to the organ of state within six months from the date on which the debt became due. The notice must set out the facts giving rise to the debt and particulars of such debt as are within the knowledge of the creditor.

259 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018).

260 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018).

261 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018).

262 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018).

263 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018).

delay.²⁶⁴ The court rules do not necessitate the plaintiff to divulge the records in their possession at the time they serve the particulars of claim. The defendant must formally notify the plaintiff that such disclosure is necessary for them to plea. This adds further delays and costs.²⁶⁵

The absence of the requirement by the court rules for parties to exchange factual witness statements early in order to understand the factual basis of the claim and the defence thereof deprives the parties of an opportunity to limit issues and assess the accuracy of each other's case.

264 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018).

265 <http://www.medicalprotection.org/docs/default-source/pdfs/Booklet-PDFs/sa-booklets/challenging-the-cost-of-clinical-negligence---the-case-for-reform.pdf?sfvrsn=4> (Date of use: 1 June 2018).

Table 3: Examples of the length of medical negligence cases in court²⁶⁶

	Case citation	Cause of action	Date of incident	Final judgement	Duration of case
1.	<i>Lushaba v MEC for Health, Gauteng</i> (17077/2012) [2014] ZAGPJHC (16 October 2014)	Cerebral palsy	30 June 2000	23 June 2016	16 years
2.	<i>M v MEC for the Department of Health, Eastern Cape Province</i> (590/2008) [2014] ZAECBHC 15 (14 November 2014)	Combination of sepsis and dehydration that led to hypovolemic and septic shock and cardiorespiratory arrest	8 April 2007	14 November 2014	7 years 7 months
3.	<i>Molefe v MEC for Health, Gauteng</i> [2016] JOL 34014 (GP)	Cerebral palsy	22 April 2005	27 February 2015	9 years 9 months
4.	<i>Links v MEC for Health, Northern Cape</i> [2016] ZACC 10	Amputation of thumb and loss of use of left arm	5 July 2006	30 March 2016	9 years 8 months
5.	<i>Ntsele v MEC for Health, Gauteng</i> (2009/52394) [2012] ZAGPJHC 208	Breach of duty of care	7 September 1996	24 October 2012	16 years 1 month
6.	<i>Rens v MEC for Health, Northern Cape</i> (799/06) [2009] ZANCHC 10 (17 April 2009)	Amputation	February 1998	17 April 2009	11 years 2 months
7.	<i>Goliath v MEC for Health</i> [2015] JOL 32577 (SCA)	Gauze swab left behind in plaintiff's abdomen	April 2011	25 November 2014	3 years 7 months
8.	<i>H v Fetal Assessment Centre</i> [2014] ZACC 34	Wrongful life	2008	11 December 2014	6 years
9.	<i>Khoza v MEC for Health, Gauteng</i> 2012/20087 (February 2015)	Child born with hypoxic ischemic encephalopathy	26 May 2008	27 February 2015	9 years 9 months
10.	<i>Smith v MEC for Health, KwaZulu-Natal</i> (3826/12) [2016] ZAKZPHC 68 (2 August 2016)	Given a medicine cup of formalin to drink instead of water	5 May 2010	2 August 2016	6 years 3 months

The table does not represent an exhaustive list of medical negligence cases that has ended up in court. These cases have been sampled randomly to emphasise the point that the traditional method of dealing with medical negligence cases in court needs to be reviewed. As from the above table, the shortest period in which a case was finalised was 3 years and 7 months and the longest court process lasted 16 years.

266 SALRC "Medico-legal claims" 20.

3.6 Vicarious liability

The principle of vicarious liability makes an employer liable for the wrongs committed by his or her employee in the cause and scope of the employee's employment.²⁶⁷ The employer does not need to be personally at fault in any way for the wrong of the employee for blame to be transferred to him or her.²⁶⁸

Vicarious liability of an employer for the wrongful acts of an employee was recognised by implication as part of our law as early as 1845 in *Dreyer v Van Reenen* (1845) 3 Menz 375, and explicitly in 1874 in the important case of *Binda v Colonial Government* (1887) 5 SC 284.²⁶⁹

In many instances, the liability of public healthcare services is likely to be vicarious. In *Masuku v Mdlalose*,²⁷⁰ the Supreme Court of Appeal perceived that despite various nuances in expression, the common-law test of vicarious liability – whether the employee in question was acting in the course and scope of his employment or, put differently, whether he was engaged in the affairs or business of the employer – has been applied consistently since 1958 to the liability of the state for the wrongful acts of police officers. The court stated that a number of previous cases, on analysis, all confirm that, in order to establish the vicarious liability of the state, the plaintiff must prove that the person who did the wrong was an employee of the state acting in that capacity, and that he or she performed the wrongful act in the course or scope of his or her employment.

In *Gibbins v Williams, Muller, Wright and Mostert Inc*,²⁷¹ the court held that, in order to determine the applicability of vicarious liability, four *indicia* are emphasised:

- i) the employer's right to employ the employee,
- ii) the payment of wages,
- iii) the employer's right to control the method of work, and
- iv) the employer's right to dismiss the employee.

The burden of proof is on the victim to demonstrate the existence of an employer-employee relationship at the time the wrongful act was committed. As indicated

267 Burchell *Principles of delict* 215.

268 Burchell *Principles of delict* 215.

269 *Masuku v Mdlalose* 1998 (1) SA 1 (SCA) 13.

270 1998(1) SA 1 (SCA).

271 1987 (2) SA 82 (T).

earlier in medical negligence cases in which the state is the defendant, the MEC for Health of the specific province will be sued as the employer of all doctors and other medical staff working in provincial hospitals. Sometimes, the premier of a province may be added as a defendant as he or she is the head of the province.

3.7 Analysis of certain medical negligence cases

Three cases were selected for this section. The first case was chosen due to the number of years it took to get finalised. It started in the high court and ended at the constitutional court, it took 16 years to finalise. The second case was chosen because of its contribution to the development in the law of delict. Wrongful life claims were never allowed in South Africa, in this case the constitutional court opened up the possibility. The third case discussed is also a constitutional case and was chosen for its significance concerning the payment of proven damages. There are many other cases that could have been discussed but the chosen three cases highlights specific issues that could have been resolved through mediation.

3.7.1 Lushaba v MEC for Health, Gauteng (17077/2012) [2014] ZAGPJHC 407

(i) Brief background

The plaintiff is the mother of the child Menzi, born on 30 June 2000. Menzi was born with cerebral palsy due to *abruptio placentae*. At around 12:00 on 30 June 2000, the plaintiff went to the maternity obstetrics unit at the Charlotte Maxeke Johannesburg Academic Hospital. She was diagnosed with *abruptio placentae*, a condition that required urgent attention. The plaintiff was only attended to at 13:45. By that time it was too late for the foetus – the brain was already deprived of oxygen to such an extent that permanent damage had set in. The plaintiff claimed that the defendant was negligent in not providing her with adequate medical care upon her arrival.

(ii) Highlights of the case

The summons was issued on 21 April 2012. Notice of intention to defend was delivered on 31 May 2012. On the same day, the defendant delivered a notice in terms of rule 36(4), calling upon the plaintiff to make available medical reports, hospital records, X-ray photographs or other documentary information of a similar nature relevant to the assessment of damages or compensation in respect of bodily

injury alleged to have been suffered by the plaintiff. The plaintiff's attorneys responded by delivering what appeared to be the neonatal records on 18 June 2012. The plaintiff placed the defendant under bar by a notice delivered on 15 August 2012. The defendant delivered its plea on 22 August 2012. On 20 September 2012, the plaintiff delivered the rule 35(1) notice. This was responded to by a discovery affidavit delivered by the defendant on 20 February 2013. The plaintiff's rule 35(3) notice was delivered on 27 July 2013. On 1 August 2013, the summary of the opinion of Dr Van den Heever (the plaintiff's expert) was delivered to the offices of the State Attorney. The plaintiff delivered her "liability bundle", containing the medical records and the report from Dr Van den Heever, to the office of the State Attorney on 23 August 2013, and filed it at court on the same date.

Mr Matlou instructed Dr Mashamba, the defendant's expert witness, to provide an expert opinion on 4 September 2013, with the trial set for hearing on 13 September 2013. Mr Matlou and counsel consulted with Dr Mashamba on 11 September 2013. The trial was set for 13 September 2013. Dr Mashamba's report was not provided to the plaintiff. Because of the unavailability of the plaintiff's experts, the trial was postponed *sine die*. It was subsequently set for 7 October 2014. The defendant's expert report was provided to the plaintiff's attorneys on 3 October 2014. On 23 July 2014 (more than a year after the delivery of the request), the plaintiff delivered her rule 35(3) application to compel. The trial was set for hearing on 7 October 2014. On that day, the matter had to stand down as the joint minutes between the experts had not been prepared. The trial could only commence on 9 October 2014. The court gave judgement on 16 October 2014. On 2 December 2014, there was an application for leave to appeal. This was refused on 2 February 2015. The MEC then appealed to the Constitutional Court. This was granted and the judgement was delivered on 23 June 2016.

(iii) Final decision

On 16 October 2014, the High Court made an order, declaring the defendant in her personal capacity 100% liable for the plaintiff's damages. If the MEC felt that other people were responsible for the damages as well, he or she should indicate such people and they would then be jointly liable. The Constitutional Court overturned the

judgment and stated that the MEC cannot be a judge in her own right and therefore she in her capacity as MEC is liable for the damages.²⁷²

3.7.2 *H v Fetal Assessment Centre [2014] ZACC 34*

(i) Brief background

The applicant was a boy who was born with Down syndrome in 2008. His mother instituted a claim for damages on his behalf in the Western Cape Division of the High Court, against the respondent, the Fetal Assessment Centre (the centre). The claim was based on the alleged wrongful and negligent failure of the centre to warn the mother that there was a high risk of the child being born with Down syndrome. It was alleged that, had she been warned, she would have chosen to undergo an abortion. The child claimed special damages for past and future medical expenses and general damages for disability and loss of amenities of life.

(ii) Highlights of the case

The initial application was heard and dismissed by the Western Cape High Court.

The Western Cape High Court dismissed the application on the basis that the centre took exception to H's particulars of claim. The centre perceived the claim as being bad in law, in not disclosing a cause of action recognised by our law. H appealed to the Constitutional Court directly, because appealing to the Supreme Court of Appeal would have been futile due to the case of *Stewart v Botha*.²⁷³ The approach in *Stewart* was that recognising a child's claim would be to make a pronouncement on a question that "should not even be asked of the law". H, in his application to the Constitutional Court, sought to have common law developed to include cases of "wrongful life".

(iii) Final decision

In deciding on the matter, the Constitutional Court found that there are prospects of success for the claim and that the claim is of significant legal and constitutional importance. The court reiterated:

272 See Mnyongani and Slabbert 2018 *Obiter* 560-572.

273 [2009] 4 All SA 487 (SCA).

