CLINICAL NEGLIGENCE IN SOUTH AFRICA ~ MAGNITUDE OF THE CRISIS, PREVENTION OF NEGLIGENT HARM AND CONFLICT RESOLUTION BY MEDIATION

NNASA CONFERENCE

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MAGNITUDE OF THE CRISIS

CURRENT STATE OF AFFAIRS REGARDING MEDICAL MALPRACTICE CLAIMS

In 2011, Pepper & Slabbert asked the following question:

“Is South Africa on the verge of a medical malpractice litigation storm?”

SOUTH AFRICAN JOURNAL OF BIOETHICS AND LAW

Former EL mom wins R700 000 civil court claim

After loss of infant son, couple start support group for bereaved parents in Cape Town

By KATHRYN KIMBERLEY
Court Reporter

MARKING the three-year anniversary of her son's death due to negligence by Frere Hospital staff, bereaved mom Debbi Windell has won a R700 000 civil claim against the Eastern Cape Department of Health.

This is the second win against the department to come out of the Eastern Cape in the past two weeks after a King William's Town mother was awarded R16 million after her baby was born brain-damaged due to negligence at Bhisho Hospital.

Represented by advocate Richard Brooks, who was instructed by attorney Ben Niehaus, Windell, a 37-year-old former East Londoner, took the Department and Frere Hospital to court after her son, Nathan Ross Windell, died during labour on March 4 2008.

Specialist medical practitioners testified that had State employees performed the scheduled Caesarian section timeously – when Windell went into early labour and ruptured her uterus – little Nathan would have survived.

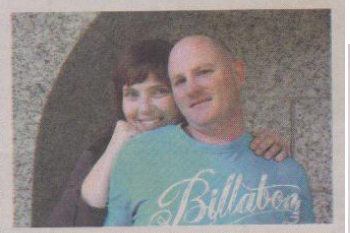
"Dating back two-and-a-half years, the trial ended in a victory for the mother, her minister husband Rory, and their two minor sons.

On Friday, Judge Phakamisa Tshiki ruled in Windell's favour, awarding her:

- R182 000 for future medical and hospital expenses, including counselling and medical treatment for stress, shock and depression;
- R225 000 for general damages in respect of shock, pain and suffering;
- R225 000 in respect of general damages for the loss of love, togetherness and affection of her baby; and
- R1 000 for past medical expenses.

The order was handed down on Thursday, a day before what would have been Nathan's third birthday.

And for the first time since the traumatic ordeal, friends and family say Windell, the daughter of famous gospel and country musician Ken Larkin, is singing again.



LIVE IN HOPE: Rory and Debbi Windell who won a R700 000 civil claim against the Eastern Cape Department of Health. Picture: SUPPLIED

The day also marked the launch of the Empty Arms support group, based on an American programme for bereaved parents, which the Windells have helped start up in Cape Town, where they now live.

Windell said the testimony by specialist doctors and witnesses opened her eyes to the events of March 4.

"It was interesting to put the events into perspective ... to see the bigger picture. That night I was more aware of the pain I was in and why they were not performing the Caesar, that I did not know what was going on around me," she said.

The East London High Court last week heard how on the night of the incident, Windell had been in excruciating pain, while her husband had been forced to search hospital corridors for a doctor, depriving him of being able to support his wife.

Windell was reportedly in and out of consciousness, vomiting and coughing up blood.

Windell yesterday insisted that her claim had not been about money but was an effort to tell her story and to create awareness.

Their own non-profit organisation Live In Hope, created in memory of Nathan, is dedicated to lending support to parents who have experienced similar bereavements.

"I went home empty-handed after my son's death. I was not put in touch with a social worker and I was not given any coping mechanisms ... this programme creates an outlet for parents who are sent home and expected to simply continue with their lives ... like us," she said.

Rory Windell is preparing to cycle from Cape Town to East London in January next year in memory of their son. Rory's progress can be followed on www.livinhope.co.za.

Niehaus said no matter what the monetary value of the win, it would never do justice to what the Windells lost that night.

He said he hoped the matter would bring some form of closure to the family. — *kathrynp@dispatch.co.za*

R1.5m claim over boy's lost finger

Daily Dispatch: Monday 6/9/2010

Woman sues State over baby's death...

...claims that hospital failed to perform Caesar in time

By KATHRYN PARKES
Court Reporter

AN EAST London woman is suing the Department of Health and Frere Hospital for nearly R700 000 following the death of her child.

Debbie Windell slapped the Department and the East London hospital staff – who delivered her infant in 2008 – with the civil suit after she went into early labour and ruptured her uterus, resulting in the death of her child.

Windell, 37, believes that if doctors had performed the scheduled Caesarian section sooner, her baby would have survived.

Further events that led to her child's death have not yet come to light.

Judge Clive Plasket postponed the case to January 25, 2011, in the East London High Court last week to give the Department time to file respondent papers.

In court documents, Windell states she was admitted to Frere Hospital's maternity ward on March 4, 2008, for the birth of her unborn baby by means of a Caesarian section.

