THE NEED FOR LEGAL REFORM TO ADDRESS MEDICAL NEGLIGENCE IN SOUTH AFRICA

by

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ABSTRACT

The core objective of this research paper is to discuss the implementation of legal reform to address medical negligence in South Africa and will set out arguments for the need for legal reform in such a context. After the issues and threats currently facing the medical industry have been determined, as well as the cause for such issues, the research paper will make an argument for the need for legal reform in the context of medical negligence to rectify and/or relieve these issues.

KEYWORDS

Medical

Negligence

Legal

Reform

Criminal Law

1. CHAPTER 1

1.1 INTRODUCTION

It can be said that the law "presupposes the society"[1] in which it operates. Thus, the law is required to be flexible and adaptable to meet the needs of the cases which it seeks to adjudicate upon.

South Africa's medical industry is currently facing a challenging time as medical negligence cases soar to an all-time high while simultaneously, the value of the damages claimed in such cases increases drastically each year.[2] In the financial year ending 2010, the Gauteng Department of Health settled negligence claims to a total amount of R573 million, while in 2013, the same Department settled claims amounting to R1.28 billion.[3] In the financial year ending 2021, the state settled a record value of medical negligence claims amounting to a total of R120 billion.[4]

However, the law pertaining to medical negligence remains stagnant, as the Health Professions Act[5] (HPA) was last updated in the year of 1974 and the National Health Act[6] (NHA) was last updated in 2003.

It cannot be reasonably expected of the medical industry to inject sufficient funds into its operations to provide quality healthcare to its patients while concurrently making substantial payments to private individuals for compensation for medical negligence claims. This is particularly true for the public healthcare sector which is already constrained by a limited budget each year (Minister of Health, Zweli Mkhize, allocated a total of just R62.5 billion to the Department of Health for the fiscal year 2021/22).[7]

Resultantly, the medical industry finds itself in a vicious cycle whereby it loses great portions of its spending income to medical negligence claims, thus losing much of its ability to spend on infrastructure maintenance and quality health care services which can arguably be said to result in more negligence claims and thus, the cycle continues.

Furthermore, the law is relatively quiet when it comes to medical negligence cases. Section 27 (1) of the Constitution[8] provides the right to healthcare, this can be said to be the most significant healthcare provision in all South African legislation. The National Health Act[9] (NHA) provides that a person who has undergone medical treatment at a healthcare facility, is able to "lay a complaint"[10] regarding the nature in which such treatment was received. However, apart from these provisions, not much else can be said, by the law, pertaining to the regulation of medical negligence cases. Resultantly, most medical negligence cases which are brought into litigation, are adjudicated upon in a manner and in a process which is determined at the court's discretion. Thus, much room is left for uncertainty as well as disparity from one case

[1] Kleyn, D; Viljoen, F *Beginner's Guide for Law Students* 4th ed (2017) 1.
[2] Pienaar. L "Investigating the Reasons behind the Increase in Medical Negligence Claims" 2016 *PELJ* (19).
[3] Pienaar. L "Investigating the Reasons behind the Increase in Medical Negligence Claims".
[4] Ensor. L "No need to wait for legislation to tackle medical negligence, says experts" 2022 website at No need to wait for legislation to tackle medical negligence, say experts (businesslive.co.za) [Accessed 27 July 2022].
[5] Health Professions Act 56 of 1974.
[6] National Health Act 61 of 2003.
[7] South African Government "Minister Zweli Mkhize: Health Dept Budget Vote 2021/22" 2021 website at Minister Zweli Mkhize: Health Dept Budget Vote 2021/22 | South African Government (www.gov.za) [Accessed 27 July 2022].
[8] Constitution of the Republic of South Africa of 1996 s27 (1).
[9] Act 61 of 2003 s18.
[10] S 18 (1) Act 61 of 2003.

to the next. The need for legal reform in South Africa pertaining to medical negligence cases has been emphasised by numerous doctor's organisations[11] (as the issue affects both the private and public healthcare sectors) as well as legal scholars.

This paper will attempt to delve into the issue of legal reform concerning medical negligence in South Africa.

1.2 RESEARCH OBJECTIVES

The core objective of this research paper is to discuss the implementation of legal reform to address medical negligence in South Africa and will set out arguments for the need for legal reform in this regard. After the issues and threats currently facing the medical industry have been determined, as well as the cause for such issues, the research paper will make an argument for the need for legal reform in this context to rectify and/or relieve these issues.

This core objective will be fulfilled through the exploration of various sub- objectives, as the research paper will aim to achieve the following. Firstly, to provide information, with the use of statistics, which displays the rate at which the amount of medical negligence claims are increasing annually, as well as the rate at which the value to these claims are increasing annually. Secondly, to provide evidence demonstrating the lack of specific legislation/ legal provision to address cases of medical negligence.

Additionally, the research paper will discuss the possible ways in which legal reform can be implemented to provide assistance and relief to the pressurised medical industry. This discussion will aim to set out arguments of how different kinds of legal reform can be utilised to assist courts in handling medical negligence cases from a procedural perspective including, the means and methods which can be used for deliberating on these cases as well as reasonable and proportionate sentencing/awarding of damages in respect of medical negligence cases.

The research paper will also strive to put forward several possible types of reforms which may be implemented in addressing medical negligence and the legal issues facing cases of this nature. Accompanying each of these suggestions of legal reform, will be a discussion on the feasibility and possible outcomes of affecting such reform.

In summary, the research paper endeavours to achieve the following:

1. To provide a discussion on the need for legal reform in the context of medical negligence cases through an analysis of case law and current legislation and with reference to the current state of affairs of the medical industry and the increasing amount of negligence claims brought forward in this regard.
2. To make suggestions as to possible types of legal reform which can be affected to address the issues facing the medical industry.

[11] McQuoid- Mason "Liability of doctors based on negligence for culpable homicide: No need to change the law concerning medical negligence to establish special medical malpractice courts – use mediation and medical assessors instead" 2022 *SAMJ* (112).

1.3 RESEARCH QUESTIONS

Firstly, this research paper will undertake to examine why legal reform is duly needed in South Africa, in the context of medical negligence.

In answering this question, consideration must first be given to the implications that legal reform will have in the context of medical negligence.

Secondly, the research paper will undertake to determine what types of legal reform could potentially be affected to bring about positive changes to the medical industry on both a private and public level, while simultaneously developing the litigation process or other parts of the law in a manner which is positive and in alignment with the Constitution and public policy.