There may be cases where there is clearly no merit in the submission that the common law should be developed to provide relief to the plaintiff. In such circumstances absolution should be granted. *But where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial judge has to refuse absolution.* If this is done, the facts on which the decision must be made can be determined after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors.²⁷⁴

The court highlighted that our Constitution explicitly protects the interests of children, and each decision must take that into consideration. Furthermore, the court found that the common law must be developed in line with the normative considerations and underlying values of our Constitution. The court stated that it did not have sufficient evidence and information before it to make a determination on the matter, and it reverted the case back to the High Court to determine if the claim was properly reformulated in delict. They thus allowed the action for wrongful birth but it needed to be proved in the High Court.

3.7.3 *MEC, Health and Social Development, Gauteng v DZ [2017] ZACC 37*

(i) Brief background

In November 2009, the respondent (the mother of the child) gave natural birth at Baragwanath Hospital in Johannesburg. There were complications that led to the child being subsequently diagnosed with cerebral palsy.

(ii) Highlights of the case

Action was instituted in the High Court on behalf of the child for damages arising from negligence of the employees of the Baragwanath Hospital. The Gauteng MEC conceded negligence on the part of the hospital and thus accepted vicarious liability on the merits and later also conceded the quantum amounting to R23 272 303, of which R19 970 631 was awarded in respect of the minor child's future medical expenses. After conceding both the merits and quantum, the MEC filed an amended plea in terms of which it was alleged that the MEC was not required to pay for future medical expenses in a lump sum but could undertake to pay the R19 970 631 directly to the healthcare service providers within 30 days of the presentation of a written quotation. The MEC's amended plea was dismissed in the High Court and,

²⁷⁴ *H v Fetal Assessment Centre [2014] ZACC 34 par 11.*

similarly, in the Supreme Court of Appeal on the basis that the “once and for all” rule precludes payment of future medical expenses in instalments. The Gauteng MEC sought leave to appeal the decision in the Constitutional Court.

(iii) Final decision

The Constitutional Court dismissed the MEC’s appeal on the basis that no evidence was adduced by the MEC to justify the development of the deeply entrenched “once and for all” rule. Froneman J further held that the possibility for future development of the common law was not excluded. He stated that, in future, structured payments of medical expenses might be permitted, just as long as evidence is adduced to support the development of the common law. Jafta J in the minority judgement held that the “once and for all” rule in its current form does not prohibit periodic payments. He stated that the rule regulates judicial process and not execution of the payment of a judgment debt. Furthermore, all South African high courts have an inherent power to direct the payment of delictual damages to be paid in instalments, provided that the defendant has a good reason to select to pay the future medical expenses in instalments, and not by way of a lump sum payment.

3.8 If mediation was initiated from the beginning

The above cases demonstrate the complexities of medical negligent cases. In all three cases, the issues could not be resolved in the court *a quo*.

In the *Lushaba* case, the court case took 16 years before finalisation was reached. The child that was at the centre of the dispute was already a teenager by then. The mother had pay for everything the child needed for 16 years. She also had to endure the process emotionally for that period of time. This case is a classic example of how litigation removes the power of the victim. The plaintiff had no choice but to adhere to the formalities of court, as well as be dependent on the lawyers. Had this case been mediated, the mother would have had control over the progression of the case; it would have saved her time and resources because the issues would not have been confused by legal jargon.

In the *H* case, the case was reverted back to the high court after going through to the highest court of the land. The issue was not entirely resolved, because the focus

was no longer on the parties but on the development of the law. This case illustrates how the focus can be diluted by the legal process from the issues between the parties. If this case was mediated from the onset, time and the use of resources would have been saved immensely, as the focus would have been on the parties rather than a question of law.

Similarly in the *DZ* case, it is the view of this author that had the case been mediated it would have been faster and simpler to resolve, because the merits and the quantum were not in dispute. The MEC accepted liability and the case was only about the method of payment. This issue could have been negotiated between the parties instead of making it a legal question and wanting to develop the common law. The process of mediation would have identified the needs as opposed to rights and kept the balance of power between the parties.

3.9 Conclusion

Suing for medical negligence in the current dispensation is an immense task that requires time, human and financial resources. As demonstrated above, the current litigation system exhibits complexities that make arguments for its dislodgement necessary. It is imperative that an alternative procedure, such as ADR, is investigated for the purpose of medical negligence cases.

CHAPTER 4: MEDIATION – A PROCESS FOR RESOLVING DISPUTES

“The glory of justice and the majesty of law are created not just by the Constitution – nor by the courts – nor by the officers of the law – nor by the lawyers – but by the men and women who constitute our society – who are the protectors of the law as they are themselves protected by the law.”²⁷⁵

4.1 Introduction

The medical environment has great potential for conflict. This is because even the best trained physicians can commit errors that result in medical disabilities and even death.²⁷⁶ The conflicts that follow from these errors are mostly fuelled by emotions and they can become very expensive and time consuming to settle using the litigation process.²⁷⁷ There is a growing recognition that ADR systems in healthcare may alleviate some of the financial and psychological burdens on doctors and patients involved in medical negligence disputes.²⁷⁸

4.2 Alternative dispute resolution

4.2.1 An overview

ADR is the commonly recognised acronym for alternative dispute resolution.²⁷⁹ It refers to techniques used to resolve conflicts without going to court.²⁸⁰ An ADR mechanism provides an opportunity to resolve disputes and conflict through the utilisation of a process that can be moulded to suit a particular dispute or conflict.²⁸¹ ADR covers a broad range of mechanisms and routes that are designed to assist conflicting parties in resolving disputes creatively and effectively.²⁸² It is significant to note that as much as the mechanisms contained in ADR do not include the processes of formal litigation, these mechanisms and processes are not envisioned

275 Kenned https://www.brainyquote.com/authors/robert_kennedy (Date of use: 7 July 2018).

276 Szmania, Johnson and Mulligan 2008 *Conflict Resolution Quarterly* 71-96.

277 Szmania, Johnson and Mulligan 2008 *Conflict Resolution Quarterly* 71.

278 Szmania, Johnson and Mulligan 2008 *Conflict Resolution Quarterly* 71.

279 SALRC “Alternative dispute resolution” 13.

280 SALRC “Alternative dispute resolution” 13. The Court-Annexed Mediation Rules of the Magistrates’ Courts define alternative dispute resolution as a process in which an independent and impartial person assists parties to attempt to resolve the dispute between them, either before or after commencement of litigation.

281 SALRC “Alternative dispute resolution” 13.

282 SALRC “Alternative dispute resolution” 13.

to usurp the usage of court adjudication, but rather to supplement it.²⁸³ The most common types of ADR include negotiation, mediation and arbitration.

4.2.2 Negotiation

Granted that negotiation is perceived to be a specific method of ADR, the reality is that negotiation is a critical element that should be applied in all methods of ADR.²⁸⁴

Negotiation is the business method that is used more than any other to resolve disputes, and with good reason. It is most flexible, informal, party-directed, closest to the parties' own circumstances and control, and can be geared to each party's own concern. Parties choose location, timing, agenda, subject matter and participants. It need not be limited to the initial topic in dispute: either party can introduce other issues as trade-offs for an acceptable agreement.²⁸⁵

Negotiation is a problem-solving process in which parties attempt to reach a joint decision about issues in disagreement. This can be facilitated by an exchange of information, by exploring the nature and extent of their differences and how their divergent expectations can be met satisfactorily.²⁸⁶ The word "negotiate" has its origins in the Latin verb *negotiarī*, which means "to trade".²⁸⁷ A trade almost always requires that something be given in return for something. This means that when in a negotiating process, parties that have the intention to resolve their differences need to compromise to reach an understanding.²⁸⁸

If the negotiations are successful the parties can benefit in many ways in that an agreement can be reached quickly and inexpensively. There is certainty and finality in that the risks of uncertain outcomes have been avoided. The relationship between the parties, which litigation so frequently destroys, is maintained.²⁸⁹ The parties have control over the process without being locked into the rules of court and the law of evidence.²⁹⁰ With negotiation, the parties can control not only the outcome but the method used to resolve the dispute itself.²⁹¹

283 SALRC "Alternative dispute resolution" 13.

284 Marnewick *Litigation skills*.

285 Brand, Steadman and Todd *Commercial mediation* 15; Mackie *et al ADR practice guide* 11.

286 Chamisa *Alternative dispute resolution mechanisms*; Gulliver *Disputes and negotiations* 79-80.

287 Marnewick *Litigation skills*.

288 Marnewick *Litigation skills*.

289 Marnewick *Litigation skills*.

290 Marnewick *Litigation skills*.

291 Marnewick *Litigation skills*.

The limitations of using negotiation as an ADR are based on its voluntariness and the necessity for compromise. A party may not be keen to give up part of their claim or any right associated with the dispute, and thus not be as eager to start the process of negotiation. According to Boulle and Rycroft, for negotiation to work both parties must be prepared to engage with creative capacity.²⁹² In the context of medical negligence claims the victims might not be willing to compromise as they might feel that they have lost too much already.

4.2.3 Arbitration

Arbitration is also a mechanism used as an alternative to resolve disputes outside the court system. Arbitration involves the use of an impartial third party who reviews evidence, hears arguments, and then takes a decision based on the evidence before him or her.²⁹³ Arbitration can be either voluntary or compulsory. An arbitrator is chosen for arbitration for his knowledge and expertise in a certain field.²⁹⁴ Arbitration in South Africa is governed by the Arbitration Act 42 of 1965. An arbitration agreement is defined by the Act as a written agreement under which an existing dispute or a future dispute, specifically defined or described in the agreement, is referred to arbitration.²⁹⁵ Section 9 of the Act provides that unless the parties agree to the contrary, arbitration will be conducted by a single arbitrator.

The arbitrator's task is to provide an opportunity for the parties involved in the dispute to submit their case and, after following a process that is fair and transparent, make an award.²⁹⁶ The advantage of an arbitration award is that it can be made into an order of court.²⁹⁷

The disadvantage of arbitration is that in certain cases there may be additional costs payable in arbitration that are not applicable in court proceedings, for example, paying the arbitrator's fees, administrative fees and hiring a venue for the hearing.²⁹⁸ Furthermore, the arbitral award is generally final and binding, and not subject to appeal, which may serve as a disadvantage if an arbitrator has erred in his or her

292 Boulle and Kelly *Mediation principles*.

293 Ramsden and Ramsden *The law of arbitration* 6.

294 Ramsden and Ramsden *The law of arbitration* 6.

295 Ramsden and Ramsden *The law of arbitration* 6.

296 Ramsden and Ramsden *The law of arbitration* 6.

297 Ramsden and Ramsden *The law of arbitration* 6.

298 Ramsden and Ramsden *The law of arbitration* 6.

decision.²⁹⁹ It is the view of this author that arbitration may not be effective for medical negligence cases.