On admission, she states that an oral agreement was made with hospital staff that they would "attend to (Windell) and her unborn baby with the skill ... reasonably expected of such medical and hospital staff ... monitor (their) condition at all relevant times to ensure that the baby will be born alive".

She further states that the agreement extended to staff taking "all necessary steps to prevent or minimise pain and trauma for (Windell) and her unborn baby and take all such steps as may be reasonably required to keep the baby alive at all times both prior to and after the delivery process".

Now Windell has accused both the hospital and the Department of negligence.

She alleges that the medical staff "failed to comply with their duties ... and thereby breached the agreement between the parties".

As a result of this and the death of her baby, Windell claims she suffered "extreme pain, anguish, shock and suffering ... and lost the love, togetherness and affection of her baby to which she was entitled".

Windell is claiming:

- R182 000 for future medical and hospital expenses including counselling and medical treatment for stress, shock and depression.
- R225 000 for general damages in respect of shock, pain and suffering;
- R225 000 in respect of general damages for the loss of love, togetherness and affection of her baby; and
- R1 000 for past medical expenses.

According to gynaecologist Dr Pierre du Toit's medical report, which forms part of the court documents, since the loss of her child Windell has been "severely depressed".

In the report, Du Toit further states that Windell "feels that if the hospital staff had performed a Caesarian section sooner, she would have been spared all the heartache and depression".

"Whilst talking to Ms Windell about her tragedy, I got the impression that she is depressive, and that reference to the loss of her infant renewed her sadness."

Du Toit stated that although Windell had expressed her desire to have another child, "it must be remembered that such a pregnancy may well result in another rupture of the uterus if labour occurs".

"It is possible that rupture may occur in another pregnancy without labour contractions. If another pregnancy is desired, an elective Caesarian section should be performed in about 37 weeks," he said. — *kathrynp@dispatch.co.za*

HEADLINES AND STATISTICS

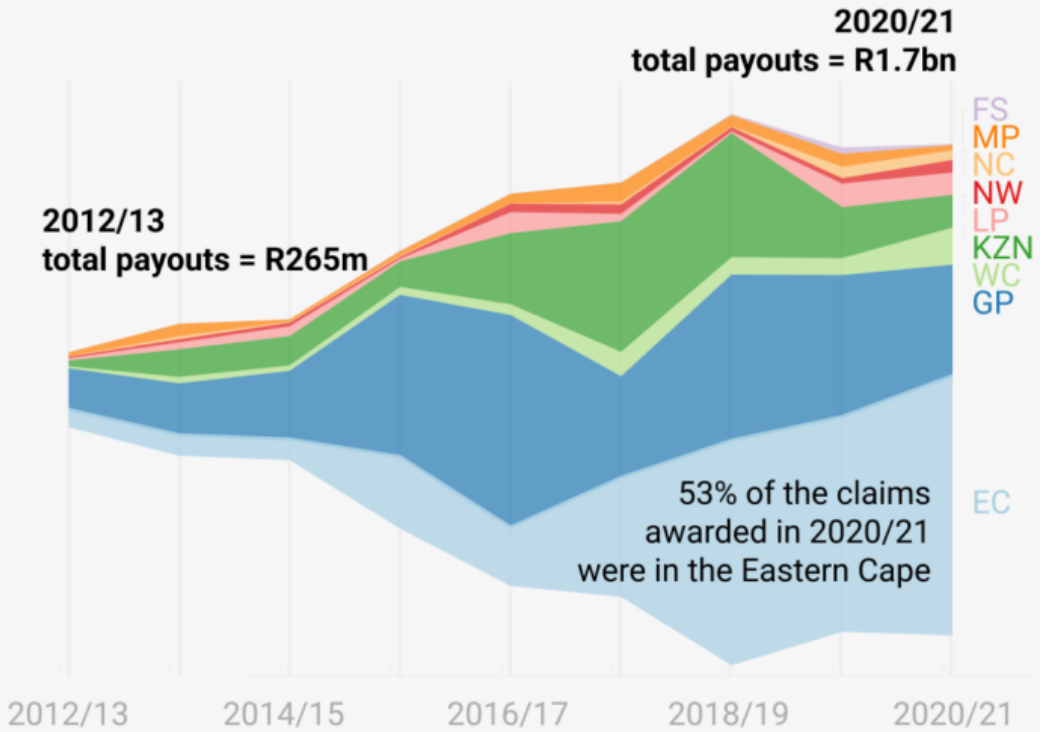
- "Eastern Cape medical negligence problem is "a runaway train". (17 Feb 2021)
- "R4,3m for botched treatment in KZN Grey's Hospital." (1 Jul 2020)
- "Limpopo Health sued after death of women after giving birth to twins." (11Mar 2020)
- "Medical negligence claims in Gauteng has increased to 29bn (10 Feb 2020)

HEADLINES AND STATISTICS (CONT.)

- **State of medical negligence claims and payouts almost quadrupled over 4 years. (29 Jan 2020)**
- Actual settlement payments by provincial health departments increased from R 499m to R1,953bn (*Statistics from SA Health Review*).
- Place a huge burden on distressed health-care services.
- Decreased financial resources available for health services provision.