1.4 PROBLEM STATEMENT

From the total amount of annual medical negligence claims ensued in South Africa, 80% occur within the domain of the public health sector.[12] In the year of 2013, the Gauteng Health Department, alone, faced medical negligence claims amounting to a total of R3.7 billion in damages. In the same year, the Eastern Cape, faced claims amounting to a total of R1.8 million in damages.[13] From the year 2011 to the year 2016, medical negligence claims increased by 35%, while the value of damages claimed in these cases, during the same time frame, saw an increase of 121%.[14] It is evident from these statistics that the number of medical negligence claims, as well as their weight in value, is rapidly increasing each year.

The increasing number and value of claims poses a threat to the public administration of health care in South Africa. As the government undertakes to make these large payments in settlement of medical negligence claims, it cannot be additionally expected of the government to affect much needed change and create quality health care services with their subsequently shortened budget. Thus, these exorbitant medical negligence claims place a great burden on an already strained public medical sector in the country. In the case of *The MEC for Health and Social Development of the Gauteng Provincial Government v Zulu,*[15] Mrs Zulu was awarded a hefty lump sum of R23 million from the Gauteng Health Department on the basis that the department's negligence had resulted in the brain damage of her son. However, a subsequent legal battle ensued when the Gauteng Health Department argued that government departments should not be expected to pay damages in the form of lump- sums but should rather be given the opportunity to assist the victim of the medical negligence through monetary instalments which could be made as expenses (resulting from the damage caused by the negligence) occur.[16] This argument of the Department is founded on the basis that the public medical sector is already operating under a constrained budget and will find difficulty in making lump- sum pay outs.

[12] Van Eck, H "Medical Negligence" 2013 Joubert Galpin Searle Attorneys website at PowerPoint Presentation (jgs.co.za) [Accessed 14 April 2022].
[13] Van Eck, H "Medical Negligence" .
[14] Henry Shields Attorneys and Conveyancers "The recent increase in medical negligence claims in South Africa" 2022 website at The recent increase in medical negligence claims in South Africa – Henry Shields [Accessed 16 April 2022].
[15] *The MEC for Education and Social Development of the Gauteng Provincial Government v Zulu* (1020/2015) [2016] ZASCA 185.
[16] Henry Shields Attorneys and Conveyancers "The recent increase in medical negligence claims in South Africa".

Considering these issues, one usually seeks out the law to provide some sort of relief or clarity regarding medical negligence cases, however, there is currently, little legislation governing medical negligence claims. South African legislation pertaining to medical negligence can be found in only a handful of provisions in the HPA[17] and the NHA,[18] as set out above (see pg. 5).

Resultantly, most medical negligence cases are determined based on existing common law. The issue pertaining to the topic of medical negligence, is therefore, that the law can be said to fall short with regards to defining the parameters of dealing with medical negligence claims. The law neglects to provide suitable procedural mechanisms and requirements to be utilised by the judiciary in dealing with such cases.

In accordance with the opinions of the authors as utilised for the study, there seems to be two main schools of thought regarding law reform to meet the demands of medical negligence cases. Firstly, many authors are of the opinion that current legislation is predominantly sufficient in tackling the issues pertaining to these claims, however, should nevertheless be developed and altered to alleviate the costly and lengthy process of medical litigation. On the other hand, is the opinion that new legislation should be enacted which contains specific provisions regulating the procedure for dealing with medical malpractice claims (the latter opinion seems to be favoured by numerous doctor's organisations).[19]

The research contained in this dissertation will serve to establish precisely where the law falls short in this regard and will discuss the views of legal scholars with knowledge of the medical field, as well as the opinions of doctors and additionally case law, to determine possible legal reform solutions to this issue. After an analysis of all the sources and professional opinions utilised in the paper, the author will make personal contributions in the form of an opinion regarding the best course of reform.

1.5 RESEARCH METHODOLOGY

The methodology of research is imperative in providing a research paper which is based on accurate and reliable information, and which can draw realistic and feasible conclusions from this information. Furthermore, the methodology used can assist in setting the structure and tone of the research paper at hand.

Encompassing all the methodologies, as set out below, it can be said that the core emphasis of the methodology used is that of a desktop nature, whereby one can access all required sources through online applications. In other words, no human communication will be used in the collection of this information (e.g., in the form of interviews, questionnaires etc.) save that which was indirectly used in the acquiring of the information as found online. The methodologies used are as follows.

[17] Act 56 of 1974.
[18] Act 61 of 2003.
[19] McQuoid- Mason "Liability of doctors based on negligence for culpable homicide: No need to change the law concerning medical negligence to establish special medical malpractice courts – use mediation and medical assessors instead".

Descriptive research[20]

This research paper will make reference to certain statistics pertaining to the amount of medical negligence claims made each year, the average value of such claims, the success rate in instituting legal action to receive damages and the increase of these claims, as well as their values between two specific time periods.

Analytical research[21]

Analytical research will be conducted, predominantly in chapter 5, through the critical evaluation of all sources to make a final determination regarding the topic of legal reform in addressing medical negligence in South Africa.

Empirical research[22]

Throughout the research undertaking, much reference will be made to legislation, particularly that of the Constitution and the NHA.[23] Which will be used as evidence to support the argument in question.

1.6 ASSUMPTIONS OF THE STUDY

The following assumptions are asserted in relation to this study:

All determinations made in terms of mentioned case law were made fairly, based on the set of facts in question and with the correct application of the law.

Legislation used is assumed to be current and constitutionally valid.

1.7 CHAPTER OUTLINE

1.7.1 Chapter 1

This chapter will commence with an overall introduction to the research topic and will determine and discuss in length the core objectives of the research conducted. The problem statement serves to elaborated on in-depth discussions pertaining to the gaps in the law regarding medical negligence, contrasting viewpoints and issues in terms of the topic will be present. Furthermore, this chapter will set out the research questions in a comprehensive but detailed fashion.

Additionally, chapter 1 will serve to provide a framework for the structure and content of the remaining chapters.

[20] Magugwana. M. University of the Free State. “Types of Research Methods”.
[21] Magugwana. M. University of the Free State. “Types of Research Methods”.
[22] Magugwana. M. University of the Free State. “Types of Research Methods”.
[23] Act 61 of 2003.

1.7.2 Chapter 2

This chapter will encompass all the aspects of the literature review. Firstly, the purpose of the relevant sources and their contention pertaining to the research topic will be examined.

All sources used in the research project will be set out in accordance with the IIE's referencing principles for each source to be subsequently scrutinised in terms of its relevance, feasibility, and application to the research topic. The schools of thought and opinions of the sources will be discussed with reference to the relevance of the research topic.

1.7.3 Chapter 3

All relevant legislation will be deposited in this chapter. The relevance and applicability will be set out and a link will be identified between each source and a point of contention involved in the research topic. All legislative provisions will be weighted in accordance with the issues which they tend to prove or disprove or support or rebut through their existence.