4.3 Mediation as an alternative dispute resolution process

4.3.1 Introduction

There is no arguing with the fact that the victims of medical negligence experience both physical and emotional pain stemming from the consequences of the medical practitioner's breach of the duty of care and/or failure to exercise reasonable care and skill in treating them.³⁰⁰ Medical negligence cases are extremely personal and emotional disputes, in that they frequently involve people who are dying or have been devastatingly injured.³⁰¹ The victims at times involve babies and children who are rendered disabled for life, which means that the families of these injured patients are inevitably drawn into the disputes as carers.³⁰² In other cases, patients lose their lives as a result of medical negligence and the patient's family members take legal action, claiming compensation as a result of the wrongful death of their family member.³⁰³ Most of the cases stemming from medical negligence are tragic in nature. Using civil litigation to resolve these tragic disputes is arguably anti-therapeutic for patients and their families.³⁰⁴ Civil litigation encourages parties to construct their narratives in a melodramatic way, with displays of expert witnesses that are required to attest on their behalf in order to prove the doctor's breach of duty and causation of the patient's injury.³⁰⁵

A typical medical negligence dispute is driven by intensely emotional factors on the part of injured patients. Victims are not merely seeking financial compensation, although the argument is not to say that financial compensation is not important, because it is.³⁰⁶ The fact remains that the victims' lives were affected, and money can make their lives easier to live – disability requires medical care that costs money and can also severely limit one's ability to work.³⁰⁷ The result of injury from

299 Ramsden and Ramsden *The law of arbitration* 6.

300 Bogdanoski 2009 *ADRJ* 77-87.

301 Bogdanoski 2009 *ADRJ* 77-87.

302 Bogdanoski 2009 *ADRJ* 77-87.

303 Bogdanoski 2009 *ADRJ* 77-87.

304 Bogdanoski 2009 *ADRJ* 77-87.

305 Bogdanoski 2009 *ADRJ* 77-87.

306 Bogdanoski 2009 *ADRJ* 77-87.

307 Bogdanoski 2009 *ADRJ* 77-87.

substandard care provided by doctors equate to an increase of costs in the form of hospital bills, loss of income, and other economic hardships.³⁰⁸ Victims of medical negligence need financial reparation to relieve them from a challenging existence in that period of their lives.³⁰⁹ The argument is that as much as the injury is quantified, money is not the focal motive for victims of medical negligence suing their doctors. What they actually want is to get clarity on what happened.³¹⁰

The effect of medical negligence on patients can be devastating, but medical practitioners are also affected emotionally by a dispute of medical negligence.³¹¹ The doctor's practice is as good as the patients' references. Therefore, medical negligence allegations have the potential to affect the doctor's reputations and future career prospects. Moreover, it is human nature to feel attacked when accused of doing less than what you should have done. When accused of medical negligence, doctors often construe these complaints as betrayals of trust.³¹² In many instances, defendant medical practitioners will strive to get a win in the courtroom so that their name is cleared of what they assume to be unjust allegations regarding their professional competence; some even go as far as refusing to settle the matter out of court because they believe that doing so implies guilt.³¹³

Regardless of any amount of money received by a plaintiff, he or she can never be placed in the position he or she was prior to their medical injury, nor will it bring back a loved one.³¹⁴ Due to this, it can be argued that medical negligence disputes resemble family disputes, which require more therapeutic and quasi-counselling approaches like mediation.³¹⁵ Hall explains that "[d]octor-patient relationships are characterized by levels of intimacy, dependency, and vulnerability that are matched or exceeded only by family relationships".³¹⁶

308 Todres 2006 *Connecticut Law Review* 667-737.

309 Todres 2006 *Connecticut Law Review* 667-737.

310 Bogdanoski 2009 *ADRJ* 77-87.

311 Bogdanoski 2009 *ADRJ* 77-87.

312 Bogdanoski 2009 *ADRJ* 77-87.

313 Bogdanoski 2009 *ADRJ* 77-87.

314 Bogdanoski 2009 *ADRJ* 81.

315 Bogdanoski 2009 *ADRJ* 81.

316 Hall 2005 *DePaul Law Review* 303.

Care and healing are the fundamental elements of any doctor-patient relationship.³¹⁷ Care is the guiding principle and healing is the objective for medical treatment.³¹⁸ It is thus submitted that these two elements must be centre stage in any system that seeks to remedy medical mistakes. When developing a mechanism to respond to medical negligence cases, it is vital that the core concepts, which form the foundation of the practice of medicine, guide the development.³¹⁹ In the current era, healthcare has been largely commercialised and commoditised – but this does not take away the fact that medicine will always be a moral enterprise in that it is dedicated to the wellbeing of the individuals it treats.³²⁰ The goal of medicine will always remain “helping those who cannot help themselves”.³²¹ The mentioned attributes of medicine make healthcare different from any other enterprise in the modern society, and make the relationship between a doctor and a patient a unique one.³²² Currently, civil litigation when it comes to medical negligence cases does not take into account the distinctive nature of medical negligence.

It is the position of this dissertation that mediation should be used as an alternative dispute resolution to civil litigation in medical negligence cases. The author is aware of the fact that mediation is not a one-size-fits-all model. Below is a discussion on how mediation can be developed and adapted to suite the current crisis in the medical world.

4.3.2 Overview of mediation

Mediation is a voluntary and confidential process. A neutral, uninvolved individual is elected by the parties to facilitate a settlement between them.³²³ Mediation is a method of ADR that is flexible and permits the parties to the dispute to have control over the resolution.³²⁴ It is centred on three core principles: party autonomy, informed decision-making and confidentiality.³²⁵

317 Bogdanoski 2009 *ADRJ* 81.

318 Bogdanoski 2009 *ADRJ* 81.

319 Todres 2006 *Connecticut Law Review* 667-737.

320 Todres 2006 *Connecticut Law Review* 667-737.

321 Todres 2006 *Connecticut Law Review* 667-737.

322 Todres 2006 *Connecticut Law Review* 667-737.

323 Todres 2006 *Connecticut Law Review* 667-737.

324 Todres 2006 *Connecticut Law Review* 667-737.

325 Todres 2006 *Connecticut Law Review* 667-737.

4.3.3 Characteristics of mediation

Mediation is usually a voluntary process.³²⁶ The parties are free to decide how the proceedings of mediation will commence and end.³²⁷ Mediation is flexible, and its informal nature makes it more desirable than litigation. The voluntariness of the mediation process affords the parties to a dispute a choice of retreating at any point if a resolution appears unlikely because the parties are at a deadlock.³²⁸ As the parties are in control of the process, they choose a mediator, decide on the length of time to mediate the issues and they decide the issues to be mediated.³²⁹

Mediation is centrally based on confidentiality. The process itself is confidential; meaning what is discussed between the parties, remains private and confidential.³³⁰ The mediator cannot pass information discussed in the process without express permission from the parties.³³¹ This characteristic of mediation is very important, as healthcare is a sensitive area for many people. The promise of confidentiality gives parties permission to be blunt and straightforward with the mediator and with each other.³³² They do this without the anxiety that whatever is being disclosed may be used against them at a trial.³³³

Parties to a mediation process do not give up any rights to resort to litigation if the mediation does not produce the desired outcome.³³⁴ Any information disclosed in mediation cannot be used as evidence in any legal proceedings.³³⁵ The mediator is not a judge, advisor or representative; he or she does not express his or her views on the merits or make suggestions.³³⁶ He or she is facilitating the process only. The

326 Sometimes mediation may be compelled: by a contract clause, by a court order or civil procedure. Legislation, e.g. the Labour Relations Act 66 of 1995, requires most employment disputes to be referred to mediation before adjudication or industrial action. The National Land Transport Transition Act 22 of 2000 regulations makes provision for disputes to be resolved through negotiation and mediation.

327 Brand *et al Commercial mediation* 24.

328 <https://corporate.findlaw.com/litigation-disputes/mediation-an-effective-process-to-resolve-complex-commercial.html> (Date of use: 7 September 2018).

329 <https://corporate.findlaw.com/litigation-disputes/mediation-an-effective-process-to-resolve-complex-commercial.html> (Date of use: 7 September 2018).

330 Roberts *Mediation in family disputes* 95.

331 Brand, Steadman and Todd *Commercial mediation* 25.

332 <https://corporate.findlaw.com/litigation-disputes/mediation-an-effective-process-to-resolve-complex-commercial.html> (Date of use: 7 September 2018).

333 De Jong 2010 *TSAR* 515-531; <https://corporate.findlaw.com/litigation-disputes/mediation-an-effective-process-to-resolve-complex-commercial.html> (Date of use: 7 September 2018).

334 Brand, Steadman and Todd *Commercial mediation* 25

335 Brand, Steadman and Todd *Commercial mediation* 25

336 Brand, Steadman and Todd *Commercial mediation* 25.

mediator uses expertise to assist the parties to explore their issues and the options available to them.³³⁷ The mediator also manages the process by deciding whether to work with the parties together in joint sessions or have private side sessions.³³⁸ The parties themselves determine the content of the mediation as well as the outcomes of the process.

In *MB v NB*, the High Court recognised the benefits of mediation when it held as follows:

Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in the country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.³³⁹

The process of mediation enables the parties to speak freely while expressing their emotions as well. It provides a platform similar to a court but without the loss of control over the outcome.³⁴⁰ The process provides the parties with the certainty that if a settlement is reached there will be a final outcome to the dispute.³⁴¹ Mediation can be cost-effective if initiated from the beginning rather than during the litigation process.³⁴² Medical negligence cases being litigated may take years to finalise, as illustrated by the table in chapter 3. This extends the physical and emotional suffering experienced by the victims because the claim remains unresolved, which prevents them from attaining closure. Mediation has the benefit of speed with which disputes can be settled as the parties have control of how quickly they want the process to begin.³⁴³ An inherent characteristic of mediation is that it addresses the root causes of the dispute as well as hidden emotions and it allows the parties to explore creative ways of addressing their interests and needs.³⁴⁴

337 Brand, Steadman and Todd *Commercial mediation* 26.

338 Brand, Steadman and Todd *Commercial mediation* 26.

339 *MB v NB* 2010 (3) SA 220 (GSJ) par 50.

340 Brand, Steadman and Todd *Commercial mediation* 27.

341 Brand, Steadman and Todd *Commercial mediation* 27.

342 Brand, Steadman and Todd *Commercial mediation* 28.

343 Brand, Steadman and Todd *Commercial mediation* 28.

344 Brand, Steadman and Todd *Commercial mediation* 29.

One of the biggest benefits of using mediation in resolving medical negligence cases is the preservation of relationships.³⁴⁵ The process includes the possibility of bridging mistrust or poor communication and it moves the dispute focus away from rights, winners and losers.³⁴⁶ Increasing evidence suggests that the injured party wants to be heard and be given an opportunity to express his or her apprehensions towards what occurred and receive an apology from the doctor.³⁴⁷ Mediation also provides an opportunity for doctors to explain why something was done the way it was.³⁴⁸

Kellett argues that:

Patients pursue malpractice claims out of anger. They often have strong 'get-even, or revenge' motives. This anger, and desire for compensation for physical *and* emotional 'hurts', propels patients to an attorney's office ... Patients do not necessarily 'want to sue for money'. What they really want is a chance to be alone in the room with the defendant doctor for about fifteen minutes.³⁴⁹

4.3.4 *The decision to mediate*

The decision to mediate is not easy. It requires a shift in thinking on the part of the parties and their representatives so that they can work towards a mutually acceptable outcome rather than a win-lose situation.³⁵⁰ Mediation in a medical negligence context ought to be looked at as an opportunity to reach solutions to problems that in other contexts usually can be solved with cash.³⁵¹ For mediation to be effective there is a considerable amount of planning and preparation that needs to be done.³⁵² The timing of commencement of mediation is critical for it to be

345 Pope and Waldman 2007 *Ohio State Journal on Dispute Resolution* 143; Chamisa *Alternative dispute resolution mechanisms* 57.

