



The SAMLRA Review

Newsletter of the South African Medico -Legal Association
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THE HIRED GUN

BRIEF WRITTEN BY PROF HENRY LERM

Several Judges have recently, after hearing expert evidence, bemoaned the lack of independence and objectivity shown by some of the experts who in their judgments, shown bias. That has caused Davis J in the case of Schneider NO and Others v AA and Another 2010 (5) SA 203 (WCC) to caution. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case' nor does he or she 'assume the role of an advocate' (at 211J-212B). In this context, similarly, it was stated more than a century and a half ago, by Lord Harper in an English case of *Arbinger v Ashton* (1873) 17 LR Eq 358 at 374, 'Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witness, rather consider themselves as the paid agents of the persons who employ them.'

To our eminent medico-legal experts at SAMLRA, have you ever found yourselves in that vulnerable position? If you have or ever contemplated but resisted the temptation, be inspired by the guidelines ordained by Creswell J in the locus classicus in the case of *National Justice Compania Naviera SA Co Ltd ('The Ikarian Reefer')* [1993] 2 Lloyd's Rep 68 at 81-82). The learned Judge on the duties and responsibilities of an expert is most instructive when he stated as follows: '1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.'

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2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate. 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion. 4. An expert should make it clear when a particular question or issue falls outside his expertise. 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one.'

These are extracts from an article written by Prof Henry Lerm 'Beware the hired gun' Are expert witnesses unbiased? De Rebus May 1, 2015. This serves as a preview to a workshop planned for later this year when you may all participate in unpacking this important topic.

THE ESSENCE OF THE QUANTIFICATION ISSUE

Written by Dean Berndt and JP Venter

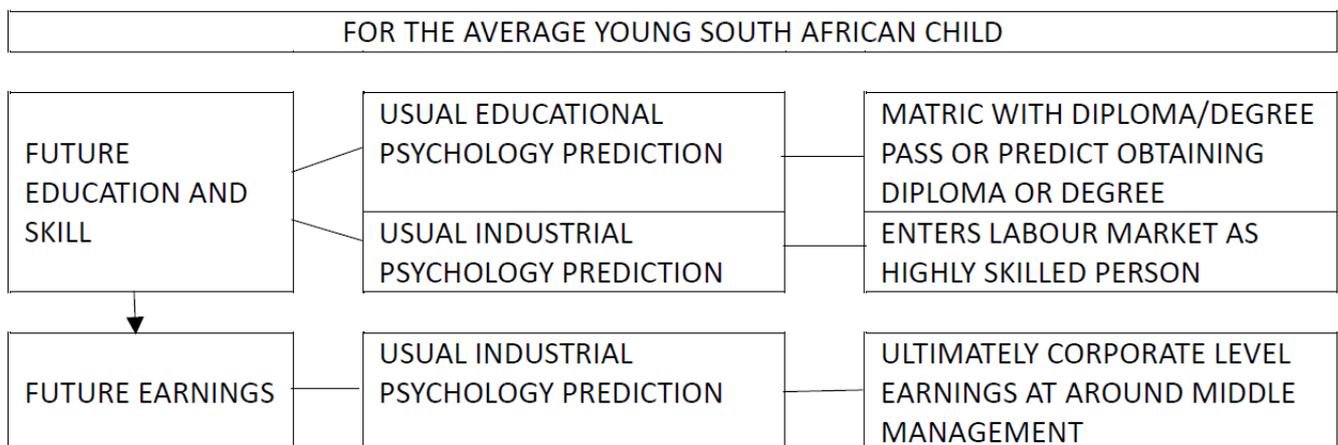
The personal injury space is plagued by certain issues. The Road Accident Fund and our Departments of Health are faced with huge personal injury claims, many of which are over-inflated. One could say that these organisations are plagued by maladministration, corruption and incompetence and that many claims against the health departments originate because of this. However, the imperfections in these organisations does not mean they should be plundered in the way they are via over-inflated claims. They remain national assets worthy of protection. One of the core reasons that claimants get away with over-inflated claims is that expert opinions support such over-inflated claims. It is further so that especially claims for very young children are open for over-inflation as there are general practice habits among experts that are so wide-spread that one could say they are simply accepted normal practice. Two main categories of experts are involved: Educational Psychologists and Industrial Psychologists. Educational Psychologists: A very common practice among these experts is to predict that average children, in the absence of the injury, would have matriculated and then imply – or directly predict that such children would have completed a diploma or a degree. Among industrial psychologist a very common practice habit is to predict that average children in the absence of the injury, would eventually earn according to the earnings found in consultant surveys. Such surveys reflect only the earnings of companies that can afford to participate, such as large corporates or wealthy smaller organisations.