The provisions of the NHA[24] and HPA[25] will be discussed considering the little assistance which they are able to provide to the medical negligence field. However, the main discussion regarding these Acts will revolve around their lack of assistance and contribution to the handling of medical negligence cases by the courts.

All relevant articles and other sources containing or revolving around these statutes will also be examined with reference to the authors of such articles as well as their viewpoints.

Despite not qualifying as legislation, the relevant provisions contained in the Constitution[26] will be discussed in this chapter as being the framework under which all other legislation (including the NHA and HPA) operate.

The Constitution will be discussed with reference to its relevance as all people of South Africa have a constitutional right to access to health care, however the Constitution does not provide for the right to quality health care. Furthermore, the NHA[27] will be discussed considering its provision which declares that persons must be able to submit complaints if they are dissatisfied with any form of medical treatment received by a healthcare institution. This provision is linked to medical negligence in that it provides the authority under which dissatisfied patients can institute legal proceedings in this regard.

1.7.4 Chapter 4

Applicable case law and the importance and relevance of their outcomes will be analysed in chapter 4. The facts of those cases which are particularly pertinent to the research topic will be discussed. Parallels will be drawn from these cases and associated with the research topic as well as any variances associated with these cases.

All other utilised sources which mention such case law will also be evaluated in this chapter in the context of their authors opinions and notations.

[24] Act 61 of 2003.
[25] Act 56 of 1974.
[26] S 27(1).
[27] S 18 Act 61 of 2003.

Below is an outline of the cases which will be discussed.

Van Wyk v Lewis[28] holds that medical professionals should be held to a higher standard of care and diligence than that of a reasonable person in determining negligence. A secondary source will be used to support this case through the journal article of McQuoid- Mason[29] in which medical negligence is defined in terms of what medical negligence can be said to comprise of. This case and journal article are of importance as they form the foundation of medical negligence in this research paper and therefore allows for the subsequent cases to build arguments of substance pertaining to legal reform in this regard.

The cases of *Mukheiber v Raath and Others*[30] and *Goliath v MESC for Health in the Province of Eastern Cape*[31] are integral in establishing how negligence is proven in medical negligence cases and involves and in-depth analysis of how negligence committed on behalf of a medical professional differs from that of a reasonable person. As per the cases, a medical professional is required to exercise a higher degree of care and skill when dealing with patients. This case supports the argument for legal reform in the submission of the requirement of the presence of medical assessors in medical malpractice cases. It holds that judicial officers (who are reasonable persons and not expert ones in the medical field) are, in themselves, unequipped to make determinations of medical negligence.

S v Van der Walt[32] pertains to the sentencing of a medical practitioner based on evidence obtained from a textbook. This case highlights the necessity of legal reform in medical negligence cases as criminal sentencing was handed down to the defendant on the based-on hearsay. Criminal charges ought to be much more thorough in terms of proving the burden of proof before a final sentence can be made. The importance of this case lies in the fact that it emphasises the consequences facing the legal and medical industries should legal reform not occur.

The MEC for Education and Social Development of the Gauteng Provincial Government v Zulu[33] revolves around a dispute pertaining to the way medical claims are paid out on behalf of the defendants in such claims. In this case, it was brought to the attention of the court, by the MEC, that it could not be practically feasible to expect the defendants of medical negligence claims to make large lump sum payments to patients. Thus, this case calls for legal reform in the process of handling medical negligence cases pertaining to the way claims for damages are calculated and paid out.

1.7.5 Chapter 5

This chapter will include the most pertinent and crucial analysis of all other chapters. Here, in depth examinations will be made, contrasting, and comparing relevant legislation as per chapter 3, case law as per chapter 4, all other accredited articles and viewpoints.

Final findings will be reached in respect of mentioned legislation and case law to determine the legal position established by each respectively.

The apparent *lacuna* which exists in current legislation pertaining to medical negligence will be clearly identified alongside supporting evidence obtained from other sources. The

[28] *Van Wyk v Lewis* 1924 AD 438 at 444.
[29] McQuoid – Mason "What constitutes medical negligence?" 2010 *SAheart* (7).
[30] *Mukheiber v Raath and Others* (262/97) [1999] ZASCA 39; [1999] 3 All SA 490 (A).
[31] *Goliath v MESC for Health in the Province of Eastern Cape* (1084/2012) [2013] ZAECGHC 72.
[32] *S v Van der Walt* (CCT180/19) [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC).
[33] (1020/2015) [2016] ZASCA 185.

foundation of the research topic will be enhanced and clarified in this chapter through a cumulative and extensive analysis of all utilised sources.

1.7.6 Chapter 6

Chapter 6 will comprise of final conclusions. All other submitted chapters, as mentioned above, will be comprehensively and succinctly compiled, and inserted in this final chapter.

Concluding statements will be drafted, determining why legal reform is needed in South Africa to address medical negligence and will make suggestions as to possible types of legal reforms which can be affected to address the issues facing the medical industry from a legal perspective, thus completing the entire study with well-defined and precise declarations.

2. CHAPTER 2

2.1 JOURNAL ARTICLES

Malherbe, J "Counting the Cost: The consequences of increased medical malpractice litigation in South Africa" 2013 *SAMJ* (103).

The article pertains predominantly to the consequences which will result from the increase in medical litigation claims in South Africa.[34] Malherbe makes use of numerous statistics relevant to my study.[35] The author will use this source to highlight the importance of legal reform regarding medical negligence cases by emphasising the unsustainability of the current legal situation, an argument which is supported through these statistics and consequences.

McQuoid- Mason "Liability of doctors based on negligence for culpable homicide: No need to change the law concerning medical negligence to establish special medical malpractice courts – use mediation and medical assessors instead" 2022 *SAMJ* (112).

This article will be used to draw attention to the fact that professionals, in both the medical and legal industry, have called for legal reform pertaining to medical negligence cases,[36] this will support my argument for the need for reform in this regard. Furthermore, the article also makes suggestions as to different types of reform which could be implemented, for example, the creation of special medical malpractice courts.[37] These suggestions will sustain my argument for the positive impact which could be achieved in the medical and legal industries through a process of reform.

McQuoid – Mason "What constitutes medical negligence?" 2010 *SAheart* (7).

The definition of medical negligence is set out in this source. Subsequently this article also establishes the requirements pertaining to the standard of care which is exercised by medical practitioners.[38] This source will be used to emphasise case law (*Van Wyk v Lewis*)[39] which states that the standard of care exercised by medical practitioners is more onerous than that of other professionals.

