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The SAMLA Review

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MEDICO-LEGAL MORASS

The buzz word currently in the medico-legal scope is reform. The diversity and extend of the challenges faced to enable reform however is vast and it seems that no single process will address such. Minister of Health, Dr Joe Phaahla, in response to a parliamentary question released the following contingent liability figures.

Claims by province 2020/2021

Province	Number of claims in 2020/2021	total claimed in 2020/2021	Average per claim
Western Cape	65	530000000	8153846.1538462
Northern Cape	15	532000000	35466666.666667
North West	66	470000000	7121212.1212121
Mpumalanga	132	1058000000	8015151.5151515
Limpopo	215	1764000000	8204651.1627907
KwaZulu-Natal	329	728000000	2212765.9574468
Gauteng	77	874000000	11350649.350649
Free State	47	513000000	10914893.617021
Eastern Cape			

Medical negligence claims against the state are alarming and disturbing at the same time. There seems generalized consensus that the root of the evil is the challenge of improving the quality of care provided in the public healthcare system.

Attempts at changing the manner in which medical negligence claims are handled include Government reintroducing the State Liability Amendment Bill in Parliament. In 2015, the health minister asked the South African Law Reform Commission (SALRC) to investigate the matter with a discussion paper published at the end of 2021. The closing date for submissions on the SALRC discussion paper was 28 February 2022.

UNPACKING THE SALR DISCUSSION PAPER

Cerebral palsy claims form around 50% of all medico-legal claims in South Africa. It is highlighted in the discussion document that no legislation currently exists in South Africa specifically to address legal claims in the medical field. Claims resulting from medical negligence is thus dealt with under the common law. There is disagreement whether this is the right approach or whether specific legislation to address the problem is needed. It is concluded by SALR that the extent of medical negligence litigation against the state has reached a level where it is adversely and prejudicially impacting in a serious manner on service delivery in the public sector and endangering the constitutional right to have access to health care services. It is thus imperative that a workable solution is found to deal with the exponential increase in claims. Several proposals on alternative affordable and, thought to be, achievable solutions are contained in chapter 9 of the discussion report by SARL.

There is general consent that improving the quality of care in the public health sector (which is agreed to be sub-standard) should result in fewer cases of medical neglect and thus fewer legitimate claims against the state. Several proposals on how this is to be achieved is made in the report with some discussed here.

Employing and retaining more properly qualified healthcare workers. This is however complicated as alluded by Dr Maggie Ravhengani, Director for Human Resources for Health in the National Health Department who pointed out that there are currently more than 22,000 vacancies and that new appointments are affected by budget constraints. Proposals are made for better management at various levels of the healthcare system to curb / prevent fraud and corruption. Need for improved and safe record-keeping systems has been highlighted.

Need to distinguish valid claims from invalid claims are highlighted as being imperative, and it has been advocated that cases of fraud and collusion in this area be prosecuted and stiff sentences be doled out if fraud is proven. Further proposal here includes setting up special courts specifically for medico-legal claims. It's suggested that judges are accordingly trained and should ideally be assisted by expert assessors. Mediation is proposed as a means of saving expenses, and some have recommended that courts should only consider claims if mediation had already been tried and failed.

Compensation is a complicated point. A balance needs to be found between limited funds available in the coffer vs fair compensation for loss. There is a rumbling in the halls that instead of the problem at hand being addressed (sub-standard care), the process of reform is a way of reducing governments liability for sub-standard care.

We all know that in some recent court judgments there has been a shift towards structured settlements vs lump-sum payments. Opposition is expressed against this shift, especially the notion (seen by many as controversial) that intervention is to be provided by state healthcare services, regarded by many as being in a parlous state.

It is a fact that highly skilled and qualified healthcare workers make unintentional errors because humans sometimes make mistakes and not because of negligence.

There is a notion that healthcare workers should be afforded the opportunity to collectively discuss issues around mistakes without fear of being prosecuted as discussion can serve as a means of preventing repetition of such. There is opinion that the current adversarial environment does not allow for this but rather repeated error. Yet, there is cause to conclude that where serious neglect is proven, it should result in people losing their licenses to practice medicine and being held responsible through the law. In our previous newsletter we had an article on the identified need for government to initiate a review into culpable homicide law and its application in a healthcare setting.