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These earnings are usually much higher than the earnings reflected by Statistics South Africa from the national base of earners. Injured minors have not completed their schooling and require the services of educational psychologists to predict educational outcomes for the purpose of these claims. If average children are predicted to complete matric it follows that the common outcome of the educational psychologists would be a matric pass. Such matric passes are then usually predicted to be at a level that would allow diploma or degree studies. Alternatively, educational psychologists often do a direct prediction that an average person would have completed either a diploma or a degree. To explain the issue, a graphic illustration is used to simplify the argument. See Graphic A and Graphic B. The combined effect of the educational psychology and the industrial psychology predictions is that claims are in general about twice the size of what the national statistical data suggests.

Although there has been extensive criticism for many years about the predictions of educational psychologists and industrial psychologists, little has changed. Actuaries, who are familiar with our national statistics, are acutely aware of the discrepancy between what is predicted and what the data suggests. The educational and earnings predictions of claimants, however, do not fall within their ambit of expertise and they defer to the opinions of the appropriate experts within the claims process. The legal system forces them to use predictions that are often at odds with the national data, which is cause for concern.

GRAPHIC A: PRE-INJURY PREDICTED OUTCOMES



MEDICO LEGAL CONFERENCE – LIMPOPO

(SAMLA) represented by Dr Thomas Mogori Mogashoa

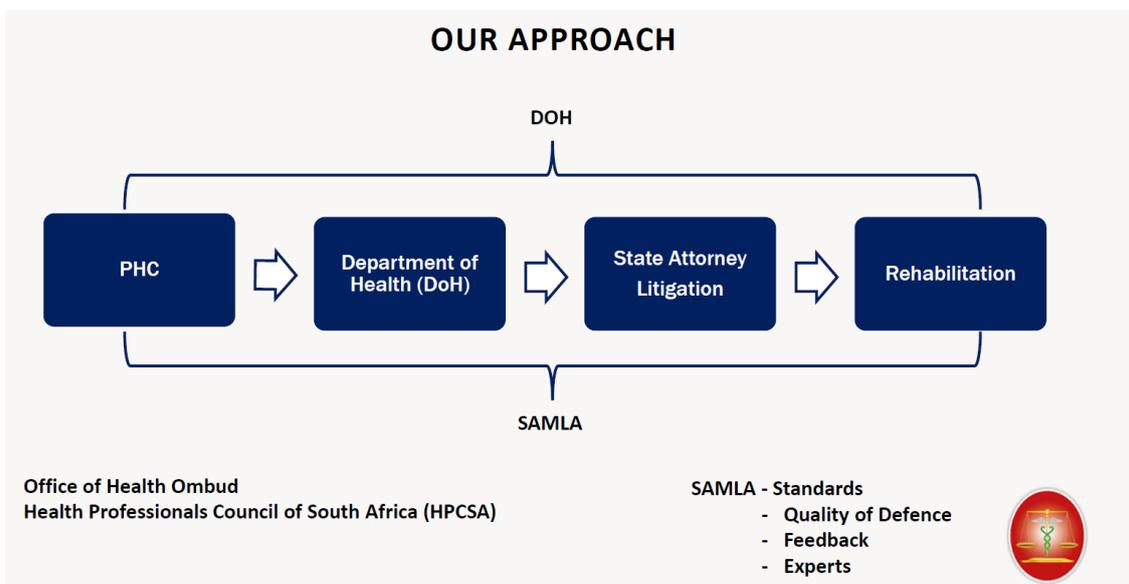
SOMETHING ABOUT THE SOUTH AFRICAN MEDICO-LEGAL ASSOCIATION (SAMLA)
The SAMLA objectives and mission statement include the following:

The SAMLA objectives and mission statement include the following:- to “Advance the Inter-Relationships between Medicine and Law” and to “Promote Excellence in Medico-Legal Practice”, by “Promoting Dialogue and Mutual Understanding between Members of the Involved Professions, guided by “Justice, Ethical Practice and Constitutional Values”.

SAMLA is 23 year old. It is an impartial, independent, non-profit organization.