Ndou, MM "Assessment of Contested Expert Medical Evidence in Medical Negligence Cases: A Comparative Analysis of the Court's Approach to the Bolam/Bolitho test in England, South Africa and Singapore" 2019 *SPECJU* (33).

This article assesses medical negligence from the perspective of the law of evidence and makes an argument for the need to have medical professionals stand as witnesses in cases

[34] Malherbe, J "Counting the Cost: The consequences of increased medical malpractice litigation in South Africa" 2013 *SAMJ* (103).
[35] Malherbe 2013 *SAMJ* (103).
[36] McQuoid- Mason "Liability of doctors based on negligence for culpable homicide: No need to change the law concerning medical negligence to establish special medical malpractice courts – use mediation and medical assessors instead" 2022 *SAMJ* (112).
[37] McQuoid- Mason 2022 *SAMJ* (112).
[38] McQuoid – Mason "What constitutes medical negligence?" 2010 *SAheart* (7).
[39] 1924 AD 438 at 444.

of medical negligence.[40] The relevance of this article will be used in the argument for different means of legal reform in addressing medical negligence cases, more specifically, the requirement that expert opinions be provided in such cases.[41] This article will also be linked to that of McQoid[42] which is in support of this view.

Pienaar, L "Investigating the Reasons behind the Increase in Medical Negligence Claims" 2016 *PELJ* (19).

This article seeks to establish possible causes for the increase in medical negligence claims.[43] This source will be used to determine potential solutions (in the form of legal reform) to the issue. Having used this source to establish the causes of the increase in medical negligence claims, an analysis will be made on how to resolve these issues through legal reform, thus solutions will be presented. These solutions will stem from the source of the issue.

Pienaar, R; van Gelder, A "Calculating medical negligence costs" 2015 *DEREBUS* (160).
The authors of this source provide for an in-depth formula for the calculating of proportional and reasonable medical negligence claims.[44] This source will be linked to relevant cases (*The MEC for Education and Social Development of the Gauteng Provincial Government v Zulu)*[45] in which the calculation of medical negligence damages was calculated incorrectly resulting in unreasonable judgements. The relevance of this source is found in its support for the argument of legal reform as the calculation of these costs often differs substantially from case-to-case.

The Law Society of South Africa "LSSA concern at Health Minister's plans for dealing with medical negligence victims" 2015 *DEREBUS* (90).

This article makes reference to the startling remarks made by the Health Minister in his quest to curve the increase of medical malpractice claims.[46] One such remark included plans to limit the right of members of the public to institute proceedings in this regard. This article will be used to support the argument of the need for legal reform through recognition of the consequences which may occur without reform.

2.2 ELECTRONIC RESOURCES

Henry Shields Attorneys and Conveyancers "The recent increase in medical negligence claims in South Africa" 2022 website at The recent increase in medical negligence claims in South Africa – Henry Shields [Accessed 16 April 2022].

This article encompasses substantial facts pertaining to the increase in medical negligence claims in South Africa, including statistics, causes and consequences of this nature. The article is written from a legal perspective and therefore the information therein will be used in the analysis of the need for legal reform and its contents will specifically relate to the legal

[40] Ndou, 2019 *SPECJU* (33).
[41] Ndou 2019 *SPECJU* (33).
[42] McQuoid- Mason 2022 *SAMJ* (112).
[43] Pienaar, L 2016 *PELJ* (19).
[44] Pienaar, R; van Gelder, A2015 *DEREBUS* (160).
[45] Zulu (1020/2015) [2016] ZASCA 185.
[46] The Law Society of South Africa 2015 *DEREBUS* (90).

consequences of not implementing such reform. The facts provided by this source pertaining to medical negligence claims in South Africa can be used as a point of departure for determining the trajectory of the consequences of not implementing legal reform.

Carstens, PA "Medical negligence as a causative factor in South African criminal law: *novus actus interveniens* or mere misadventure" 2006.

This dissertation will discuss medical negligence in the context of criminal law.[47] This article will be used to highlight the seriousness of medical negligence claims and offences and resultantly the need for such claims to be properly dealt with in the eyes of the law.

Van Eck, H "Medical Negligence" 2013 Joubert Galpin Searle Attorneys website at PowerPoint Presentation (jgs.co.za) [Accessed 14 April 2022].

This source will be utilised purely for the purposes of extracting analytical data. This presentation contains data pertaining to the numerical value of increases in medical negligence claims per year as well as the average value of damages awarded in such claims.[48] These statistics will be used to support the argument of the need for legal reform by emphasising the strain that medical negligence proceedings cause on the health care sector

[47] Carstens, PA "Medical negligence as a causative factor in South African criminal law: *novus actus interveniens* or mere misadventure" 2006.
[48] Van Eck, H 2013 Joubert Galpin Searle Attorneys.

3. CHAPTER 3

APPLICABILITY OF STATUTES

South African legislation is particularly silent in the context of medical negligence claims. Legislation fails to make any provisions for the litigation process in dealing with medical negligence claims. Additionally, legislation negates to establish requirements for the determining of negligence in the context of the medical profession.

3.1 CONSTITUTION

The Constitution, as being the supreme law of the land, will find its application in respect of this dissertation as well as all its accompanying case law and legislation. The Constitution of the Republic of South Africa was enacted to give recognition and acknowledgement to the injustices posed to South Africa in the past and to provide for a new democratic era which reconciles such past injustices, paves the way for an open society with a people's government, under which, all people are able to recognise their potential and improve their life's quality.[49]

3.1.1 Section 27 (2)

Section 27(2) of the Constitution imposes a duty upon the State to take reasonable measures (including legislative) to give rise to the realisation of the right enshrined in section 27(1),[50] to have access to health care services, including reproductive health care.[51]

As the right to receive health care services is included in the Constitution, it can be said that medical practitioners are charged with a special duty to give effect to this right through the offering of health care services. However, although the Constitution makes provision for the right to health care services, it does not provide for the right to quality health care services. Thus, the Constitution negates to include the standard of care which is required of medical professionals in the effecting of this right.

Resultantly, a gap is left in the constitutional and legislative framework for the provision of health care services which are of a specific quality. Legislation in South Africa should be inclusive of the express right to quality health care services. Such a right would, by implication, statutorily require that medical practitioners, as effectors of this right, conduct themselves in manner which is absent of negligence.

3.2 HEALTH PROFESSIONS ACT 56 OF 1974[52]

The Health Professions Act was enacted to provide a framework for the regulation of the conduct of medical professionals employed in South Africa. The HPA makes provision for the establishment of the Health Professions council of South Africa (HPCSA) and provides for the management of the processes of training, educating, registering and practicing of health care professionals in the country.[53]

[49] Constitution of 1996 Preamble.
[50] S27 (1).
[51] S27 (2).
[52] Act 56 of 1974.
[53] Act 56 of 1974.