"It must be stated emphatically that legislative intervention alone cannot address the myriad challenges faced by the public health sector. As is often said, there is no claim without negligence. Legislation can address procedure, establish bodies to deal with some issues, create interventions that do not currently exist, alter the method and timing of compensation, and so forth; but legislation cannot address systemic problems with leadership, governance, management, budgeting, and procurement, quality of care, lack of skills, personnel shortages, training, attitudes of staff and maintenance of facilities and equipment. The best legislation in the world will not make any difference unless it is applied, implemented, complied with, and monitored," according to the SALRC discussion paper.

CP CONFERENCE

SAMLA held their first CP Conference on Saturday 7 May. The conference was hosted by the Gauteng and Western Cape Provincial branches and was organised by Stacey Aires (Gauteng) and Renier Jacobs (Western Cape). It was a professional, well-balanced conference with speakers from both Plaintiff and Defence perspectives. The conference was hosted by a professional conference-hosting company, who ensured that everything ran smoothly, despite load shedding. The speakers were:

- Mr Nic van der Walt SC (Advocate) who spoke on the constitutionality of the courts developing the common law in CP litigation.
- Dr Natalie Benjamin-Damons (Physiotherapist) provided detail about Centers of Excellence, what are they, who do they cater for, and services offered by them.
- Mr Enver Swartz (Attorney) spoke about The Public Health Defense raised by the State Attorney in cases of CP litigation against the State that also included a discussion of relevant case law.
- Prof GS Gericke (Specialist Medical Geneticist) did a talk on the challenges of using genetic information in CP litigation and possible emerging new insights.
- Ms. Deborah Jacobson (Dietician) and Ms. Kathryn Schie (Speech & Language Therapist) spoke about indications for the prescription of a PEG.
- Mr. Kobus Meier (Attorney) topic of discussion was on administrative and logistical problems in the office of the State Attorney.
- Dr. S Mandondo (Obstetrician and Gynaecologist) provided some insight on the experience of the Department of Health, with reference to CP, litigation, and records.
- Mr. Ian Dutton (Advocate) did a talk on assembling evidence for trial, pre-trial preparation, Rules 35 to 38 of Court.
- Dr. Karen Levin (Speech & Language Therapist) provided her insights on AAC, Cerebral Palsy and Medico-Legal claims.

- Mr. Andrew Church (Rodel Fiduciary) finished off the day by providing a talk on the current judicial view of, characteristics of, and practical considerations in the administration of special trusts. Comparison between a curator bonus and a special trust.

The topic of CP litigation is broad. We hoped to provide a "taste" of just some of the issues and aspects pertaining to the litigation process and we have already had some suggestions which may lead to a second conference in the future.

SAMLA would especially like to thank our headline event sponsor, The Christopher Group, whom without it would not have been possible to host such an event of this nature.

TELEMEDS

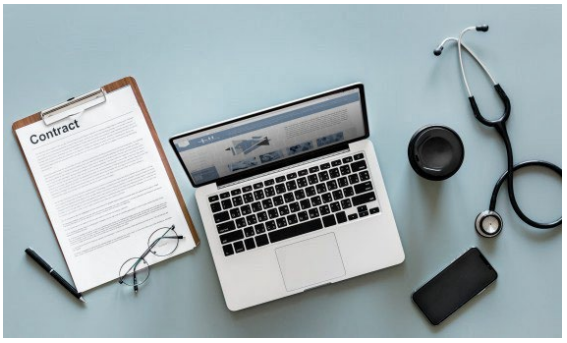
Telemedicine refers to the practice of medicine using electronic communications, information technology or other electronic means between a healthcare practitioner in one location and a healthcare practitioner in another location for the purpose of facilitating, improving, and enhancing clinical, educational, and scientific healthcare and research.

Telemedicine in South Africa is required to be in line with applicable legislation, in particular the National Health Act No. 61 of 2003 (as amended). The National Department of Health's e-Health Strategy South Africa (2012 – 2016) specifically refers to Telemedicine as "a tool that could bridge the gap between rural health and specialist services".

