

Looking at mediation to resolve medico-legal disputes

More appropriate forms of dispute resolution between patients and healthcare providers need to be implemented to reverse the medico-legal crisis currently playing out in South Africa



Justice John Hlophe, judge president of the Western Cape High Court

The litigation process in relation to medico-legal matters typically takes seven years in South Africa. This means that patients who are deserving of compensation must wait before funds for their care can be accessed. Similarly, doctors who acted in accordance with their professional standards have to endure long periods before their names can be cleared of any alleged misconduct.

“The results of mediation, on the other hand, are available within days,” said Justice John Hlophe, judge president of the Western Cape High Court. He explained that mediation is a process whereby disputants engage independent and impartial third parties to assist them in resolving their differences.

Complex issues

During facilitated discussions, the needs, interests and concerns of those in conflict are taken into account and final solutions agreed mutually between them. This contrasts with litigation where public officials decide the outcome of any conflict. Who is ‘right’ and ‘wrong’ is proclaimed on the basis of the application of the law to the facts of the case as understood by the judge.

“Considering the complex nature and intricacies of legal as well as clinical issues pertaining to medico-legal cases, this is a real challenge,” said Hlophe. “We do not have judges in South Africa who are also doctors. Instead judges have to rely on the testimony of clinical specialists in their interpretation of a case and their final decision-making.”

Win/win solutions

This does not mean that mediation is without its hurdles. “In China, there is one mediator per 300 citizens”. In South Africa, mediation as a means to achieving morally right and fair outcomes is, however, relatively new and experienced mediators, especially those with an interest in medical cases, remain scarce.

"When individuals seek the path of litigation, there are winners and losers. The winner takes all."

During successful mediation, however, parties strive to achieve win/win solutions. "Being a retributive punitive process, litigation destroys relationships between patients and doctors," he said. This contrasts with mediation, which aims to bring people together during times of strife. The fact that mediation can avoid unnecessary legal costs that may run into millions of rands is another advantage.

Those interested in conflict management often refer to alternate dispute resolution (ADR), when speaking about mediation. According to Hlophe, it would be preferable for the abbreviation to be interpreted as appropriate dispute resolution. "It is really about finding the most appropriate way of addressing differences between aggrieved parties. There will always be cases where litigation is the most suitable option."

For the majority of disputes, however, patients and their doctors are likely to be served better by means of a consensual process that is facilitated by an experienced mediator.

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