346 Pope and Waldman 2007 *Ohio State Journal on Dispute Resolution* 143; Brand, Steadman and Todd *Commercial mediation* 29; Chamisa *Alternative dispute resolution mechanisms* 57.

347 Pope and Waldman 2007 *Ohio State Journal on Dispute Resolution* 143.

348 Pope and Waldman 2007 *Ohio State Journal on Dispute Resolution* 143.

349 Kellett 1987 *Mo J Dispute Resolution* 111.

350 Brand, Steadman and Todd *Commercial mediation* 49.

351 Warshauer M "mediation of a medical negligence case from the plaintiff's perspective"<https://wmlawgroup.com/wp-content/uploads/2014/05/24.MediationMedNegl Case.pdf> (Date of use: 7 August 2018).

352 Brand, Steadman and Todd *Commercial mediation* 49.

effective.³⁵³ If mediation is going to take place, it should be as early as possible, taking into consideration the merits of each case.³⁵⁴

Cases seem to resolve more consistently if mediation occurs very early. Unlike many defendants, most medical malpractice defendants are experts who can understand the risks and the theories. They may very likely have access to almost all the facts long before the plaintiff's discovery seeks them.

Further claimants' negative feelings towards health care providers will harden over time. Physicians' 'denial matrices' also seem to harden more as time passes. What was a great tragedy for which a defendant feels sorry eventually becomes a past matter that the defendant does not wish to remember or to accept blame in. Settlement works best when both parties are still able to communicate and listen.³⁵⁵

Looking at the benefits of mediation, it is tempting to suggest that every medical negligence case should be mediated at the earliest possible stage. However, that would be just too simplistic, because every dispute is unique. The dispute might be like another but the circumstances surrounding the dispute do not evolve in a uniform way. The decision to mediate should be treated as a matter of fundamental strategic and tactical importance in the dispute resolution process.³⁵⁶

Whether or not mediation is suitable depends on what you are seeking to achieve through the process. There will be disputes in the medical negligence context that parties might view as inappropriate for mediation.³⁵⁷ Mediation can be suitable for disputes between parties that want to preserve their relationship, multiple-party disputes, multi-jurisdictional disputes or disputes where there are significant collateral issues.³⁵⁸ The following list, identified by Acland,³⁵⁹ suggests circumstances that might favour mediation:

- where preserving the relationship is a priority;
- where parties do not want to lose control of the process and outcome;

353 Most dispute that end up in mediation in medical negligence cases usually commence with litigation which than means that it has already incurred all the costs and disadvantages of litigation.

354 Warshauer <https://w-mlawgroup.com/wp-content/uploads/2014/05/24.MediationMedNeglCase.pdf> (Date of use: 7 August 2018).

355 Warshauer <https://w-mlawgroup.com/wp-content/uploads/2014/05/24.MediationMedNeglCase.pdf> (Date of use: 7 August 2018).

356 Brand, Steadman and Todd *Commercial mediation* 50.

357 It is the argument of this author that very few disputes are incapable of being resolved through negotiation and mediation.

358 Brand, Steadman and Todd *Commercial mediation* 50.

359 Acland *Sudden outbreak of common sense* 24; Brand, Steadman and Todd *Commercial mediation* 50; Boule and Kelly *Mediation principles* 92-97.

- where both sides believe that they have a good case;
- where there is no great disparity in power;
- where speed is important;
- where bad communication and resultant misunderstandings are largely to blame for the dispute;
- where highly complex technical issues are involved;
- where an adverse precedent will be a nuisance for both sides;
- where confidentiality is important;
- where the case will probably settle out of court anyway;
- where both parties do not want to litigate; and
- where parties want an opportunity to confront each other.

There are disputes that might not be appropriate for mediation, not because they cannot be resolved through mediation, but because the parties are not focused on solving the dispute. The parties might be interested in setting a precedent or one party might feel that the other does not have a *bona fide* claim and it will be a waste of time to interact. Parties may also rather resort to litigation if there is a specific remedy that parties are looking for, for example, an interdict.³⁶⁰

The stage of the dispute is essential to the decision to mediate.³⁶¹ Mediation can commence at any time, regardless of whether formal proceedings have been initiated or not.³⁶² The disadvantage of starting the mediation process too early is that the other party might perceive it as a sign of weakness and thus have unrealistic expectations when it comes to negotiation.³⁶³ To start the mediation process too late might prolong the cost of the dispute. Parties may have already spent money on litigation and then still have to pay money for mediation.³⁶⁴ Once the decision has been made to mediate a dispute, it is important to select the proper mediator. The parties are the front-runners of the process and they must decide what kind of mediator they prefer, for example, an expert in the subject matter of the dispute, an expert in the mediation process or someone with both subject-matter knowledge

360 Brand, Steadman and Todd *Commercial mediation* 54.

361 Radford 2000 *Real Prop Prob & Tr J* 601.

362 Radford 2000 *Real Prop Prob & Tr J* 601.

363 Radford 2000 *Real Prop Prob & Tr J* 601.

364 Radford 2000 *Real Prop Prob & Tr J* 601.

and mediation experience and expertise. Another consideration is the style of the mediator.³⁶⁵

There are three common types of styles used in mediation. These are transformative, facilitative and evaluative.³⁶⁶ In practice, these styles are not mutually exclusive; they can be used interchangeably.³⁶⁷ *Transformative mediation* is more focused on assisting the relationship between parties rather than focusing on the dispute. The mediator fosters an environment where parties can talk directly to one another.³⁶⁸ *Facilitative mediation* is focused on providing an environment that will enable the parties to negotiate and agree on an outcome.³⁶⁹ In this style, the mediator will not impose his or her opinion on the content or merits of the issues, but will focus on how to best arrive at the negotiated outcome. *Evaluative mediation* is where the mediator focusses on the issues at hand and is an expert in the subject matter.³⁷⁰ The mediator may give advice and recommendations to the parties on the outcome.³⁷¹ He or she may further evaluate the strengths and weakness of each party's arguments and may attempt to persuade the parties to accept a specific outcome.³⁷²

Facilitative styles of mediation are preferable when dealing with medical negligence cases because of their aptitude to address the complex emotional needs and interests of the injured patient and his or her family. As mentioned above, medical negligence disputes are hardly about money but more human disputes, in which the issue of money is only a part of the problem.³⁷³ Meschievitz³⁷⁴ argues that the facilitative mediation style "attempts to remove the parties' adversarial posturing and replaces it with a harmonious relationship". Facilitative mediation provides a platform where victims can "actually talk to their doctors"³⁷⁵ and receive explanations on the decisions made by the doctor. The environment created by this is one that

365 <https://corporate.findlaw.com/litigation-disputes/mediation-an-effective-process-to-resolve-complex-commercial.html> (Date of use: 7 September 2018).

366 Brand, Steadman and Todd *Commercial mediation* 21.

367 Brand, Steadman and Todd *Commercial mediation* 21.

368 Brand, Steadman and Todd *Commercial mediation* 21.

369 Brand, Steadman and Todd *Commercial mediation* 22.

370 Brand, Steadman and Todd *Commercial mediation* 22.

371 Brand, Steadman and Todd *Commercial mediation* 22.

372 Brand, Steadman and Todd *Commercial mediation* 22.

373 Bogdanoski 2009 *ADRJ* 77-87.

374 Meschievitz 1991 54(2) *Law and Contemporary Problems* 195 at 198-199.

375 <https://www.mediate.com/articles/ansmedic.cfm> (Date of use: 12 September 2018).

requires the parties to actively listen to each other's stories and openly address and acknowledge each other's expressed and unexpressed desires and feelings.³⁷⁶

4.3.5 *Mediation with restorative justice principles*

Todres³⁷⁷ suggested that a facilitative mediation model that incorporates restorative justice principles, as is often applied in the criminal law and juvenile justice area, can be usefully applied to the resolution of medical negligence disputes. Restorative justice is a criminal mechanism that focuses on repairing the harm caused by offenders through reconciliation with victims and the community.³⁷⁸ The focus of this system is to unite the people who have been affected by a crime, with the purpose of allowing them to agree on how best to address the harm done by the criminal.³⁷⁹ It is defined as "a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future".³⁸⁰

Restorative justice views criminal activities as a "violation of people and of interpersonal relationships".³⁸¹ It includes a variety of practices and procedures that are designed to empower victims, offenders and communities to "redress the material, psychological and relational harms generated by crimes".³⁸² Therefore, restorative justice is "less about punishing people and more about achieving a presumed relational equilibrium".³⁸³

According to Strang and Lawrence, there are five elements that victims of crimes desire the criminal justice system to deliver: information; an opportunity to participate; emotional restoration and apology; material reparation; and fairness and respect.³⁸⁴ One of the frustrations experienced by victims of crime is the lack of information received about the progress of their case.³⁸⁵ The restorative justice model gives them an opportunity for discussion, which enables the victim to have

376 Bogdanoski 2009 *ADRJ* 77-87.

377 Todres 2006 *Connecticut Law Review* 667-737.

378 Todres 2006 *Connecticut Law Review* 667-737.

379 Todres 2006 *Connecticut Law Review* 667-737.

380 Todres 2006 *Connecticut Law Review* 667-737.

381 Todres 2006 *Connecticut Law Review* 667-737.

382 Todres 2006 *Connecticut Law Review* 667-737.

383 Todres 2006 *Connecticut Law Review* 667-737.

384 Strang and Lawrence 2003 *Utah L Rev* 20-25.

385 Todres 2006 *Connecticut Law Review* 667-737.

access to information.³⁸⁶ In the medical negligence setting, access to information is one of the main sources of frustration for patients, which leads to patients instigating legal action for the purpose of gaining information.³⁸⁷

The lack of participation when it comes to criminal law proceedings serves as a frustration for many victims.³⁸⁸ They feel left out and powerless regarding their own case.³⁸⁹ Restorative justice provides a forum where victims of crime can have meaningful participation.³⁹⁰ In the medical negligence environment, similar concerns exist for injured patients. “Frequently, in the context of modern medical facilities, the patient’s voice is muted, if not lost, and the patient’s ability to vindicate his or her interests is overpowered.”³⁹¹

The criminal justice system has never considered the emotional and psychological damage caused by the crime to the victims;³⁹² therefore, an apology has never been a key factor. The restorative justice model understands that an apology is a key component of the victim-offender dialogue.³⁹³ Wagatsuma and Rosett identify that the purpose of an apology can be to confirm that the offender is remorseful; portray the intention of the offender to compensate the victim; and acknowledge that should the apology be accepted, the harmony between victim and offender will be restored.³⁹⁴ In a medical scenario, without an apology the injured patient will not get full closure. When a doctor fails to apologise, patients feel that the doctor never cared from the start and that the doctor is unable to empathise with their loss.³⁹⁵

The suffering experienced by victims of crime can manifest as both bodily injuries and economic loss. For victims to be fully healed, compensation plays a vital role. The two central approaches in restorative justice are compensation and restitution.³⁹⁶ The victim’s compensation funds are usually established by government for payment of medical expenses for injuries suffered by victims. It also

