REPORT:

MEDICAL MALPRACTICE WORKSHOP

HELD ON 3 MARCH 2017 AT HOGAN LOVELLS (SOUTH AFRICA)

IN RESPECT OF THE ADDRESSES GIVEN BY:

THE HONOURABLE NALEDI PANDOR, THE NATIONAL MINISTER OF SCIENCE, AND TECHNOLOGY;

THE HONOURABLE AARON MOTSOALEDI, THE NATIONAL MINISTER OF HEALTH;

AND

THE PRESENTATION GIVEN BY PANEL 1\(^1\): “NAVIGATING OUR WAY AROUND MEDICAL MALPRACTICE LITIGATION: MEDIATION vs LITIGATION”

1. This Report is to be read in conjunction with the Notes on the Addresses, which has been prepared by the author.

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\(^1\) Panel 1 was chaired by Dr. Herman Edeling, with the Panelists being: Judge Neels Claassen; Adv Alan Nelson SC; Dr Anthony Behrman; Adv Jacques Joubert; Dr Paul Dalmeyer; and Professor Kapil Satyapal. Their speaker profiles are set out in Annexure.
Introduction

2.

A Medical Malpractice Workshop was held on 3 March 2017 at the offices of Hogan Lovells (South Africa).

3.

The Workshop was a National Department of Health Initiative. It was hosted by Hogan Lovells (South Africa), and was sponsored by Constantia Insurance Company Limited. These organisations are to be complimented on an innovative, proactive and well-organised initiative.

Comment on Key Points Raised

4.

The author attended the Workshop by invitation and in his capacity as the Chairperson of the KwaZulu-Natal Branch of the South African Medico-Legal Association (SAMLA).

5.

The stated intention of the Workshop was not to duplicate what has already been done in describing the current medical malpractice crisis, but to seek solutions to the problems.
6.

In promoting the intention of the Workshop, the key points raised by the speakers are set out below, together with a comment on practical solutions to each of the key points raised. A specific point made by Justice Hlophe is dealt with first, before turning to the challenges and issues raised by Minister Motsoaledi and Minister Pandor, and then a discussion of the key points raised by the members of Panel 1.

7.

**Justice Hlophe was of the firm view that medical malpractice matters should first be mediated**

7.1 The author is given to understand that Justice Hlophe immediately implemented his approach by insisting that all medico-legal matters enrolled in the Cape High Court as from 7 March 2017 be mediated first. It will be most interesting and instructive to watch the results of this directive. Relevant data as to the success rate of this directive should be compiled, safely stored and made available to concerned entities.

7.2 **Comment:** The Honourable Judge’s attitude was, in the author’s opinion, particularly commendable, since it implemented a direct and practically effective approach to the issue. It is recommended that the initiative be more widely implemented.
Minister Aaron Motsoaledi raised the following challenges and concerns:

8.1 **Whether the problem was a medical, legal or governance problem.**

**Comment:** The author endorses the approach adopted by the Minister that the problem is multi-faceted, and is being faced in countries around the world. As the Minister pointed out, the origins of the problem are global in nature; but the solutions must be found in the uniquely South African context, with appropriate regard to challenges and solutions from around the world.

The remarkable advances in medicine, technology and human biology, coupled with the establishment of a rights-based culture in which the patient’s rights are respected and promoted, has led to a fundamental upheaval in the relationship between doctor and patient with attendant knock-on effects for the public healthcare sector, individual practitioners, insurers and the legal sectors.

It is in this space that the challenges raised by the Minister arise, and solutions to the challenges must be found. The particular points raised by the Minister are discussed against this background.

8.2 **There were a number of key areas of concern: Obstetrics, Neurosurgery, Neonatology and Orthopaedic Surgery**

(See the discussion at para 8.4 below).
8.3 There was a particular problem with Cerebral Palsy cases, with an issue regarding prescription only occurring about 20 years later.