The Act deals substantially with the necessary requirements which must be satisfied to be admitted as various medical practitioners. In the becoming of a medical practitioner, the training is rigorous and includes long periods of study and community service.[54] The Act further provides for provisions to be made by the relative council which aim to ensure that registered professionals continue to act in accordance with the standard as expected from them to retain their registrations.[55]

Due to the nature of the providing of medical services, it is necessary for the Act to set out strict regulations and requirements for the admittance onto the register of practicing medical experts. Although this Act does not expressly mention the standard of care which is expected of medical practitioners through the course of their work, the relevant requirements and management of practitioners speak to this standard. The tone and objectives of the Act emphasise that that medical practitioners are expected to conduct themselves in accordance with high ethical standards and extreme degrees of care when dealing with patients.

3.3 NATIONAL HEALTH ACT 61 OF 2003[56]

The National Health Act (NHA) was enacted in order to provide a foundation on which a uniform health care system could be established. The NHA seeks to provide for the maintaining of health care standards, the proper governance of health care services and to promote the objectives of the Constitution throughout.[57]

The NHA gives rise to the right to litigate in respect of medical negligence claims in South Africa. Section 18[58] provides that all persons who have received medical treatment at a health care facility, have the right to lodge a complaint regarding the nature of such treatment, and to have the treatment investigated.[59]

The Act subsequently provides for the setting up of relevant procedures by the respective municipal councils and provides that such procedures must be on display and effectively communicated to those who receive medical services.[60]

Through section 18, the NHA provides all people with the ability to; institute legal proceedings against any health care facility after having received unsatisfactory treatment, and to have such treatment investigated by the judiciary. Thus, the NHA provides the very foundation upon which all medical negligence claims are built.

However, while the NHA provides authority to institute legal proceedings in cases of medical negligence, it does not provide for any mechanisms to be used in such proceedings by the judiciary or legal practitioners. This can be said to be a large shortcoming of the Act, and more broadly, South African legislation, as too often, those who are experts in the legal industry are tasked with making decisions regarding the medical industry. The lack of medical expertise of the judiciary, coupled with the lack of aid provided for by legislation, makes for the many

[54] Act 56 of 1974 25.
[55] Act 56 of 1974 26.
[56] Act 61 of 2003.
[57] Act 61 of 2003.
[58] S18 of Act 61 of 2003.
[59] S18 (1) of Act 61 of 2003.
[60] S18 (2) (3) of Act 61 of 2003.

challenges now facing medical negligence cases. Such cases are increasing in size and value each year, without any solid backing or development from legislation. A lack of procedural mechanisms results in the often-disproportionate calculation of compensation claims.

As a result of the lack of clarity, regarding medical negligence claims, provided by South African legislation, courts have been required to deal with such claims in accordance with their own discretion. Resultantly, the current procedures and legal principles utilised by courts in dealing with medical negligence cases is almost entirely based on precedent.

4. CHAPTER 4

RELEVANT CASE LAW

Negligence is determined by way of the reasonable persons test. However, in respect of medical experts, this test is insufficient in establishing negligence as the reasonable person is not deemed to have expert knowledge in the medical field. Resultantly, negligence in medical cases only arises when medical experts stray from the typical conduct of what is expect of the reasonable expert in their position. Whether a legal duty rests on medical practitioners to conduct themselves in a particular manner is not expressly mentioned by South African legislation and therefore, the determining of negligence in such cases becomes problematic in a legal sense. However, case law has provided some certainty in this regard through numerous cases.

The case of ***Mukheiber v Raath,***[61] involved the instituting of action against Mr Mukheiber, a professional gynaecologist, who was alleged to have made a false and negligent representation to Mr and Mrs Raath, who, in believing in the truth of the representation, acted on it to their detriment.[62]

The husband and wife claimed that Mr Mukheiber had negligently made a misrepresentation to them regarding the completion of a sterilisation procedure on Mrs Raath. Having *bona fide* believed that such a procedure had been performed, the couple neglected to implement any form of birth control subsequent to their consultation with Mr Mukheiber and resultantly, Mrs Raath became pregnant. Mr. and Mrs Raath instituted proceedings against Mr Mukheiber in order to be compensated for economic loss which was to be suffered as a result of the birth of the child.[63]

The Cape High Court stated that in all probability, the case of the Raath couple was true. Olivier JA stated that Mr and Mrs Raath must have *bona fide* believed that a sterilisation procedure had been conducted due to the fact that they acted on such a belief (neglected to continue the use of contraception) to their own detriment, additionally, it was stated that this belief must have been created in the minds of Mr and Mrs Raath as a result of some action of Mr Mukheiber.[64]

The question of whether Mr Mukheiber had a legal duty upon him, as a medical professional, to conduct himself in a manner which could be described as cautious and accurate was posed by the court in determining whether such a representation had been unlawful or negligent.[65]

It was concluded that the standard of care usually applicable to lay persons (the *bonus parterfamilias)* was not applicable to professional or expert persons. Rather, the standard of care required by expert persons can be said to be much more onerous on such persons and should be comparable to other experts in the same field or profession.[66]

[61] (262/97) [1999] ZASCA 39; [1999] 3 All SA 490 (A).
[62] [1999] 3 All SA 490 (A) [2].
[63] [1999] 3 All SA 490 (A) [4].
[64] [1999] 3 All SA 490 (A) [22](i).
[65] [1999] 3 All SA 490 (A) [28](i).
[66] [1999] 3 All SA 490 (A) [32].

Finally, the court concluded that as an expert person (medical professional), Mr Mukheiber should have reasonably foreseen the possibility of causing harm to Mr and Mrs Raath as a result of his representation and should have taken preventative measures in this regard.[67]

The case of *Mukheiber v Raath and Others*[68] is integral in establishing how negligence is proven in medical negligence cases and involves and in-depth analysis of how negligence committed on behalf of a medical professional differs from that of a reasonable person in that a medical professional is required to exercise a higher degree of care and skill when dealing with patients.

The standard of care, which is specifically applicable to medical professionals, as established in this case, should be firmly planted into South African legislation in order to avoid lengthy court inquiries which strive to determine whether such a standard exists in light of the relevant facts.

