

## TO WHOM IT MAY CONCERN

### **Western Cape Provincial Department of Health (WCDoh)**

#### **Current Strategy: Risk management and Medical malpractice case-handling**

Over the past 15 years, WCDoh has experienced a similar escalation of medical malpractice claims as seen in other provinces. This escalation has necessitated strengthening of professional capacity in the Department and a similar re-organisation of personnel at the Cape Town office of the State Attorney.

At present, case management is handled on behalf of WCDoh by a unit comprising two medical practitioners, two administrative personnel, and one State Law Advisor seconded by The Office of the Premier. A specialist medico-legal section has been created in the Cape Town office of the State Attorney and comprises 4 senior attorneys who only take instructions from WCDoh.

A "pool" of Counsel at all levels of seniority have been identified who take a special interest in medical litigation, and understand the State Health System. Although briefs are preferentially sent to these advocates, there is a constant awareness of the need to promote transformation at the Bar, and to identify newly admitted advocates who are willing to enter into long-term professional relationships with WCDoh.

The above claims-handling model has been in place for more than 2 decades. Having medical practitioners at the centre of the model also allows for *inter alia*;

1. Professional scrutiny of evidence in all cases before instructions are provided;

2. Established professional “networks” which allow for easy identification and engagement of appropriate medical experts;
3. A 24 hour ethical and medico-legal advisory service, the tone, language and ethos of which are highly acceptable to health-workers as well as managers;
4. An effective means of feeding lessons learnt from litigation back into a departmental risk management programme.

Changes in the frequency, profile and inflation of medical malpractice cases have also demanded constant review of strategy aimed at containing the growing financial burden on the provincial fiscus. This has generated a wide spectrum of interventions which are designed to avoid wastage of State resources while always ensuring fair and appropriate compensation to Plaintiffs. Unfortunate experience over the last 15 years has pointed to less than altruistic methods and motives on the part of certain private attorneys who exploit Plaintiffs as a vehicle for enrichment rather than as the focus for restorative justice.

Although the South African Law Reform Commission has been briefed by The National Minister of Health to investigate and draft new Legislation to regulate medical malpractice litigation, the time-frame for this process is simply unknown, making State Health departments with no option but to develop the Common Law where certain discreet aspects of compensation are concerned. WCDoH is currently focussing on the following strategies on a case-by-case basis;

1. Appointment of joint experts and case managers by consensus in quantum determinations;
2. Early without prejudice settlement of low-value or moderate claims by informal negotiation;
3. Pleading for early establishment of institutional Trusts for minors with inclusion of for top-up and clawback clauses which negate the need for massive up-front payments.

4. Tendering of State undertakings in lieu of specific future medical costs, where state facilities are considered equivalent to private services;
5. Review of interim payments as a standard practice during the course of negotiations.

Ultimately, the WCDoh medico-legal service recognises that the only effective way to “cap” medical malpractice litigation and its financial implications is to reduce preventable clinical error at service level. This in turn, requires rehabilitation of distressed services, and the highest possible level of accountability at all levels of management and clinical oversight throughout each provincial health department. Compared with this priority, all legal strategies which too often occupy centre stage, effectively amount to damage control and nothing more.

A handwritten signature in black ink, appearing to read "David Bass", written over a horizontal line.

**Dr David Bass**  
**Head of Medico-legal Unit**  
**WCDoh**

27th April 2019