Healthcare practitioners registered with the HPCSA who provide Telemedicine are required to do so in line with the provisions of the Health Professions Council Act No. 56 of 1974 (as amended).

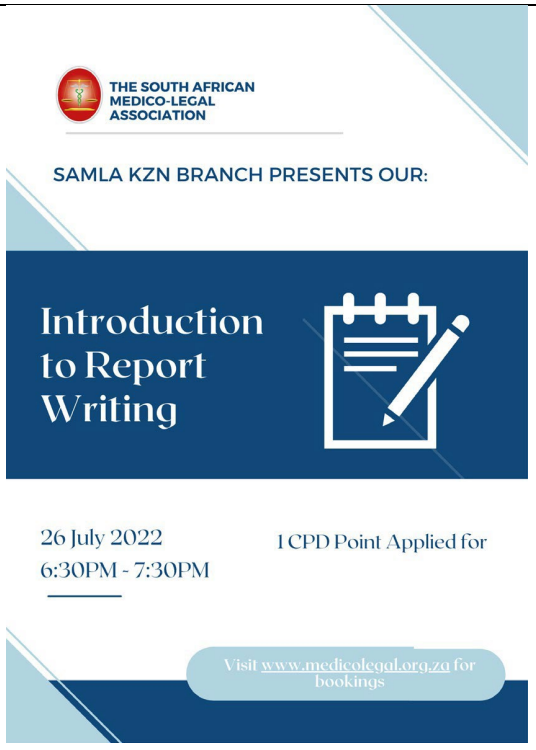
Telemedicine is not seen as a replacement for normal "face-to-face" healthcare, but an add-on meant to enhance access to healthcare for South Africans who are disadvantaged and outside of the health services reach, such as specialists.

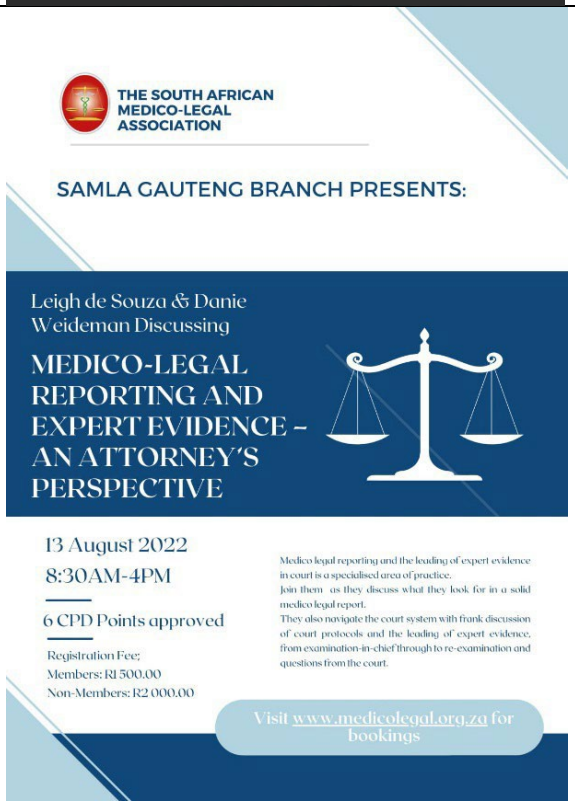
Telemedicine should be utilised within the HPCSA ethical guidelines to ensure that healthcare practitioners facilitate, improve, and enhance clinical, educational, and scientific healthcare and research, particularly to patients from under serviced areas.