386 Todres 2006 *Connecticut Law Review* 667-737.

387 Todres 2006 *Connecticut Law Review* 667-737.

388 Todres 2006 *Connecticut Law Review* 667-737.

389 Todres 2006 *Connecticut Law Review* 667-737.

390 Todres 2006 *Connecticut Law Review* 667-737.

391 Todres 2006 *Connecticut Law Review* 667-737.

392 Strang and Lawrence 2003 *Utah L Rev* 20-25.

393 Latif 2001 *BUL Rev* 289, 291.

394 Wagatsuma and Rosett 1986 *Law & Soc’y Rev* 461-515.

395 Todres 2006 *Connecticut Law Review* 667-737.

396 Todres 2006 *Connecticut Law Review* 667-737.

compensates loss in earnings for missed work while recuperating.³⁹⁷ Restitution entails the payment of money by the offender to victims in order to attempt to reimburse the victims for the losses suffered because of the crime.³⁹⁸ In the medical negligence setting, the suffering encountered by patients is a result of substandard care from the medical practitioner. As mentioned above, loss of earnings and medical bills can be very detrimental to one's livelihood, especially if the injury is substantial. Therefore, compensation for the loss and injury suffered is, and must continue to be, an essential part of any resolution of medical negligence disputes.³⁹⁹

An inquiry into the primary factors influencing victims' satisfaction with the justice system has revealed that it is the sense of fairness of the process, rather than the specific outcomes of the case, that satisfies the victims.⁴⁰⁰ Most victims only want a voice in the process and an opportunity to be heard – they never expect to have control over the outcome.⁴⁰¹ In a medical negligence situation, victims of negligence usually will not sue their doctor if they are under the impression that the doctors have been truthful, have treated them with respect, and have done their best to achieve the best possible result for them.⁴⁰² However, if patients feel they have been wronged, this can lead to them suing the doctor in the hope of achieving some sense of fairness.⁴⁰³

The principles of restorative justice as set out above can apply to how medical negligence cases are mediated. As illustrated, the goal of restorative justice is to offer healing to the offender, the community and the victim. The emphasis of restorative justice is on “re-establishing the integrated community, rather than exacting retribution for crimes”⁴⁰⁴ and it looks at promoting reconciliation and peace between and among the affected parties. In a healthcare context, it is imperative that whatever process is identified to deal with medical negligence cases will be a process that promotes peace and reconciliation and will not be driven by

397 Todres 2006 *Connecticut Law Review* 667-737.

398 Todres 2006 *Connecticut Law Review* 667-737

399 Todres 2006 *Connecticut Law Review* 667-737.

400 Strang and Lawrence 2003 *Utah L Rev* 20-25.

401 Strang and Lawrence 2003 *Utah L Rev* 20-25.

402 Todres 2006 *Connecticut Law Review* 667-737.

403 Todres 2006 *Connecticut Law Review* 667-737.

404 Todres 2006 *Connecticut Law Review* 667-737.

vengeance.⁴⁰⁵ Civil litigation focuses more on having a winner or a loser – without restoring hope and relationships.

A restorative model in medical negligence cases has certain benefits. Physicians may accept responsibility at the outset for their actions and their focus will shift from declaring their innocent to enabling reconciliation between themselves, the patient and the community. This will start a trend of doctors being open about the choices they made, and the injured party might understand the events that took place. Medical professionals will be able to review and determine the impact of the injury and provide mechanisms to avoid the same injuries happening in future. This model will provide opportunities for doctors' restoration, which the current medical negligence litigation system does not provide for.

4.3.6 Limitations of mediation

Mediation, like any other man-made creation, has its drawbacks. It is not a magical band-aid to solve every medical negligence dispute. One of the major limitations of mediation is that it is non-binding.⁴⁰⁶

As mentioned above, mediation is a confidential process that cannot be used to produce precedents as is the case with civil litigation. The impact of this is that the creation and maintenance of civic values and norms that are essential for legal certainty, on which both social justice and economic prosperity are dependent, are not sustained.⁴⁰⁷ A civil judgement is available to the public and must be justifiable and contain justifiable reasons for the outcome, the outcome of mediation cannot be made public, and no reasons need to be put forward to justify it. It is simply a settlement agreement that remains between the parties. It is a "private interest" that remains confidential. Consequently, it cannot have a part to play in serving the public as a "public good" in a state where the rule of law is applied.⁴⁰⁸ For example, if the dispute concerned was about gross negligence in a public hospital, and the parties settled the matter, the settlement does not create a precedent for the community on how to deal with similar cases. Another individual that might

405 Todres 2006 *Connecticut Law Review* 667-737.

406 <http://www.wipo.int/amc/en/mediation/guide/> (Date of use: 8 August 2018).

407 Vettori 2015 *African Human Rights Law Journal* 360.

408 Vettori 2015 *African Human Rights Law Journal* 360.

experience a gross negligence case in the future cannot benefit from the mediated settlement.

Another drawback of mediation is that the parties may fail to reach an agreement due to the fact that they are both fixed in contrasting viewpoints and their suggested outcomes are very far apart.⁴⁰⁹ The fact that mediation occurs in the shadow of the law does not encourage disputants to push to reach an agreement.⁴¹⁰ The knowledge that parties could resort to litigation could give each party an endowment of sorts if an agreement is not reached.⁴¹¹ The implication of this is that the costs and time spent on the mediation process would have been wasted and the parties would still have to embark on civil litigation.

A power imbalance may also be present between parties; for example, a more powerful party may walk over a weaker party.⁴¹² This power imbalance may manifest itself in a variety of ways, like when one of the disputants drags its feet in attempting to resolve the dispute because it has knowledge that the other party will probably not be able to sustain protracted litigation.⁴¹³ In such a situation, the party in whose favour the balance of power lies can take advantage of the mediation process to manipulate and pressurise the other side to enter into an agreement that is obviously unfair. Waldman⁴¹⁴ argues that negotiation is shaped by power. “In the give-and-take of negotiation, the more power people have, the less they must give. Conversely, the less power people have, the more they must give.”

Mediators, in their capacity as mediators, are not officers of the court; thus they do not have the same powers as attorneys, which, in turn means that they cannot compel discovery and get to the truth of matters in the way that an attorney can in court.⁴¹⁵ In court, witnesses can be compelled to testify and to expose evidence they might prefer to keep quiet.⁴¹⁶

409 Vettori 2015 *African Human Rights Law Journal* 360.

410 Pope and Waldman 2007 *Ohio State Journal on Dispute Resolution* 143.

411 Pope and Waldman 2007 *Ohio State Journal on Dispute Resolution* 143.

412 Radford 2000 *Real Prop Prob & Tr J* 601; Vettori 2015 *African Human Rights Law Journal* 336.

413 Radford 2000 *Real Prop Prob & Tr J* 601; Vettori 2015 *African Human Rights Law Journal* 336.

414 Pope and Waldman 2007 *Ohio State Journal on Dispute Resolution* 171.

415 Vettori 2015 *African Human Rights Law Journal* 364.

416 Vettori 2015 *African Human Rights Law Journal* 364.

According to Forehand,⁴¹⁷ lawyers have many misconceptions about the effectiveness of mediation. Some of the common misconceptions are that

- (1) patients are not compensated as generously in mediation as they are in litigation,
- (2) patients will be intimidated into prematurely settling meritorious claims during mediation, and
- (3) mediation simply prolongs the dispute process by delaying the real resolution process – litigation.

The question of whether mediation is tailored enough for healthcare disputes is quite contentious, taking into account the complex and technical nature of healthcare disputes, looming power imbalances and financial risks.⁴¹⁸ Even though the mediation process has its limitations, it offers a much more desirable and creative alternative to addressing and lessening the challenges faced by medical practitioners and patients in healthcare disputes.⁴¹⁹ In contrast to litigation, parties in mediation can agree to appoint medical legal experts to conduct the mediation and guide them.⁴²⁰ Having experts as mediators is advantageous for both parties because less time is spent on the technical aspects of medical disputes.⁴²¹ The mediation process is arguably more tailored than litigation if set up and administered correctly.⁴²²

4.4 Framework for dispute resolution by mediation in South Africa

4.4.1 Background

Mediation is not yet the accepted or preferred way of resolving medical negligence cases. It is, however, worthwhile to look at other legal sources that do implement mediation as the way to resolve disputes.

417 Forehand 1999 *Ohio State Journal on Dispute Resolution* 907.

418 Barnard L “Mediation and arbitration in medical health care disputes” <https://adriaansattorneys.com/2017/09/28/mediation-and-arbitration-in-medical-health-care-disputes/> (Date of use: 10 September 2018).

419 <https://adriaansattorneys.com/2017/09/28/mediation-and-arbitration-in-medical-health-care-disputes/> (Date of use: 10 September 2018).

420 <https://adriaansattorneys.com/2017/09/28/mediation-and-arbitration-in-medical-health-care-disputes/> (Date of use: 10 September 2018).

421 <https://adriaansattorneys.com/2017/09/28/mediation-and-arbitration-in-medical-health-care-disputes/> (Date of use: 10 September 2018).

422 <https://adriaansattorneys.com/2017/09/28/mediation-and-arbitration-in-medical-health-care-disputes/> (Date of use: 10 September 2018).

4.4.2 *Mediation in the magistrates' court*

Mediation is typically viewed as a technique for resolving disputes headed for or already embroiled in litigation. Mediation is not generally a central part of any court system, even if it stands in close relationship to it. Due to the overflow of cases in magistrates' courts, the legislature has considered ways that can reduce cases that go to trial. On 1 December 2014, the Magistrates' Courts Rules came into to operation.⁴²³ These rules provide an alternative to formal litigation in the form of voluntary mediation. The rationale behind the rules was to preserve relationships as well as "facilitate an expeditious and cost-effective resolution of a dispute between litigants or potential litigants ..."⁴²⁴

4.4.3 *Court-annexed mediation*

In 2011, there was an access to justice conference held in July. The conference was held for the purpose of achieving the delivery of accessible and quality justice for all. The resolution taken was that an alternative dispute resolution to the court system must be introduced.⁴²⁵ Consequently to this, the Rules Board drafted and introduced rules to regulate the procedure for voluntary referral to court-annexed mediation of civil disputes to be implemented on a pilot basis.⁴²⁶

The Court-Annexed Mediation Rules provide in rule 3(1) that a dispute can be referred to mediation by any party prior to the commencement of potential litigation or after commencement of litigation but prior to judgment if they have obtained authorisation by the court. A judicial officer also has the discretion to refer the dispute to mediation at any time after the commencement of litigation if he/she believes that there is good reason for doing so. Rule 6(1) provides discretion to any party to the dispute to request the dispute resolution officer, in writing, to refer the dispute to mediation at any stage prior to trial.

Rule 8(1)(c) provides that the role of the mediators is a facilitative one, meaning they cannot make any decisions of a fact or law and they cannot determine the credibility of any person participating in the mediation. Rule 8(1)(e) provides that all

423 Askew 2016 *De Rebus* 17.

424 Rules Board for Courts of Law Act 107 of 1985.

425 Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa.

426 Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa.

discussions and disclosures made during mediation are confidential and inadmissible as evidence in any court. Rule 10 allows for parties to draft a settlement agreement once an agreement has been reached. This agreement must be transmitted by the mediator to the clerk and placed before the magistrate for noting that the dispute has been resolved or to make the agreement an order of court. In terms of rule 13(1), the parties to mediation may be represented by legal representatives.