The organization is funded by membership (490 members) contributions, donations and funds generated through seminars. SAMLA advances and promotes educational and other similar activities which enhance and complement the interaction between medicine and law from within the health and legal professions.

SAMLA comprise of a group of concerned South Africans who offer their collective expertise and goodwill to advise stakeholders on the medico-legal issues in our country. We are acutely aware of the human suffering, loss of economic productivity and multi-billion rand financial losses that this medico-legal crisis presents.



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DOH INVITE DESIGNING SOLUTION TO DEAL WITH THE MEDICO-LEGAL CASES FROM A CLINICAL AS WELL AS LEGAL POINTS OF VIEW

Assistance sought in areas of--Best Practice (The 2023 SAMLA Conference Theme in October).

-Developments in Law (SALRC and Eastern Cape Province TM obo BN 36/2017).

-Case Research

-Case Management

DOH REQUIREMENT PREVENTION (INSIGHTS):

- Standards maintenance (MEC mentioned continuous development of midwives).
- Medico-legal training through feedback from current cases.
- Triage of high exposure areas (cases/district/population/value).
- Accountability (HOD mentioned consequences for providers/executive).
- Bedside manner.

INCIDENT MANAGEMENT (INSIGHTS):

- Record keeping (Who keeps normal vs incidents records?).
- Leadership involvement (Ntate Mawasha Batho Pele).
- Bedside events handling.

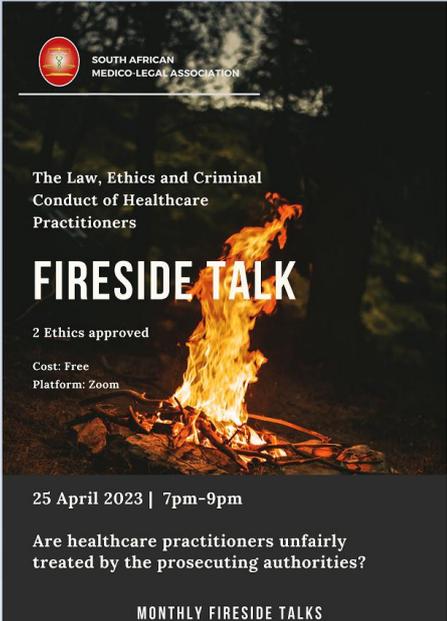
LITIGATION MANAGEMENT (INSIGHTS):

State Attorney

- ADR (38 Medical Negligence, 100 RAF Mediations conducted by SAMLA)
- Assessors (Involvement of Academic Institutions).
- Certificate of Merits for both sides (Prima Facie).
- Feedback loop (Clinical and Nursing Managers).



UPCOMING TRAINING EVENTS

Date	Topic	Proposed Presenter
<p>25 April 2023 19h00-21h00</p>  <p>The Law, Ethics and Criminal Conduct of Healthcare Practitioners</p> <p>FIRESIDE TALK</p> <p>2 Ethics approved</p> <p>Cost: Free Platform: Zoom</p> <p>25 April 2023 7pm-9pm</p> <p>Are healthcare practitioners unfairly treated by the prosecuting authorities?</p> <p>MONTHLY FIRESIDE TALKS</p>	<p><i>The Law, Ethics and Criminal Conduct of Healthcare Practitioners (Seminar) at no cost.</i></p>	<p><i>Prof Henry Lerm Adv Johan Engelbrecht Adv/Dr Anton Van den Bout</i></p>
<p>24 May 2023</p>	<p><i>Medico-legal report writing</i></p>	<p><i>IP -Dr Sharon Munyaka PT – NBD/Stacey OT - TBC Nursing – Prof Stellenberg Neonatology - Carlien Medical-Dr Thomas Mogori Mogashoa</i></p>
<p>29 July (Half day) 2023</p>	<p><i>Informed Consent</i></p>	<p><i>Prof Lerm</i></p>
<p>TBC **Full day (face to face)</p>	<p><i>Mock Trial Venue – Jhb/Pretoria/Midrand</i></p>	<p><i>TBC</i></p>

We hope to introduce the Foundations Course in the second half of the year (July-August 2023). This course will not be done in person. We will provide more detail soon.

NEWSFLASH!!!

Please note that SAMLA has appointed a full-time admin coordinator / manager who will commence duty on 1 May 2023.

****DON'T FORGET TO FOLLOW SAMLA ON OUR Facebook, LinkedIn and official Website****