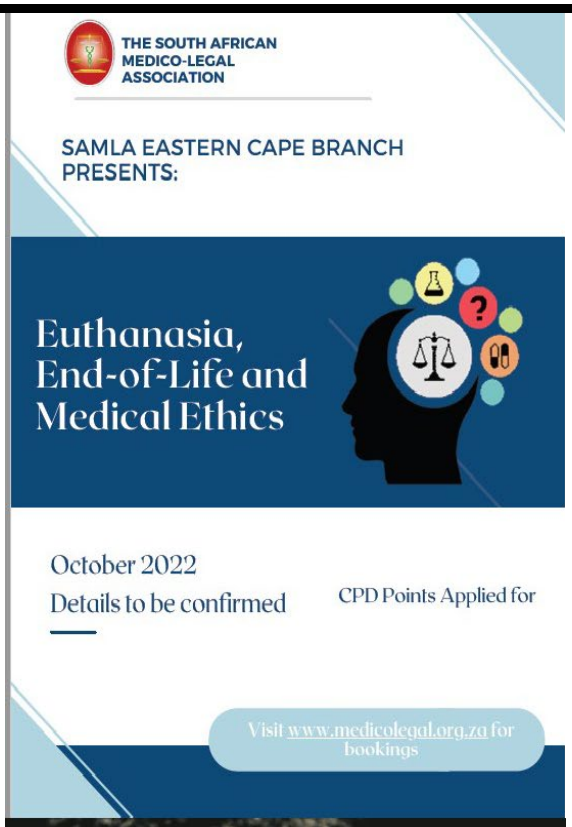
UPCOMING TRAINING EVENTS

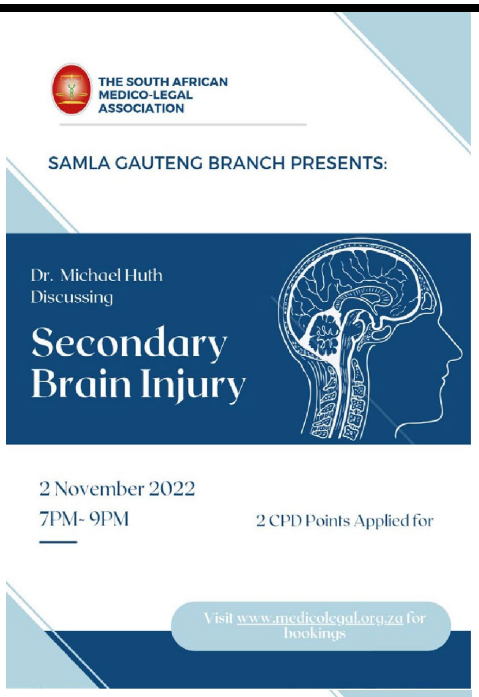
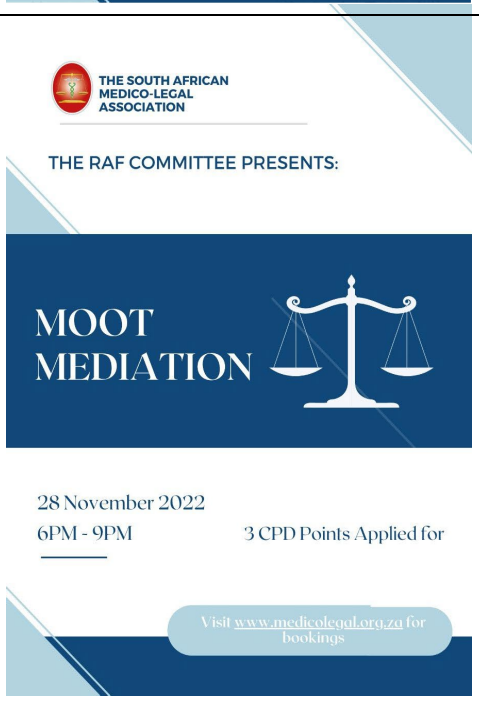
MONTH	COURSE / CONFERENCE	SPEAKERS	PROVINCES INVOLVED
31 MAY 2022			Gauteng

28 JUNE 2022		Professor Henry Lerm and Ms Desiree David	Western Cape
26 JULY 2022		To be confirmed	KZN

10 AUGUST 2022			KZN
13 AUGUST 2022		Leigh De Souza Danie Weidemann	RAF Committee

27 AUGUST 2022		Professor Henry Lerm and Dr & Adv Anton van den Bout	Western Cape
17 SEPTEMBER 2022		Adv. André Oosthuizen SC and Adv. Brigitta Schwulst	Western Cape

OCTOBER 2022		***Details to be confirmed***	Eastern Cape
25 OCTOBER 2022			Western Cape

2 NOVEMBER 2022			Gauteng
28 NOVEMBER 2022			National endeavour as the committee members preparing same are from Gauteng, KwaZulu-Natal, and the Cape Provinces

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