4.4.4 Labour Relations Act 66 of 1995

The Labour Relations Act (LRA) provides that all legal disputes under the LRA must be referred to conciliation first before any arbitration or court adjudication takes place.⁴²⁷ In terms of the Act, the following unfair dismissals must be referred to mediation or conciliation before they can be arbitrated or adjudicated: dismissal as a result of failure by an employer to renew a fixed-term contract of employment on the same or similar terms, where the employer offered to renew it on less favourable terms, or did not renew it, or the failure by an employer to retain the employee in employment on an indefinite basis, but otherwise on the same or similar terms as the fixed-term contract, in circumstances where the employee had a reasonable expectation of such indefinite renewal;⁴²⁸ refusal by the employer to reinstate an employee after maternity leave;⁴²⁹ constructive dismissal;⁴³⁰ selective non-re-employment;⁴³¹ dismissal for misconduct or incapacity;⁴³² where the reason for dismissal is not known;⁴³³ dismissal based on operational requirements;⁴³⁴ dismissal for participating in an unprotected strike;⁴³⁵ automatically unfair dismissals;⁴³⁶ dismissal in the context of closed shop;⁴³⁷ dismissal in the context of transfer of employment contracts;⁴³⁸ dismissal because the employee made a protected disclosure in terms of the Protected Disclosures Act 26 of 2000;⁴³⁹ and

427 Vettori 2015 *African Human Rights Law Journal* 364-365.

428 LRA s 186(1)(b); Vettori 2015 *African Human Rights Law Journal* 365.

429 S 186(1)(C) & 187(1)(e); Vettori 2015 *African Human Rights Law Journal* 365.

430 S 186(1)(e); Vettori 2015 *African Human Rights Law Journal* 365.

431 S 186(d); Vettori 2015 *African Human Rights Law Journal* 365.

432 S 191(4) & (5); Vettori 2015 *African Human Rights Law Journal* 365.

433 S 191(5)(a)(iii); Vettori 2015 *African Human Rights Law Journal* 365.

434 S 192(5)(b)(ii) & 191(12); Vettori 2015 *African Human Rights Law Journal* 365.

435 S 192(5)(b)(ii); Vettori 2015 *African Human Rights Law Journal* 365.

436 S 195(5)(b)(i); Vettori 2015 *African Human Rights Law Journal* 365.

437 S 192(5)(b)(iv); Vettori 2015 *African Human Rights Law Journal* 365.

438 S 191(5)(b)(l); Vettori 2015 *African Human Rights Law Journal* 365.

439 S 191(5)(b)(l); Vettori 2015 *African Human Rights Law Journal* 365.

dismissal relating to probation.⁴⁴⁰ Other unfair dismissals must also first be referred to conciliation or mediation.⁴⁴¹

In terms of the LRA, all unfair labour practices must also be referred to conciliation or mediation before any forum can have jurisdiction to either arbitrate or adjudicate the dispute.⁴⁴² Case law suggests that labour disputes under the LRA must be referred to mediation and conciliation as a first step in resolving the dispute. In *National Union of South Africa v Driveline Technologies (Pty) Ltd*,⁴⁴³ Zondo AJP (as he then was) stated that “the wording of section 19(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or be referred to the Labour Court for adjudication”. In *Intervale (Pty) Ltd v NUMSA*⁴⁴⁴ Waglay JP held that:

[O]n the issue of [a] constitutional right to have a day in court; this right is not to be exercised at a litigant’s pleasure. The Act is clear. It makes provisions which must be complied with. There is nothing unconstitutional about that. One cannot fail to comply with the steps that are required to be followed to enforce a right and then complain that these steps which you have failed to follow now impinges your constitutional right, particularly when there is a right to purge that failure and no steps are taken or properly taken to purge the failure. When NUMSA failed to refer the dispute to conciliation timeously, it applied for condonation for its late referral which was not granted but NUMSA did not challenge this refusal. In these circumstances, it cannot be said they are being denied their day in court.

... In the absence of conciliation, it is not entitled to refer its dispute for adjudication to the Labour Court as provided in S191 (5). The Labour Court does not have jurisdiction to entertain the dispute, and as such it serves no purpose to consider whether the application for joinder has merit.⁴⁴⁵

In terms of section 191(5), if a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the commission received the referral, and the dispute remains unresolved, the council or the commission must arbitrate the dispute at the request of the employee. In terms of this section, the precondition before the dispute can either be arbitrated or adjudicated, is referral.⁴⁴⁶ This means that even if mediation was not embarked on to solve the issue, or if it was referred to mediation and 30 days have lapsed since

440 S 191(5A); Vettori 2015 *African Human Rights Law Journal* 365.

441 S 191(5)(a)(iv); Vettori 2015 *African Human Rights Law Journal* 365.

442 Vettori 2015 *African Human Rights Law Journal* 365.

443 2000 (4) SA 645 (LAC).

444 [2014] ZALAC 10.

445 *Intervale (Pty) Ltd BHR Piping Systems (Pty), v NUMSA* [2014] ZALAC 10 paras 23-24.

446 Vettori 2015 *African Human Rights Law Journal* 368.

the date of referral to mediation, it may proceed either to arbitration or adjudication if it is a dispute of right.⁴⁴⁷

4.4.5 Commission for Conciliation, Mediation and Arbitration

The Commission for Conciliation, Mediation and Arbitration (CCMA) was established in terms of section 112 of the LRA. The services provided by the CCMA are free of charge. It receives its funding from the Department of Labour. There are rules that the CCMA operates in terms of.

Rule 13 entitled “What happens if a party fails to attend or is not represented at conciliation” provides as follows:

- (1) The parties to a dispute must attend a conciliation in person, irrespective of whether they are represented.
- (2) If a party is represented at the conciliation but fails to attend in person, the commissioner may –
 - (a) continue with the proceedings;
 - (b) adjourn the proceedings; or
 - (c) dismiss the matter by issuing a written ruling.
- (3) In exercising discretion in terms of sub-rule (2), a commissioner should take into account, amongst other things –
 - (a) where the party has previously failed to attend a conciliation in respect of that dispute;
 - (b) any reason given for that party’s failure to attend;
 - (c) whether conciliation can take place effectively in the absence of that party;
 - (d) likely prejudice to the other party of the commissioner’s ruling;
 - (e) any other relevant factors.
- (4) If a party to a dispute fails to attend in person or to be represented at the conciliation, the commissioner may deal with it in terms of rule 30.

Rule 30 entitled “What happens if a party fails to attend proceedings before the Commission” provides as follows:

- (1) If a party to a dispute fails to attend or be represented at any proceedings before the Commission, and that party –
 - (a) had referred the dispute to the Commission, a commissioner may dismiss the matter by issuing a written ruling; or
 - (b) had not referred the matter to the Commission, the commissioner may –
 - (i) continue with the proceedings in the absence of that party; or
 - (ii) adjourn the proceedings to a later date.

447 Vettori 2015 *African Human Rights Law Journal* 368. In *Premier Gauteng & Another v Ramabulana & Others* (2008) 29 ILJ 1099 (LAC) it was held that “(w)here no attempt has been made to conciliate a dispute within the 30-day period prescribed, the employee acquires the right to have his or her dispute either arbitrated or adjudicated.”

According to rules 13 and 30 above, a party who refers a matter to the CCMA for conciliation and fails to attend the conciliation proceedings runs the risk of having the matter dismissed, with no chance of it being arbitrated or adjudicated.⁴⁴⁸ If the respondent fails to attend conciliation proceeding which he or she has been notified to attend, he or she faces the risk of the conciliation taking place in his or her absence.⁴⁴⁹ In *Premier Gauteng & Another v Ramabulana & Others*,⁴⁵⁰ Zondo JP stated:

[T]he Act does not anywhere confer on the CCMA or a bargaining council the power to dismiss an employee's referral of a dismissal dispute simply because he failed to attend the conciliation meeting. If there is such a power, it certainly is not in the Act. And the CCMA is a creature of statute that, generally speaking, derives its powers from the Act. Of course, it can also derive some of its powers from its rules governing the dispute-resolution process that it is empowered to undertake. Needless to say, its rules should not be in conflict or inconsistent with provisions of the Act. Where they are, the Act will obviously prevail and such rules would be ultra vires.⁴⁵¹

Section 115(2)(A)(iii)(a) empowers the CCMA to make rules "regulating the practice and procedures for any process to resolve a dispute through conciliation". These rules insofar as they relate to conciliation are not meant by the Act to take away any substantive right of any party. Where the Act confers a right on a party, the CCMA rules cannot take away those rights. Any rule that does that would conflict with the Act and the Act will prevail in such a case. Furthermore, section 191(4) of the Act states that a party to a dispute who refers a dispute to the CCMA or a bargaining council for conciliation has a right, once a period of 30 days from the date when the CCMA or a bargaining council received the referral has lapsed, to have his dismissal dispute arbitrated if he so requests or has a right to refer it to the Labour Court for adjudication, without such party having done anything after referring the dispute for conciliation.

The above are examples where mediation can or should be used as part of certain legislative prescriptions. Below the application of mediation in other countries will be discussed in order to see whether their systems could possibly work in South Africa and specifically in a medical negligence context.

448 Vettori 2015 *African Human Rights Law Journal* 369; *Premier Gauteng & Another v Ramabulana & Others* (2008) 29 ILJ 1099 (LAC).

449 Vettori 2015 *African Human Rights Law Journal* 369.

450 (2008) 29 ILJ 1099 (LAC).

451 *Premier Gauteng & Another v Ramabulana & Others* (2008) 29 ILJ 1099 (LAC) par 10.

4.5 Application of mediation in other jurisdictions

In South Africa, medical negligence mediation is a new phenomenon. Thus, there is new ground to be broken and new models to be established so that a competent dispute resolution mechanism in the medical field is created.⁴⁵² At present, the United States of America, Germany and Thailand have embraced mediation for settling medical disputes.⁴⁵³ Wisconsin in the USA was chosen because they have an act requiring pre-litigation mediation for all medical negligence claims. Germany has a mediation centre that assists with the solving of medical negligence allegations. The centres recommendations count a lot towards subsequent court proceedings. Thailand has a civil procedure code which was amended in 1999 to allow mediation in medical cases.

4.5.1 Mediating medical negligence disputes: the Wisconsin experience

In May 1986 the Wisconsin legislature enacted Act 340, which requires pre-litigation mediation for all medical negligence claims.⁴⁵⁴ This Act replaced the mandatory pre-screening panel system that had been in operation since 1975.⁴⁵⁵ In terms of the new statute, for medical negligence claims a claimant must file a request for mediation within fifteen days of filing a medical negligence claim. The request for mediation may also be initiated before filing a claim.⁴⁵⁶ The application of the statute of limitation is delayed for ninety days during the period of mediation and for an additional thirty days following the end of the mediation period. Parties are required to submit a claim statement or rebuttal to a claim and share all health records in their possession. During the mediation period, the Act prohibits the conducting of discovery, such as depositions of witnesses and additional compulsory production of records.⁴⁵⁷

The Act does not specifically prescribe how the mediation system should be administered. The Office of the Director of State Courts developed its own set of

452 Barnard <https://adriaansattorneys.com/2017/09/28/mediation-and-arbitration-in-medical-health-care-disputes/> (Date of use: 10 September 2018).