In an article written by McQuoid – Mason,[69] the standard of diligence and care required by medical practitioners is discussed. This case can be used in support of the argument for legal reform in the submission of the requirement of the presence of medical assessors in medical malpractice cases. It can be argued that judicial officers (who are considered to be reasonable persons and not expert ones in the medical field) are, in themselves, unequipped to make determinations on medical negligence. Therefore, the presence of medical assessors during medical negligence cases will allow for a proper standard of care, relative to other professionals in the industry, to be applied in court. McQuoid - Mason[70] suggests this type of reform (the presence of medical assessors in medical negligence cases) in his article.

Ndou[71] finds favour in McQuoid's suggestion of having medical practitioners objectively partake in court proceedings regarding medical negligence. Ndou assesses medical negligence from the perspective of the law of evidence and makes an argument for the need to have medical professionals stand as witnesses in cases of medical negligence.[72]

Van Wyk v Lewis[73] found that medical professionals should be held to a higher standard of care and diligence than that of a reasonable person in determining negligence.

The journal article of McQuoid- Mason[74] can be viewed in light of this case. The article defines medical negligence and dissects such a definition in terms of what medical negligence can be said to comprise of. This case, supported by this article, is of importance as it forms the foundation of medical negligence in this research paper and therefore allows for the subsequent cases to build arguments of substance pertaining to legal reform in this regard.

[67] [1999] 3 All SA 490 (A) [33].
[68] [1999] 3 All SA 490 (A).
[69] McQuoid- Mason 2022 *SAMJ* (112).
[70] McQuoid- Mason 2022 *SAMJ* (112).
[71] Ndou, MM 2019 *SPECJU* (33).
[72] Ndou, MM 2019 *SPECJU* (33).
[73] 1924 AD 438 at 444.
[74] McQuoid – Mason 2010 *SAheart* (7).

Goliath v MESC for Health in the Province of Eastern Cape[75] is another case which deals with the standard of care required by medical practitioners as experts in their field. The plaintiff in this case had undergone a routine surgery at Dora Nginza Hospital.[76] Shortly after having received her treatment, the patient came to the realisation that surgical swabs had been left in her abdomen before the medical staff had sutured her wound closed. The swabs had to be surgically removed some months later resulting in numerous unforeseen medical costs incurred on behalf of the plaintiff.[77]

The court discussed the reasonableness test in establishing negligence in medical malpractice cases and held the defendant to the standard of care as expected from a medical expert in the field. This case echoes that which was established in *Mukheiber v Raath.*

The NHA has been of great assistance to the litigation of medical negligence claims, but still falls short in providing for procedural litigation mechanisms in respect of such claims. Thus, in this regard, there remains a grey area which is given no clarity from South African legislation. The dangers which can result from this apparent gap in the law are emphasised by the outcomes of numerous cases.

S v Van der Walt[78] pertains to a case regarding the sentencing of a medical practitioner based on evidence obtained from a textbook. Dr Van der Walt was a practicing gynaecologist and was sentenced to five years imprisonment after his negligent conduct resulted in the death of a woman who was his patient.[79] He approached the court with the objective of obtaining leave to appeal against his conviction and sentencing alleging that his previous trials had been unfair and an infringement of his Constitutional right to a fair trial.

However, the appeal court declared that the hearsay evidence provided by a Dr Titus was sufficient in proving causation in the State's case and that such evidence could be utilised in a fair trial against Dr Van der Walt. The court also found that Dr Van der Walt had infringed his patient's constitutional right to life, and that this infringement was of such a serious nature, to convict and sentence Dr Van der Walt.[80]

This case highlights the necessity of legal reform in medical negligence cases as criminal sentencing was handed down to the defendant on the basis of hearsay. Criminal charges ought to be much more onerous in terms of proving the burden of proof before a final sentence can be made, especially in cases of culpable homicide. The importance of this case lies in the fact that it emphasises the consequences facing the legal and medical industries should legal reform not occur.

The MEC for Education and Social Development of the Gauteng Provincial Government v Zulu[81] revolves around a dispute pertaining to the manner in which medical claims are paid

[75] (1084/2012) [2013] ZAECGHC 72.
[76] (1084/2012) [2013] ZAECGHC 72 [1].
[77] (1084/2012) [2013] ZAECGHC 72 [4].
[78] (CCT180/19) [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC).
[79] 2020 (11) BCLR 1337 (CC) [2].
[80] 2020 (11) BCLR 1337 (CC) [17].
[81] (1020/2015) [2016] ZASCA 185.

out on behalf of the defendants in such claims. In this case, Mrs Zulu brought an action against the MEC for Education and Social Development of the Gauteng Provincial Government (the MEC) in a claim for damages based on acts of negligence on the part of medical staff at Baragwanath Hospital which resulted in the brain death of her minor child (Wandile).[82]

The MEC averred that it could not be practically feasible to expect the defendants of medical negligence claims to make large lump sum payments to patients. Rather, the MEC contended, that compensation for damages should be made in instalments, periodically, as medical costs arise in the treatment of Wandile. Additionally, the MEC also requested that should a lacuna exist in this regard under South African law, the court should make an effort to reform such law.[83]

The request of the MEC to reform the law regarding the payment of compensational damages in medical negligence claims was dismissed by the court, but not on the grounds of having been an unreasonable request, but rather on the grounds of the MEC having insufficiently provided the court with evidence to prove that such reform was necessary.[84]

The court acknowledged in this case that the quantum for medical negligence claims are often calculated by "reasoned estimate", "sheer speculation" and "mere guesswork" on some occasions and that such calculations are deemed as being final and irreversible regardless of the occurrence of unexpected future events (costs).[85]

Thus, this case calls for legal reform in the process of handling medical negligence cases pertaining to the manner in which claims for damages are calculated and paid out. The article of Pienaar and van Gelder[86] will be discussed as it demonstrates how courts should possibly calculate medical negligence claims and compares this method to a case in which another calculation method was used.

An in- depth formula for the calculating of proportional and reasonable claims in medical negligence claims is provided by Pienaar and Gelder.[87] As emphasised in the Zulu case, the relevance of setting up a formula for the calculation of damages is imperative as the current legal framework lacks any sort of provision, therefore.

[82] (1020/2015) [2016] ZASCA 185 [1].
[83] (1020/2015) [2016] ZASCA 185 12.3.
[84] (1020/2015) [2016] ZASCA 185 [11].
[85] (1020/2015) [2016] ZASCA 185 [7].
[86] Pienaar, R; van Gelder, A 2015 *DEREBUS* (160).
[87] Pienaar, R; van Gelder, A 2015 *DEREBUS* (160).

5. CHAPTER 5

ANALYSIS OF AUTHORITATIVE SOURCES

The legislation pertaining to the provision of health care services in South Africa is relatively silent on the provision of such services in the context of medical negligence. While case law attempts to provide some legal certainty and structure regarding the judicial process of dealing with such cases, it remains insufficient to be applicable across the board as each case deals specifically with the unique issues in contention. The apparent *lacuna* created in this regard, calls for legal reform.

