KLINCK & SAMUELS (Pty) Ltd

SOUTH AFRICAN MEDICO-LEGAL ASSOCIATION CONFERENCE

Professional Accountability and Disciplinary Processes in Healthcare Practice

Adv Alton Samuels

KLINCK & SAMUELS (Pty) Ltd

Error is a human certainty. The response to it is a matter of ethics, law and institutional design.

Discussion

1

The human factor

Why errors happen and how they are judged

2

The landscape

Parallel routes to accountability

3

The process

From complaint to sanction and appeal

4

Ethics and culture

Candour, support and a just culture

5

Practical lessons

What practitioners and institutions can do

KLINCK & SAMUELS (Pty) Ltd

Two ways of explaining error

Person approach

- Locates the cause in the individual: carelessness, forgetfulness, inattention
- Responds with blame, naming, retraining and discipline
- Fits legal processes, which ask who is responsible

System approach

- Locates the cause in conditions: workload, staffing, design, communication
- Responds by strengthening defences and redesigning the work
- Assumes that well-trained people will still err

Source: J Reason, Human error: models and management (2000) 320 BMJ 768

KLINCK & SAMUELS (Pty) Ltd

Anatomy of an adverse event

Latent conditions

Staffing, rosters, equipment, protocols, culture

Active failure

A slip, lapse, mistake or violation by a person

Failed defences

Checks, handover, alerts, supervision

Harm to the patient

The point at which formal processes begin

Accountability processes begin at the last box and tend to work backwards to a single person.

KLINCK & SAMUELS (Pty) Ltd

Judging error after the fact

Hindsight bias

Once the outcome is known, the warning signs look obvious and the error looks avoidable

Outcome bias

The same decision is judged more harshly when the result is bad than when it is not

Attribution error

Other people's mistakes are explained by character, our own by circumstances

The task is to reconstruct what the practitioner knew, with the resources available, at the time.

KLINCK & SAMUELS (Pty) Ltd

Routes to accountability

Forum	Question asked	Standard	Outcome
Statutory councils (HPCSA, SANC, SAPC)	Is the conduct unprofessional?	Balance of probabilities	Caution to removal from the register
Civil courts	Wrongful, negligent and causative of loss?	Balance of probabilities	Damages
Criminal courts	Culpable homicide or another offence?	Beyond reasonable doubt	Conviction and sentence
Employer or hospital	Breach of policy, contract or privileges?	Set by the policy or contract	Warning to dismissal; privileges
Oversight bodies (OHSC, Health Ombud)	Do systems meet the norms and standards?	Compliance with norms and standards	Findings, directions, reports

KLINCK & SAMUELS (Pty) Ltd

One event, parallel processes

Hypothetical

A delayed diagnosis after a handover failure leaves a patient with permanent harm.

Regulator

Complaint to the statutory council

Civil claim

Letter of demand and summons

Institution

Incident review and privileges process

Oversight

Complaint to the OHSC or Health Ombud

Different timelines, different evidence, and statements made in one forum may be used in another.

KLINCK & SAMUELS (Pty) Ltd

Sources of professional accountability

Constitution

Section 27 (health care), sections 10 and 12 (dignity, bodily integrity), section 33 (just administrative action)

Health Professions Act 56 of 1974

Registration, ethical rules, inquiries into unprofessional conduct and penalties

National Health Act 61 of 2003

Information and consent (ss 6 to 8), records and confidentiality (ss 13 and 14), oversight bodies

Other professional statutes

Nursing Act 33 of 2005, Pharmacy Act 53 of 1974, Allied Health Professions Act 63 of 1982

Ethical rules and guidelines

HPCSA Ethical and Professional Rules (GN R717 of 2006) and the ethical booklets

Common law

Delict and contract for civil liability; culpable homicide for criminal liability

KLINCK & SAMUELS (Pty) Ltd

The standard of care

Van Wyk v Lewis 1924 AD 438

The practitioner must show the skill and care of a reasonable practitioner in the same branch

Kruger v Coetzee 1966 (2) SA 428 (A)

Negligence turns on reasonable foreseeability of harm and the steps a reasonable person would take to prevent it

Michael v Linksfield Park Clinic 2001 (3) SA 1188 (SCA)

Expert opinion must withstand logical scrutiny; the court decides, not the expert

Castell v De Greef 1994 (4) SA 408 (C)

Informed consent is assessed from the perspective of the reasonable patient

KLINCK & SAMUELS (Pty) Ltd

Negligence and unprofessional conduct

Civil negligence

- Purpose: compensate the patient for loss
- Requires harm and a causal link
- Question: did the practitioner fall below the standard of the reasonable practitioner?