453 Walters 2014 *S Afr Med J* 717-718.

454 Meschievitz 1991 *L & Contemp Probs* 195-215.

455 Meschievitz 1991 *L & Contemp Probs* 195-215.

456 Meschievitz 1991 *L & Contemp Probs* 195-215.

457 Meschievitz 1991 *L & Contemp Probs* 195-215.

guiding principle and practices in this regard.⁴⁵⁸ The guidelines require that the panel consists of three members: an attorney who chairs the panel, a physician or health professional with some expertise in the claim, and a public member appointed from a pool of names provided by the governor. Panels should convene within the ninety-day mediation period. If it is not possible to convene, mediation will only proceed if both parties agree to an extension. This makes enforcing the mandatory requirement of the process difficult. A recent judgement held that failure to mediate a claim within the ninety-day period does not vitiate a claimant's right to pursue the claim in court. In *Gauger v Mueller*,⁴⁵⁹ the court held that the statutory language establishing the ninety-day period for conducting mediation was a directive rather than a mandate. Therefore, the plaintiffs' failure to mediate within the statutory period did not preclude the trial court from exercising jurisdiction over the claim or allowing an untimely mediation.

Even though there is no statutory authority for this, high-priority matters can bypass mediation altogether if the Mandatory Mediation Panel System office in their exercise of administrative discretion, determines that mediation is unlikely to promote a settlement or assist the negotiation process.⁴⁶⁰ The sessions are informal and nonbinding; there is no record-keeping, and whatever is said during the session is admissible in a pending court action.⁴⁶¹ Panellists do not make decisions; they facilitate a compromise and settlement where it is possible. However, if mediation fails to produce an agreement between the parties, panel members can advise the parties on their predictions of the likely outcome should the case proceed to trial.⁴⁶²

4.5.2 *The German experience*

The German healthcare system is a decentralised and diversified system that has more than 200 insurers. It provides healthcare to the entire German population. The medical practitioners are regulated primarily by the law of the state.⁴⁶³ The civil code

458 Meschievitz 1991 *L & Contemp Probs* 195-215.

459 149 Wis 2d 737, 439 NW2d 637 (Wis Ct App 1989).

460 Meschievitz 1991 *L & Contemp Probs* 195-215.

461 Meschievitz 1991 *L & Contemp Probs* 195-215.

462 Meschievitz 1991 *L & Contemp Probs* 195-215.

463 The German Civil Code (Bürgerliches Gesetzbuch/BGB); Palmer "Medical Liability: Canada, England and Wales, Germany, and India", published by the Law Library of Congress in August 2009 <https://www.loc.gov/law/help/medical-malpractice-liability/medical-liability.pdf> (Date of use: 20 September 2018).

provisions on liability arising from contracts and torts govern medical negligence. Case law has helped to develop the various causes of liability that can arise within the context of medical treatment in the country.⁴⁶⁴ The most common causes of liability are defective treatment, wrong diagnosis, wrong medication, lack of disclosure, and unauthorised treatment.⁴⁶⁵

Where there has been a medical negligence incident, the first step for a claimant is to go to the liability insurer of the physician or hospital. Should the claimant be unsatisfied with the way the insurer is resolving the matter, the next step is to go to court or use the services of a mediation centre.⁴⁶⁶ Using a mediation centre is advantageous in that there are no charges involved; whereas the litigation route has a risk of the plaintiff being ordered to bear the costs if the loses.⁴⁶⁷

Once the claimant has taken the dispute to the mediation centre and the centre believes there was negligence on the part of the physician; the claimant may again approach the liability insurer.⁴⁶⁸ The opinion of the mediation centre is highly valued – in 85% of cases the centre has found for the plaintiff and a settlement was usually offered. For the 15% of cases that did not take the centre’s opinion and went to court, the court ruled as indicated by the mediation centre. Most medical liability claims are settled out of court, either immediately or after the mediation centre has given its opinion.⁴⁶⁹

The day-to-day running of the mediation centres is done by the state medical associations. Mediation centres are independent organisations that have a

464 The German Civil Code (Bürgerliches Gesetzbuch/BGB); Palmer <https://www.loc.gov/law/help/medical-malpractice-liability/medical-liability.pdf> (Date of use: 20 September 2018).

465 The German Civil Code (Bürgerliches Gesetzbuch/BGB); Palmer <https://www.loc.gov/law/help/medical-malpractice-liability/medical-liability.pdf> (Date of use: 20 September 2018).

466 The German Civil Code (Bürgerliches Gesetzbuch/BGB); Palmer <https://www.loc.gov/law/help/medical-malpractice-liability/medical-liability.pdf> (Date of use: 20 September 2018).

467 The German Civil Code (Bürgerliches Gesetzbuch/BGB); Palmer <https://www.loc.gov/law/help/medical-malpractice-liability/medical-liability.pdf> (Date of use: 20 September 2018).

468 The German Civil Code (Bürgerliches Gesetzbuch/BGB); Palmer <https://www.loc.gov/law/help/medical-malpractice-liability/medical-liability.pdf> (Date of use: 20 September 2018).

469 The German Civil Code (Bürgerliches Gesetzbuch/BGB); Palmer <https://www.loc.gov/law/help/medical-malpractice-liability/medical-liability.pdf> (Date of use: 20 September 2018).

reputation for independent judgments. The centre's staff members are lawyers and physicians.⁴⁷⁰ Evaluations are mostly done on a *pro bono* basis by volunteering physicians.⁴⁷¹ The duties of the members are to advise plaintiffs of their claim and compiling statistics on the claims brought to their attention, which are consolidated annually by the Federal Medical Association. The primary purpose for the statistics is to avoid errors in future.⁴⁷²

4.5.3 Thailand experience

Mediation in Thailand has helped alleviate the economic burden in various sectors.⁴⁷³ One of the early users of mediation that incorporates mediation into its working process is the court of justice.⁴⁷⁴ Mediation as a process for resolving disputes has been prescribed in the Civil Procedure Code since 1934.⁴⁷⁵ In 1999, the code was amended to allow for mediation that is carried out by mediators.⁴⁷⁶

Until recently, disputes between patients and medical practitioners were rare in Thailand.⁴⁷⁷ This was due to the fact that the profession was viewed as something sacred by patients.⁴⁷⁸ The patients and caregivers believed that healthcare providers did their utmost to provide quality service, and anything wrong that transpired was probably beyond the control of the practitioner.⁴⁷⁹ This attitude started to change when patients and their relatives began to recognise that healthcare practitioners are humans who can negligently provide their services. Due to this change of attitude, patients started to actively pursue action against

470 Palmer <https://www.loc.gov/law/help/medical-malpractice-liability/medical-liability.pdf> (Date of use: 20 September 2018).

471 Palmer <https://www.loc.gov/law/help/medical-malpractice-liability/medical-liability.pdf> (Date of use: 20 September 2018).

472 Palmer <https://www.loc.gov/law/help/medical-malpractice-liability/medical-liability.pdf> (Date of use: 20 September 2018).

473 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018); see also the Thai Civil Procedure Code.

474 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018).

475 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018).

476 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018).

477 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018).

478 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018).

479 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018).

practitioners they believed gave them substandard care.⁴⁸⁰ Cases involving medical negligence started to become regular in the country.

The Ministry of Public Health recognised that there was a need to address disputes arising from the healthcare sector.⁴⁸¹ Mediation was promoted as a mechanism to address the rise of disputes in the healthcare service. Through this effort, the ministry established the Centre for Peace in Healthcare for the purpose of promoting mediation as a principal method to resolve disputes arising from medical negligence.⁴⁸² Hospital personnel have been trained on how to handle patients and their relatives if there is dissatisfaction with the service provided by the healthcare providers.⁴⁸³ Should the hospital personnel fail to defuse the situation, the next step is to refer the conflict to the Centre for Peace in that particular hospital for mediation.⁴⁸⁴ The aim of this process is to reduce the number of disputes litigated in court.⁴⁸⁵

4.6 Conclusion

The attributes of mediation do not condone a one-size-fits-all approach when it comes to the resolution of medical negligence cases. But, it is an undeniable fact that the mediation process can yield just results at a fraction of the cost and much quicker than would have been the case had the parties resorted to civil litigation.⁴⁸⁶

Mediation has demonstrated to be suitable for medical negligence claims in comparison to litigation for the following reasons:⁴⁸⁷

- (a) It is a process that is private, which results in no adverse publicity for the medical professional or institution involved. Any admissions made during the mediation process will not be admitted as evidence in court.

480 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018).

481 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018).

482 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018).

483 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018).

484 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018).

485 Limparangsri https://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf (Date of use: 11 October 2018).

486 Vettori 2015 *African Human Rights Law Journal* 363.

487 Emanuel and Mills 2002 *ADR Bulletin* 55-58.

- (b) Mediation has demonstrated to be a quicker and more cost-effective process than litigation.
- (c) Mediation is much more informal, which creates a relaxed environment for the parties and may leave the doctor-patient relationship intact, whereas litigation tends to commonly promote a defensiveness and lack of empathy from doctors. Medical practitioners often fear displaying compassion or acknowledgment of wrongdoing on their part thinking that it will weaken their legal position in the matter.
- (d) It focuses on and seeks to maximise the parties' underlying interests, rather than simply deciding between their positional claims.
- (e) It provides an atmosphere where the parties are able to express their apprehensions and participate in a discussion that may lead to an acknowledgment of the problem. Occasionally, an apology is received from the doctor.
- (f) The emphasis is on the parties' future needs rather than past occurrences, which aids in an amiable reconciliation.
- (g) The parties have a degree of control over the mediation process and outcomes compared to litigation or arbitration. Mediation can take into account remedies not capable of being granted by the courts, such as an apology, explanation or exploration of the best treatment and remedy for the patient going forward. If a negotiated solution is not sufficient, mediation can be supplemented by other forms of ADR, such as early neutral evaluation, a mini-trial or expert advice.

Should mediation be ultimately unsuccessful in resolving the dispute between the parties, due to an inability to reach a mutually agreeable settlement or for whatever reason, it may still have been worthwhile because it would most likely have led to a refinement and clarification of the issues in dispute.⁴⁸⁸ In addition to this, partaking in the mediation process would have allowed the parties, especially the plaintiff, "to speak in a safe environment without interruption or cross-examination,"⁴⁸⁹ which

488 Bogdanoski 2009 *ADRJ* 81.

489 Bogdanoski 2009 *ADRJ* 81.

allows the parties to vent their anger and other emotions so that they can focus more effectively on litigating their dispute should it still be necessary.⁴⁹⁰

South Africa could learn from all three jurisdictions discussed. It will help if South Africa could have an act requiring pre-litigation mediation for all medical negligence cases. It will also benefit South Africa to have a mediation Centre as in Germany.