5.1 THE LEGAL POSITION AS ESTABLISHED BY THE RELEVANT LEGISLATION

5.1.1 CONSTITUTION[88]

Section 27 (2)

The Constitution is not silent on the provision of health care services in South Africa but provides for the fundamental right to have access to health care services in its section 27.[89]

As the right to receive health care services is enshrined in the Constitution, it can be said that medical practitioners are charged with a special duty to give effect to this right by offering health care services. However, although the Constitution makes provision for the right to health care services, it does not provide for the right to quality health care services.[90]

Therefore, the standard of care to be exercised by medical practitioners is not provided for by the Constitution. This, much like the lack of an express definition in the HPA, leaves room for uncertainty regarding this standard. It can be argued that negligent healthcare services or those which are provided under the pretences of malpractice can be detrimental to the functioning of the Constitutions s27. This is because cases of medical negligence can often leave the patients involved with injuries or complications which are deemed more severe than those which for which they wished to be initially treated, thus leaving this provision redundant in such cases.

Resultantly, for the constitutional right to the access of health care services to be fully beneficial in cases of medical negligence, the Constitution ought to include the right to access to quality health care services.

5.1.2 HEALTH PROFESSIONS ACT 56 OF 1974[91]

The core objectives of the Health Professions Act (HPA) include the providing of the necessary requirements to be met to qualify as a practicing health care professional in South Africa.[92]

[88] Constitution of the Republic of South Africa of 1996.
[89] S27 (2) of the Constitution.
[90] Towlson. S "The need for legal reform to address medical negligence in South Africa Part 4" 2022 Learn.
[91] Health Professions Act 56 of 1974.
[92] Act 56 of 1974.

According to the Act, registered and qualified medical practitioners are to maintain a particular standard of practice to retain their registrations.[93]

However, the Act does not expressly provide for the degree of this standard, which is required to be maintained, nor does it provide for any requirements of such a standard, although the Act does provide for the establishing of rules regarding this standard by the medical council.[94]

The nature of the medical profession is one which requires much responsibility and integrity on behalf of medical practitioners as they deal with the health care and fundamental rights of their patients. In this regard, the Act sufficiently provides for the strict adherence to the relevant requirements to be registered as a health care professional. However, while the tone and objectives of the Act emphasise the importance of medical practitioners conducting themselves in a manner which involves diligence, care and skill, the Act negates to make any such express mention of the standard of this care as required to maintain registration.

The lack of a precise legal definition of what constitutes the correct or acceptable standard of care to be practiced by medical professionals, thus leaves room for medical practitioners to fail to conduct themselves in accordance with the standard of care which is merely implied by the Act through its other prerequisites.
In this regard, the lack of an explicit definition regarding the standard of care to be maintained by medical professionals can be said to be a shortcoming of the Act. Resultantly, medical practitioners are given a certain amount of leeway as they are not statutorily required to refrain from conducting their practice negligently.

5.1.3 NATIONAL HEALTH ACT 61 OF 2003[95]

The National Health Act (NHA) provides the legal foundation upon which all medical negligence claims are built. Section 18[96] provides individuals with the right to institute a legal investigation into any treatment received at a health care facility should the individual believe that such treatment was unsatisfactory.[97] This provision of the Act is thus, integral in all medical negligence claims as it provides individuals with the right to seek legal relief and recourse regarding any received health care and thus, promotes the spirit of democracy and the Constitutional right to health care.[98]

While the Act can be said to integral in providing individuals with the right to seek legal recourse after having received unsatisfactory medical attention, the Act fails to provide for legal procedures and mechanisms to be utilised by the judiciary in such cases. Resultantly, the procedures to be followed in medical negligence cases are determined on a case-to-case basis by the relevant courts. The judiciary, while having professional knowledge in the legal industry, lack medical expertise and therefore, the procedures established by the courts in

[93] S26 of Act 56 of 1974.
[94] S26 of Act 56 of 1974.
[95] 61 of 2003.
[96] S18 of Act 61 of 2003.
[97] S18 (1) of Act 61 of 2003.
[98] S27 (2).

such cases often result in legal disparities (for example, the awarding of disproportionate compensation claims).

As the amount of medical negligence cases increase annually, as does the call for solid procedural mechanisms to be put in place by legislation. The legal position in the process of addressing and dealing with such claims from the perspective of the judiciary, seems to be, that there is a lack of such legal position. The Act can be said to be inadequate in addressing its core objectives in a modern South Africa and an amendment to the Act (last updated in 1974) may provide for the necessary medical criminal procedures to be followed by the courts. Should the courts be bound to the provisions of the Act in this regard, the subsequent cases flowing from the amended Act would create legal uniformity and certainty in the legal sphere of medical negligence claims.

5.2 THE LEGAL POSITION AS ESTABLISHED BY THE RELEVANT CASE LAW

Where legislation has fallen short in defining the standard of care required by medical practitioners, case law has, on numerous occasions, provided for such a standard. However, although these cases can be used a precedent for creating a definition of such a standard in subsequent proceedings, many of the cases are specific to the relevant issues in contention and therefore, subsequent presiding courts are likely to make their own inquiries into the required standard of care based on the fact before them.

The case of *Mukheiber v Raath*[99] found that a medical practitioner of Mr Raath's expertise (a gynaecologist) had a certain legal duty on him to act cautiously and accurately. The court delved into the reasonable person test (*bonus paterfamilias*) and determined that experts such as Mr Raath were exempt from the standard of the reasonable person, but rather the standard of an expert persons (a more onerous standard) in the relevant field should be applicable in the circumstances.

This case set the legal position for establishing the way negligence ought to be proven in medical cases. In cases not pertaining to experts in the medical field, the *bonus paterfamilias* test is used to prove negligence, however, *Mukheiber v Raath* established that such a test is insufficient in establishing negligence in medical negligence cases as medical experts are to be held to a higher standard of skill and care in conducting their practice.