Unprofessional conduct

- Purpose: protect the public and the integrity of the profession
- Harm is not always required, for example dishonesty, boundaries, records and billing
- Question: does the conduct fall short of professional and ethical standards so as to deserve censure?

Where a charge rests on clinical error, the threshold between compensable negligence and punishable conduct is contested.

KLINCK & SAMUELS (Pty) Ltd

From complaint to inquiry

1. **Complaint**
   From a patient, colleague or scheme, or initiated by the council

2. **Investigation**
   The practitioner is asked to respond in writing within a set time

3. **Preliminary inquiry**
   A committee decides whether to dismiss, resolve or refer the matter

4. **Charge and notice**
   Formal charges with particulars and notice of the inquiry

5. **Professional conduct inquiry**
   Hearing on the merits, then a finding on each charge

6. **Sanction and remedies**
   Penalty, then internal appeal and High Court appeal or review

KLINCK & SAMUELS (Pty) Ltd

The professional conduct inquiry

Pro forma complainant

Presents the case for the council and leads the evidence in support of the charges

Respondent practitioner

May be legally represented, give evidence, call witnesses and cross-examine

Committee and legal assessor

A panel of peers and lay members decides, advised on law and procedure by a legal assessor

Evidence and proof

The council bears the onus on the civil standard, and expert evidence is often decisive

KLINCK & SAMUELS (Pty) Ltd

Sanction

Caution or reprimand

Fine

Suspended sanction with conditions

Suspension from practice

Removal from the register

Ordered from least to most severe

Factors weighed

- Nature and gravity of the conduct
- Harm caused
- Insight and remorse
- Prior record
- Mitigating and aggravating circumstances
- Protection of the public
- Proportionality

KLINCK & SAMUELS (Pty) Ltd

Procedural fairness

Notice and particulars

Clear charges, so the practitioner knows the case to meet

Access to evidence

Disclosure of the material the council relies on

An impartial tribunal

Decision-makers free of bias and conflicts of interest

A fair hearing

The right to be heard, to be represented and to challenge evidence

Reasons

Findings and sanction explained in writing

Reasonable promptness

Delay is itself a harm to practitioners and complainants

KLINCK & SAMUELS (Pty) Ltd

Case study: Welkovics v HPCSA

Welkovics v Health Professions Council of South Africa (A274/2024)

Gauteng High Court, Pretoria

Kekana AJ, Collis J concurring

Held

- Appeal against conviction and sanction upheld on 4 July 2025
- A private practitioner may decline to accept a private patient absent an emergency
- On the facts, no doctor-patient relationship arose

Why it matters

- A charge presupposes a professional relationship and the duties that flow from it
- Accountability is bounded by the scope of what the practitioner undertook
- The threshold question comes before the question of the standard of care

KLINCK & SAMUELS (Pty) Ltd

Candour and disclosure

Concealment converts a clinical problem into an integrity problem.

Ethical duty

Tell the patient what happened, honestly and promptly, and what will be done next

Legal tension

Statements may later be relied on as admissions, and there is no general apology statute

Practical course

Factual disclosure with empathy, coordinated with the indemnifier and legal adviser

KLINCK & SAMUELS (Pty) Ltd

The second victim

Impact on the practitioner

Guilt, anxiety, isolation, burnout and defensive practice

Risk to future patients

Distress may impair performance, and fear of discipline discourages reporting

A supportive response

Peer support, confidential counselling and sensitive handling of proceedings

Source: A Wu, Medical error: the second victim (2000) 320 BMJ 726

KLINCK & SAMUELS (Pty) Ltd

A just culture

Behaviour	Example	Response
Human error	A slip or lapse, such as picking up the wrong vial	**Console and fix the system**
At-risk behaviour	A drift into workarounds or shortcuts that have become normal	**Coach and remove the incentives**
Reckless conduct	Conscious disregard of a substantial and unjustifiable risk	**Sanction**