490 Bogdanoski 2009 *ADRJ* 81.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

*“By three methods we may learn wisdom: first, by reflection, which is noblest; second, imitation, which is easiest; and third by experience, which is the bitterest.”*⁴⁹¹

5.1 Introduction

Chapter 1, the introductory chapter, highlighted the escalating number of medical negligence cases, as well as giving possible reasons for the increase in medical negligence litigation. The research question, “Can mediation be an alternative option to litigation in respect of medical negligence cases,” was also posed. Chapter 2 briefly covered the history and development of medical negligence and mediation in South Africa. Chapter 3 focused on the legislative framework for medical negligence claims, using three cases to indicate the time a medical negligence case could take when going to court. It also analysed how these cases could have saved the parties both time and money if mediation was used to solve the dispute.

Chapter 4 focussed on the mediation process, the advantages of such a process and the possible disadvantages. The chapter also used other jurisdictions, namely experiences in Wisconsin in the United States of America, Germany and Thailand to indicate how mediation as a dispute resolution mechanism could be used effectively.

5.2 Conclusions

From the reading of the previous chapters it is quite obvious that the South African medical liability system has problems. Mounting evidence indicates that a substantial number of individuals in South Africa die or suffer serious injury from mistakes that occurred during their medical treatment.⁴⁹² In terms of a report from the Johns Hopkin Hospital, diagnostic errors cause up to 160 000 deaths annually

⁴⁹¹ <http://www.adrtoolbox.com/library/adr-quotes/> (Date of use: 27 August 2018).

⁴⁹² *Goliath v MEC for Health* [2015] JOL 32577 (SCA); *Smith v MEC for Health, KwaZulu-Natal* (3826/12) [2016] ZAKZPHC 68 (2 August 2016); the Life Esidemeni incident, where 94 psychiatric patients died due to medical negligence.

in South Africa.⁴⁹³ Even more interesting is the fact that medical negligence is the third leading cause of death in the world.⁴⁹⁴

It is unarguable that avoidable deaths and injuries from substandard medical treatment demands attention. However, this thesis addresses the problem of the aftermath. The research addressed the concern of the absence of a practical legal process for medical negligence claims. A huge issue with medical negligence litigation is the manner in which the claims are resolved. Litigation provides injured patients and caregivers a traditional platform for addressing medical negligence claims. However, due to many reasons highlighted, this system does not seem adequate for dealing with disputes arising from alleged medical negligence. Mediation offers a promising solution to the problems surrounding redress of medical negligence disputes.

Through mediation patients are given an opportunity to find out what went wrong; healthcare providers are able to make improvements in healthcare delivery; and parties are allowed to deliberate suitable financial compensation without resorting to litigation.⁴⁹⁵ This thesis argued that the majority of problems associated with medical negligence litigation should be alleviated by simply using mandatory mediation as a first step in the medical negligence dispute process. Adopting this reform could improve the time dealt with disputes of this nature immensely. Furthermore, it is envisaged that mediation will restore a sense of fairness to medical negligence proceedings, as well as improve the standard of care between medical practitioners and patients as the line of communication shall be more open.

The previous chapters illustrated that mediation is very different from a civil trial. With a trial the aim is to argue in front of a judge and provide admissible evidence so that the judge is equipped to make a binding decision with regard to the issues that the parties are in dispute over.⁴⁹⁶ There is one party that will lose and another that will win. Mediation tries to reach outcomes through negotiation and agreement

⁴⁹³ <http://journalismiziko.dut.ac.za/feature-review/doctors-are-not-perfect/> (Date of use: 15 October 2018).

⁴⁹⁴ <http://journalismiziko.dut.ac.za/feature-review/doctors-are-not-perfect/> (Date of use: 15 October 2018).

⁴⁹⁵ Todres 2006 *Connecticut Law Review* 667-737.

⁴⁹⁶ <http://www.clinical-disputes-forum.org.uk/> (Date of use: 16 October 2018).

between the parties.⁴⁹⁷ There is no imposition from a third party; this makes it possible for both parties to feel that they have gained from the process.⁴⁹⁸

The assumption of this thesis is that the current system of resolving medical negligence disputes is flawed. The increase in medical negligence cases suggests that the current system is failing to produce an effective response to the situation.⁴⁹⁹ There is a need for a system that will provide compensation for the injured patients but that will also provide incentives for doctors and hospitals to reduce the number of incidences involving negligence. The system should aim to preserve the relationship between the doctor and patients, as well as be cost-effective and efficient. The current system fails to meet these requirements. Three other jurisdictions were discussed, Wisconsin in the USA, Germany and Thailand. SA could learn something from all of them concerning mediation.

With mediation, more patients might receive compensation for injuries as a result of medical negligence, as many never even institute action due to a lack of funds for a litigation process.⁵⁰⁰ Those patients that eventually receive compensation after a lengthy trial often have to wait years before the compensation is eventually paid to them.⁵⁰¹

Mediation also creates a forum for doctors to discuss medical mistakes that occurred so that they can learn from their errors. The current legislative process does not allow doctors to express empathy while still caring for their injured patient, nor to discuss what happened with colleagues. Thus, from the outset when medical negligence is suspected, the patient and the doctor become immediate enemies and the doctor cannot even consult his peers.

Another sad reality of the current system is that doctors practice under the constant threat of litigation and rising insurance premiums.⁵⁰² When things go wrong, doctors are isolated and feel alienated by an impersonal litigation process. The current system therefore fails to nurture trust between the doctor and patient and even

⁴⁹⁷ <http://www.clinical-disputes-forum.org.uk/> (Date of use: 16 October 2018).

⁴⁹⁸ <http://www.clinical-disputes-forum.org.uk/> (Date of use: 16 October 2018).

⁴⁹⁹ Todres 2006 *Connecticut Law Review* 667-737.

⁵⁰⁰ Todres 2006 *Connecticut Law Review* 667-737.

⁵⁰¹ Example in chapter 3.

⁵⁰² Todres 2006 *Connecticut Law Review* 667-737.

society at large. Healthcare users today are very aware of their rights and they run to attorneys after a medical mishap far too easily. In many instances, there is no reason or basis for litigation; yet, the patient would like assurance from the medical practitioner that he or she did whatever was possible to avoid the mishap. The explanation of what possibly went wrong during the procedure could be done very successfully through a mediation process.

An ideal mediation system will provide healing for all parties involved. The system should incorporate compensation, it should promote trust, try to reduce the harm suffered, provide a platform for exchange of information, and offer opportunities for restoration.⁵⁰³

5.3 Recommendations

The solution that is proposed to deal with the current escalation of medical negligence claims is to institute a programme that will make it compulsory for mediation to be the first step in all medical negligence disputes (for example like Wisconsin). Incorporating such a step into the process will assist in resolving matters efficiently and more cost-effectively. Mediation will also assist in sifting cases that do not need to go all the way to court, making it possible for claims to be disposed of faster and at a much lower cost (the German Mediation Centre for example). Moreover, this system will help get to the root cause of the negligence because mediation encourages free flow of information between medical practitioners and patients. Adding this step to the process would make litigating medical negligence cases a bit fairer in that the parties will be given an opportunity to arrive at a mutually suitable resolution before proceeding to an adversarial lawsuit.

Introducing mediation as a first step to medical negligence disputes should not be problematic due to the fact that the cost of mediation is reasonable. Chances of getting resistance from the legal community are relatively low as this introduction does not involve changing their entire process of dealing with disputes.

⁵⁰³ Todres 2006 *Connecticut Law Review* 720.

There are a range of possible models for mediation. The model suggested by this thesis is what is called the Healing-In-Truth Commission (HITC) doing mediation in alleged medical negligence cases.⁵⁰⁴

This model is based on lessons learnt from other jurisdictions, as well as the restorative justice model mentioned in chapter 4. To comprehensively discuss any model requires that a detailed analysis should be done. However, that is beyond the scope of this thesis. The discussion here is only for illustration purposes.

The working of the HITC will be based on the principles of mediation with a restorative component.⁵⁰⁵ The fundamental element of an HITC process is that it should be the first step in resolving disputes involving medical negligence. An HITC could be created in terms of legislation similar to the CCMA. However, the difference to the CCMA model would be that the commissioners will be facilitating resolutions, not deciding cases. The role of the HITC members, once they have identified possible medical negligence, would be to listen to all parties and find solutions, as well as provide recommendations for the prevention of similar incidences in the hospital or private practice.⁵⁰⁶ The commission members would also be tasked with collaborating with health facilities so that they can follow up and monitor the implementation of their recommendations.⁵⁰⁷ Commission members could include physicians or health professionals with special expertise, general practitioners, public servants, attorneys, insurance experts, actuaries and members of the public.

The process of getting a medical negligence case to the HITC could be done in two ways:

- (1) a patient, after experiencing an adverse outcome from a health practitioner, can request a review of their case; or

⁵⁰⁴ This model was created after reading the model offered by Todres (2006 *Connecticut Law Review* 728). It takes after the model, Truth-in-Medicine Commission (TIMC). The difference between the two models is that TIMC is more community-based in its approach. The similarities are that mediation and restorative elements are at the core. The TIMC looks to introduce its existence through enterprise liability similar to an internal review process; unlike HITC which suggests existing through legislation. The vision put forward for HITC is similar to how the CCMA was created.

⁵⁰⁵ Todres 2006 *Connecticut Law Review* 728.

⁵⁰⁶ Todres 2006 *Connecticut Law Review* 728.

⁵⁰⁷ Todres 2006 *Connecticut Law Review* 728. The follow-up element of the model requires parallel functioning with various stakeholders such as auditors, economists, etc. This will require great organisational skills. It should be modelled in a way that there is as little red tape as possible.

- (2) a doctor can report a medical negligent event that occurred for investigation and recommendations.⁵⁰⁸

When a case has been reported to the HITC, the case will be assigned to members, depending on the type of dispute. The commissioner will then review medical reports and facilitate a dialogue session between the parties in dispute to try to gain a better appreciation of how the cause of events occurred and to understand what each party requires going forward.⁵⁰⁹ The objective of this step is to obtain a full and open account of the events that caused the injury, generate options for consideration by the parties, agree upon appropriate compensation for the injured patient, and develop recommendations to improve practices and standards of care.⁵¹⁰

It is clear that South Africa is experiencing an alarming increase in medical negligence cases. A solution that is viable should be implemented as soon as possible. It was the aim of this thesis to provide a possible solution that can be implemented.

⁵⁰⁸ Many injured patients do not sue after a medical negligence occurrences due to different reasons. It is vital that doctors report these incidents in order to overcome an environment of error. There should be a policy that mandate doctors to disclose errors; Todres 2006 *Connecticut Law Review* 728.

⁵⁰⁹ Taft 2005 *Annals Health L* 93-94.

⁵¹⁰ Brand, Steadman and Todd *Commercial mediation*.

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Scharf M “The medico-legal pitfalls of the medical expert witness” (Unpublished LLM Thesis University of South Africa 2014)

Other

Court-Annexed Mediation Rules of the Magistrates’ Courts, 2014

Rules Regulating the Conduct of Proceedings of the Magistrates’ Courts of South Africa

Keynote address at the Medico-Legal Summit, St George’s Hotel, Pretoria 9-10 March 2015

South African Law Reform Commission, Issue Paper 8, Project 94 “Alternative Dispute Resolution”

South African Law Reform Commission, Issue Paper 33, Project 141 “Medico-legal claims”