In an article written by McQuoid – Mason,[100] the standard of diligence and care required by medical practitioners is discussed. The *Mukheiber v Raath* case can be used in support of the argument for legal reform in the submission of the requirement of the presence of medical assessors in medical malpractice cases. It can be argued that judicial officers (who are considered to be reasonable persons and not expert ones in the medical field) are, in themselves, unequipped to make determinations on medical negligence. Therefore, the presence of medical assessors during medical negligence cases will allow for a proper

[99] *Mukheiber v Raath and Others* (262/97) [1999] ZASCA 39; [1999] 3 All SA 490 (A).
[100] McQuoid- Mason "Liability of doctors based on negligence for culpable homicide: No need to change the law concerning medical negligence to establish special medical malpractice courts – use mediation and medical assessors instead" 2022 *SAMJ* (112).

standard of care, relative to other professionals in the industry, to be applied in court. McQuoid - Mason[101] suggests this type of reform (the presence of medical assessors in medical negligence cases) in his article.[102]

Ndou[103] finds favour in McQuoid's suggestion of having medical practitioners objectively partake in court proceedings regarding medical negligence. Ndou assesses medical negligence from the perspective of the law of evidence and makes an argument for the need to have medical professionals stand as witnesses in cases of medical negligence.[104]

The *Mukheiber* case is supported by the cases of *Van Wyk v Lewis*[105] and *Goliath v MESC for Health in the Province of Eastern Cape*[106] as the courts agreed that medical professionals are to conduct themselves in a manner which is in accordance with a higher degree of care and diligence when compared to that of a reasonable person in cases pertaining to negligence.

The case of *S v Van der Walt*[107] shines a light on the necessity of altering the way courts approach cases of medical negligence. The court relied on hearsay in the form of textbook evidence to criminally convict and sentence Dr Van der Walt for committing culpable homicide. It must be noted that courts should be reluctant to rely on mere hearsay evidence to produce their finding, especially in criminal cases where guilt is to be proven beyond a reasonable doubt. The dangers of remaining in the current legal *status quo* pertaining to the way the courts handle medical negligence cases is highlighted through this case. Courts should conduct thorough investigations into the issues surrounding medical negligence cases and refrain from relying on mere hearsay on which to base entire convictions.

Should no type of legal reform be affected to the legal industry in the context of medical negligence, more cases are likely to follow the suit of Van der Walt case, leading to the sentencing of medical practitioners based on insufficient evidence.

The MEC for Education and Social Development of the Gauteng Provincial Government v Zulu[108] case sets an example of how the procedure followed by the courts in managing medical negligence cases is unsustainable. The case saw that an extremely large amount of compensation was awarded to Mr Zulu on behalf of the Gauteng provincial department of social development. The MEC claimed that such a large amount could not be practically or feasibly made due to the financial strain already placed on the public health sector.

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[101] McQuoid- Mason 2022 *SAMJ* (112).

[102].

[103] Ndou, MM "Assessment of Contested Expert Medical Evidence in Medical Negligence Cases: A Comparative Analysis of the Court's Approach to the Bolam/Bolitho test in England, South Africa and Singapore" 2019 *SPECJU* (33).

[104] Ndou, MM 2019 *SPECJU* (33).

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

[106] *Goliath v MESC for Health in the Province of Eastern Cape* (1084/2012) [2013] ZAECGHC 72.

[107] *S v Van der Walt* (CCT180/19) [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC).

[108] (1020/2015) [2016] ZASCA 185.

The MEC also drew the court's attention to the fact that no law existed whereby compensation could be made in instalments as needed and that the procedure for dealing with such issues required legal reform. The court decided, based on a lack of evidence, that reform was not necessary. However, the court did acknowledge the fact that the value of compensation to be awarded in medical negligence cases is often not calculated according to a predetermined method and is based on estimates and speculations.

Thus, this case supports that the current handling of medical negligence cases is unsustainable in that the compensation to be paid on behalf of the public sector based on loose calculations. Such cases will see an apparent increase in the value of these claims as there is an absence of ceiling amount or limit for the amounts to be claimed. These cases will inevitably place strain on the budget of the public health care sector.

The very legal issues faced by the courts prompting their inquiries, highlights the lacuna which exists in both legislation and precedent regarding medical negligence. Therefore, the prospect of legal reform seems to be a beneficial solution to the issues faced by the courts in dealing with such cases.

6 CHAPTER 6

CONCLUSIONS

This research paper endeavoured to establish whether legal reform addressing medical negligence in South Africa was a necessary prospect, and if so, the paper further attempted to establish the best possible types of reform in addressing the issue facing the legal industry regarding medical negligence.

6.1 TO WHAT EXTENT HAVE THE RESEARCH QUESTIONS BEEN ANSWERED

Why legal reform is needed in South Africa to address medical negligence

After an analysis of the above-mentioned case law and journal articles, one can establish that significant pressure is placed on the medical sector, particularly on that of the public sphere because of the increasingly large amounts of compensation awarded by the courts in medical negligence cases. Furthermore, the courts follow their own varying procedures (rather than statutorily established procedures) when dealing with such cases which creates disparities from case to case and ultimately legal uncertainty. Additionally, medical practitioners have been sentenced through legal proceedings which have lacked legal certainty.

Therefore, it can be concluded that in order for medical negligence claims to be dealt with through a process of legality which is uniform and structured, legal reform in this regard is to take place.

Types of legal reform which could potentially be affected to bring about positive change

The types of legal reform which could be implemented to effect change in realm of medical negligence cases includes the following.

An amendment of the Health Professions Act

An amendment to the HPA to be inclusive of a fully comprehensive legal definition regarding the standard of care which is required to be practiced by medical practitioners in order to maintain their registrations. Such a definition may include a list of requirements which could be utilised by the courts in determining whether medical negligence had in fact occurred on behalf of the practitioner in question.

An amendment to the National Health Act

While the NHA has been successful in providing South Africans with legal recourse in the case of medical negligence, it is not helpful in providing courts with a procedure to be followed in dealing with the exercise of this right.

An amendment to this Act may include criminal procedural mechanisms for the specific dealing with of medical negligence claims and may include the requirement of having an objective medical professional present in all such cases to provide their opinions in assisting the court with their determinations.

Another amendment to this Act may include a method for the calculation of damages to be awarded in medical negligence claims as well as a provision for the payment of such compensation to be made in instalments should the necessary requirements be satisfied.

Mediation

To minimise the sheer number of medical negligence claims brought before the courts, the requirement of mediation before litigation could be introduced. It is likely that many medical negligence claims could be settled through mediation with the use of an objective mediator in order to reach an agreement.

6.2 FINAL REMARKS

Legal reform is needed to address medical negligence in South Africa. There are numerous avenues of reform available to assist both the legal and medical industries in dealing with such cases. Reform in this regard will alleviate the pressure placed on the legal industry, as courts will find themselves better equipped to deal with medical malpractice matters, furthermore, legislation regarding medical malpractice will be formalised creating legal certainty.

The medical industry will too benefit from legal reform in the context of medical negligence in both private and public spheres as legal reform in this regard will makes considerations of the resources of such sectors in the process of litigation.

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