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Our Reference: GS17-19

BY E-MAIL: manager@emlct.com

14 June 2019

The Chairman
South African Medico-Legal Association

FOR ATTENTION: THE HON JUDGE NEELS CLAASSEN

Dear Judge Claassen

SUBMISSION FOR CONSIDERATION BY THE PRESIDENT REGARDING MEDICAL MALPRACTICE AND NEGLIGENCE CLAIMS / CASES IN SOUTH AFRICA

Attached please find a brief submission (Annexure) regarding the abovementioned problem, from the perspective of a forensic pathologist who is routinely involved in the medico-legal investigation of fatal outcome cases where medical negligence may be implicated in the causation of such deaths.

Yours sincerely

A handwritten signature in black ink, appearing to be 'G Saayman', written over a light blue circular stamp.

PROF G SAAYMAN
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THE MEDICO-LEGAL INVESTIGATION OF NON-NATURAL DEATHS - WITH PARTICULAR REFERENCE TO PROBLEMS ASSOCIATED WITH THE INVESTIGATION OF DEATHS WHERE NEGLIGENT MEDICAL CARE MAY BE IMPLICATED AS PRIMARY OR CONTRIBUTORY CAUSE OF DEATH

PROBLEM AREA NO. 1:

COMPETENCE AND INDEPENDENCE OF DEATH INVESTIGATION SERVICE IN SOUTH AFRICA

- South Africa has one of the highest non-natural death rates in the world, primarily as a result of an exceptionally high rate of interpersonal violence and homicide - but also due to one of the highest rates of suicide *and* one of the highest rates of road traffic fatalities in the world. For every fatal outcome case there may be as many as 10 non-fatally injured victims - all of which constitute a very heavy burden on our health care services and subsequent legal / judicial processes - such burden perhaps even precipitating substandard medical / nursing care and thus resulting in claims of negligence (i.e. "adding insult to injury").
- Reliable and/or accurate figures are not available, but it is likely that approximately 80,000 non-natural deaths take place in South Africa every year - all of which require formal medico-legal investigation, as prescribed in terms of (*inter alia*) the Inquests Act. Unfortunately, there are only approximately 50 practising specialist forensic pathologists in the country - which inevitably means that almost 80% of medico-legal autopsies have to be performed by non-specialist medical practitioners (some of which may hold a diploma in forensic medicine but who are *not* pathologists). Expecting of a non-specialist forensic pathologist to adequately perform such death investigations, inclusive of conducting or coordinating the full spectrum of scientific investigations and reporting which may be required in such cases, is perhaps similar to expecting of a general medical practitioner to perform a mastectomy or to insert a coronary artery stent...
- Section 56 of the Health Professions Act states that every death where the administration of medical care (in the form of ANY diagnostic, therapeutic or palliative action), is deemed a non-natural death and must be referred for forensic medical investigation in terms of the Inquests Act - falling under the joint jurisdiction and responsibilities of the Forensic Pathology Service (FPS) and the South African Police Service (SAPS).

- In many of our larger cities (for example, Mbombela / Nelspruit, Kimberley, East London, etc) there are no specialist forensic pathologists - despite the fact that tertiary level specialist services (ranging from O & G to neurosurgery, etc.) may be available in those centres and may have been involved in the treatment of a deceased person.

Inevitably then, in any case where medical treatment (or lack thereof) may be implicated in the fatal outcome in a patient, the medico-legal investigation and autopsy will reside under a non-specialist medical practitioner - which is likely to constitute major problems for or during subsequent legal or professional review.

It is unreasonable and beyond the scope of professional competence of a police officer, trained as a homicide detective, to take responsibility (i.e. carrying the docket”) for the investigation of such “procedure related” deaths. These are generally highly complicated cases, involving one or more medical specialities and surgical procedures/interventions, usually against the background of pre-existing morbidity / disease.

The vast majority of cases of alleged medical mismanagement and associated fatal outcome, derive from state hospitals/institutions. Provincial health authorities are then inevitably implicated as the guilty or at least interested parties - yet are indeed the “owners” of the death investigation process (through the FPS, which also resides under the provincial departments of health). It is clear that there is a potential conflict of interest here - and that the potential exists for abuse (such as perhaps inadequate investigation and/or inappropriate access to information). Indeed, it is highly likely that the vast majority of such deaths (i.e. potentially implicating medical mismanagement) are NOT being reported for medico-legal investigation. This cannot be deemed to be in the interests of next of kin.

The legal maximum of “justice must not only be done, but it must also be *seen* to be done”, dictates that the investigative agency charged with such cases should be autonomous, completely objective and professionally competent - as would be the case with independent state agencies like medical examiners and/or coroners (USA, etc). Placing Forensic Pathology Services within the domain of provincial health authorities, further undermines resource allocation as this functionality is generally not seen by provincial health administrators and managers as a true “health care” function.

PROBLEM AREA NO. 2:

COMPLEXITY, MULTIPLICITY AND COST INTENSIVENESS OF MEDICO-LEGAL AND JUDICIAL INVESTIGATIVE PROCESSES IN CASES OF POSSIBLE MEDICAL NEGLIGENCE

In cases where poor or negligent medical assessment or care may be implicated in the demise of a patient, it is prescribed process / protocol for some form of in-house review

or departmental investigation to be conducted. This may be by means of clinical audit committee review or by formal **disciplinary review**, etc.

In all such cases, it is furthermore mandatory that the matter be reported (as stated above, in terms of the Inquests Act), to the SAPS and FPS, for formal medico-legal investigation of death (including autopsy, etc). In most cases there would be the subsequent holding of formal **inquest proceedings** in a court of law - which will involve multiple legal parties (including representatives acting on behalf of nurse practitioners, one or more medical practitioners, hospital management and/or family members - often assisted by medical experts (with even the presiding officer being assisted by one or more expert medical assessors). Clearly, this is an extremely cost intensive and often protracted, process.

- It may well be that the NPA then (subsequent to formal inquest proceedings) brings **criminal charges** against the nurse or medical practitioner who may be implicated - once again, resulting in formal, adversarial and very cost intensive proceedings (not to mention, the emotional burden on the healthcare professional and the next of kin).

- Parallel to and quite independent of the criminal proceedings which may be instituted, **civil litigation** may also ensue - bringing once again huge financial and emotional burden to all parties concerned.

- Last but not least, it is likely that **professional disciplinary** proceedings (HPCSA and/or Nursing Council) will be instituted against the health care worker, once again requiring formal representation by legal counsel and the participation of expert medical witnesses.

- It is clear that the emotional burden and financial strain on professional practice and direct costs associated with the legal process and representation may be enormous - with up to **5 formal legal investigative processes** arising from one single incident (which may at the end of it all, result in a finding of the doctor or nurse NOT being culpable!). Does this not constitute some form of infringement of the rule of "double jeopardy" for doctors / health care workers?

- It is strongly advocated that consideration be given to the implementation of a system whereby there will be the holding of a single, inquisitorial and non-adversarial investigative process or forum, driven by disinterested but competent experts / professionals, rather than the multiple processes alluded to above.