Source: D Marx, Patient safety and the just culture (2001)

KLINCK & SAMUELS (Pty) Ltd

Accountability beyond the individual

Employers

Vicarious liability, and responsibility for staffing, rosters and supervision

Hospitals and clinics

Clinical governance, credentialing and incident management systems

The State

Liability for public sector care, with notice under Act 40 of 2002 within six months

Oversight bodies

Inspection and enforcement of the norms and standards for health establishments

KLINCK & SAMUELS (Pty) Ltd

Scenario 1: The overnight handover

Hypothetical

17:30	Mr S (61) presents to a private hospital with severe abdominal pain. Dr A admits him and orders a CT scan.
19:30	Dr A's shift ends. Handover to the night doctor is verbal, in a corridor, and does not mention the pending CT. The ward does not use the written handover form.
22:15	Radiology phones a result needing urgent surgical review to a nurse covering two wards. She charts it but does not escalate.
07:45	The day team finds the report. Emergency surgery follows. Mr S survives with permanent harm.
After	Dr A tells the family what happened and expresses regret. Within months: an HPCSA complaint, a letter of demand and a privileges review.

Forums. Which are now engaged, and what does each ask?

System. Which latent conditions set Dr A up to fail?

Biases. How might hindsight and outcome bias colour the review?

Threshold. Is this error or misconduct, and how much should candour weigh on sanction?

Records. Dr A later adds an undated note to the chart. What changes?

KLINCK & SAMUELS (Pty) Ltd

KLINCK & SAMUELS (Pty) Ltd

Technology changes where errors arise. It does not change who must answer for them.

Questions for technology-assisted practice

Automation bias

When is accepting a tool's output reasonable, and when is it a failure of independent judgment?

Documentation

Should records show how a tool was used and why its advice was followed or overridden?

Shared responsibility

How should responsibility be allocated among the developer, the institution and the practitioner?

Consent and disclosure

Must patients be told that a tool contributed to their diagnosis or treatment?

KLINCK & SAMUELS (Pty) Ltd

Scenario 2: The tool said “normal”

Hypothetical

Setting	A hospital adopts an AI chest X-ray tool, validated by the vendor abroad but not locally. Doctors must still review images; nothing requires recording the tool's use.
Night shift	Ms N (45) attends casualty with a persistent cough and weight loss. Dr B, covering over 60 patients, views the X-ray. The tool reports “no abnormality”.
Decision	Dr B has a slight doubt, but the radiologist's report is not due until the next day. She charts “CXR clear”, discharges Ms N and does not mention the tool.
Month 8	Advanced lung cancer is diagnosed. On review, the original image shows a visible lesion.
After	An HPCSA complaint and a civil claim follow. The vendor's contract excludes its liability.

Automation bias. Was it reasonable to accept the tool's output?

Documentation. What should the record have shown?

Responsibility. How should it be shared among Dr B, the hospital and the developer?

Consent. Was Ms N entitled to know that a tool contributed?

Just culture. Which kind of behaviour is this, and how should each forum respond?

KLINCK & SAMUELS (Pty) Ltd

When a complaint arrives

Altering a record turns a clinical problem into an integrity problem.

1. Notify the indemnity provider immediately
2. Secure the records and never alter them
3. Diarise every deadline and respond on time
4. Obtain legal representation before responding in substance
5. Respect patient confidentiality under the National Health Act and POPIA
6. Seek personal and peer support

KLINCK & SAMUELS (Pty) Ltd

Strengthening the system

Proportionality	Match the process and the sanction to culpability and harm
Timeliness	Clear time frames for investigation, charge and inquiry
Expertise	Panels and assessors with relevant clinical and legal skill
Learning	Anonymised outcomes feed into training and system improvement
Resolution	Mediation and informal resolution where the matter suits it

KLINCK & SAMUELS (Pty) Ltd

Key messages

1. **Errors are human and predictable, so accountability systems must be designed with that in mind.**

2. **Parallel processes demand fairness, proportionality and clear thresholds between error and misconduct.**

3. **Candour, support and learning belong in the accountability framework alongside sanction.**

KLINCK & SAMUELS (Pty) Ltd

KLINCK & SAMUELS
(Pty) Ltd

Questions and discussion

Adv Alton Samuels | Klinck and Samuels (Pty) Ltd