Comment: This is a legal and legislative issue. It is the author’s view that legislative intervention will be necessary to alter the current position, which is currently governed by the Prescription Act, 1969.

8.4 There was a particular problem in the field of Obstetrics.

Comment: The work by SASOG must be mentioned as being incisive and ground-breaking. The model which is being developed is founded in sound medical practice, which synchronises with patients’ rights and has the result of improving the quality of medical practise while empowering clinicians in respect of potential malpractice lawsuits.

8.5 The medical solution

Comment: It is submitted that the medical solution is central to meeting the challenges on a coherent and effective manner. Simply put, without negligence there can be no successful claim for negligence. However, the challenge lies in devising a professionally and intellectually robust system for a medical solution. This will empower medical professionals and promote patient’s rights to professional healthcare services. In this regard, the pioneering work of SASOG in devising its BetterObs Programme cannot be too highly praised. It should serve as a template for other branches of the medical profession.
8.6 **The administrative solution**

The Minister must be complimented for tackling these challenges head-on, and for acknowledging the challenges in this regard.

8.7 **The legal solution**

8.7.1 **Contingency Fees**

**Comment:** This is a legal and legislative issue. It is the author’s view that legislative intervention will be necessary to alter the current position, which is currently governed by the Contingency Fees Act.

8.7.2 **Staggered Payments**

**Comment:** A recent test case in the Cape High Court partially opened the door to such an arrangement, provided it was done by consent. The Court held that legislative intervention would be necessary to introduce a non-consensual system. (Further details can be obtained from the author on request).
8.7.3  

**Mala Fide Claims**

**Comment:** It is the author’s view that the existing legal framework including criminal charges for dealing with such cases should be utilised. (See e.g. *Findlay v Knight; Udwin v May; May v Udwin*). [Citations will be inserted]

9.

Minister Naledi Pandor raised the question of researching the concept of mediation more fully.

The Minister commented positively on the concept of mediation, and expressed an interest in promoting further scientific/academic research into the area.

**Comment:** The Minister must be complimented on her commendable adherence to academic and scientific rigour, which will promote a sound and well-informed approach. In the interests of building on the Minister’s sentiments, the author advises that there is a considerable body of academic work available, with scientifically rigorous research and conclusions, which underpins and informs the proposals made in respect of mediation made by the Panel. (The author may be contacted for further information should this be required).

10.

Alan Nelson SC proposed that a clause be inserted into all contracts within the public and private sector consenting to a free pre-mediation meeting
The proposed clause (as duly amended after an intervention by Judge Claassen) is annexed hereto marked “D”.

**Comment:** This proposal is supported, and the initiative encouraged and promoted. If the State takes the lead in this regard, the private sector will follow. The proposed clause is flexible enough to be applicable to a range of practical scenarios (including a Peer Review process and programmes such as BetterObs); non-prescriptive, and therefore does not violate the Constitutional right of access to the courts; and in the author’s opinion will result in immediate and drastic reduction of the contingent liabilities faced by the State in respect of medical malpractice litigation.

11. **Dr Paul Dalmeyer proposed that the BetterObs Programme be used as a template for other branches of the medical profession**

**Comment:** See the discussion at para 8.4 above

12. **Professor Kapil Satyapal**

Professor Satyapal highlighted the fact that the medical profession needed to take ownership and responsibility for the situation.
Comment Professor Satyapal’s presentation served to underline the points made by the Minister of Health that the medical profession had an important role to play in meeting the challenges posed by the medical malpractice crisis.

13.

Dr Anthony Behrman

Dr Behrman pointed out that the challenge had grave potential consequences for the national economy, and highlighted the adverse working conditions of many medical practitioners.

Comment: The warnings about dire economic consequences are well-founded. The contingent liability of outstanding medical malpractice claims currently exceeds the annual budgets of many Provinces. An urgent and effective response is needed.

I.T. Dutton

Chairperson

KwaZulu-Natal Branch

South African Medico-Legal Association

8 March 2017