Public health legal costs balloon

Most damages payouts by provincial health departments are for obstetric, paediatric, orthopaedic & trauma cases



Source: National Treasury & SA Law Reform Commission (2021)

theoutlier.co.za

THE CRISIS…

- Number and value of medical negligence claims in SA has skyrocketed.
- Affects both the private and public sector.
- Increase in the cost of indemnity insurance for medical practitioners.
- Trend to practice "defensive medicine" rather than "compassion-centred care".
- Practising defensive medicine results in increased costs for the healthcare system and patient.

CAUSES IDENTIFIED BY THE LAW REFORM COMMISSION

South African Law Reform Commission

- **Cerebral palsy-type claims make up 50 % of medico-legal claims in South Africa.**
- Lack of quality of care, failure to take reasonable steps, misdiagnosis and delayed treatment contribute to increase in litigation
- Lack of resources play a role.
- 2008 amendments to the Road Accident Fund Act
- The Contingency Fee Act of 1999. The Act provides for a "no win, no fee" system. This allows people who would not normally be able to afford litigation to do so. It may also lead to inflated claims.
- Patient-centred approach to healthcare – have made patients more aware of their rights.
- Patients also have higher expectations and less likely to tolerate poor management of complications.

https://theconversation.com/legal-claims-for-medical-mistakes-are-on-the-rise-in-south-africa-whats-behind-the-trend-187393

OTHER CAUSES OF MEDICO-LEGAL LITIGATION

- "Soft" Claims
- Touting and advertising by lawyers
- Criminal conduct – unlawful selling of hospital records
- Lack of proper HCW/patient relationships
- Overburdened and understaffed health care providers
- Unethical behavior
- DR. GOOGLE

MOST COMMON TYPES OF MEDICAL NEGLIGENCE CLAIMS IN SOUTH AFRICA

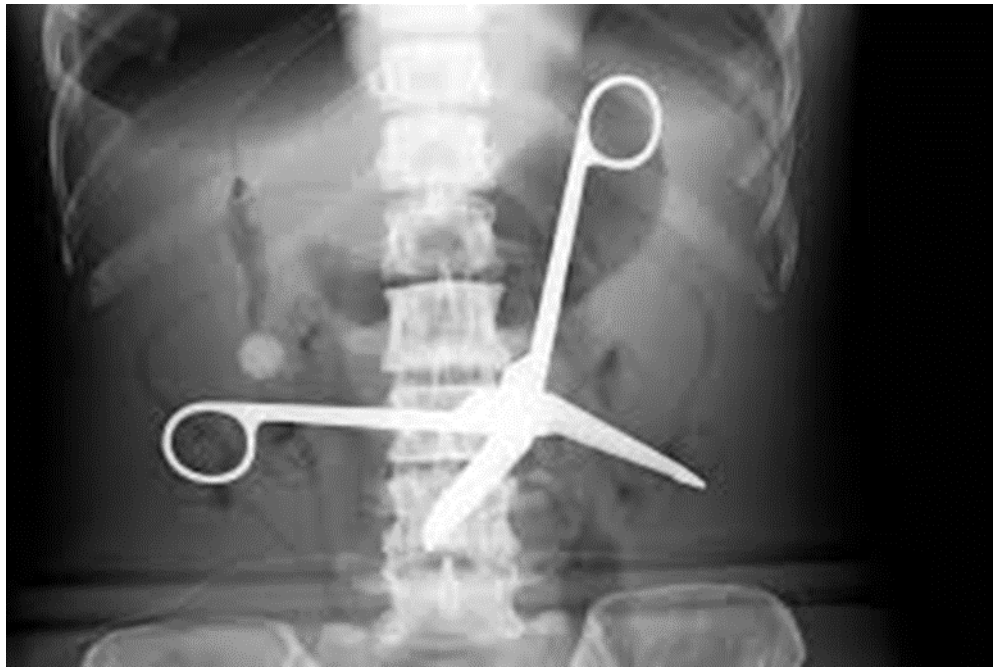
- Birth injury
- Obstetric & Gynaecology claims
- Neurosurgery claims
- Orthopaedic claims
- Neonatology (Retinopathy of Prematurity, Kernicterus, Extravasation injuries, arterial line spasms)

WHY DOES IT COST SO MUCH?

QUANTUM

- Compensation to place the plaintiff as far as possible in the **same position**, have it not been for the negligent act causing harm.
- **"Once and for all" principle**
- Problem: Life expectancy
- <u>Heads of damages:</u>
  - Past and future medical and hospital expenses
  - Future loss of earnings
  - General damages

WHAT IS NEGLIGENCE?



ELEMENTS TO PROOF NEGLIGENCE

- HCP relationship with client (**DUTY**)
- HCP fail to uphold the standard of care (**BREACH**)
- Patient suffers harm, injury or damage (**HARM**)
- Harm direct result of HCP failure to provide a reasonable expected standard of care (**CAUSATION**)
- Balance of probabilities of 51%
- Logical reasoning

TEST FOR STANDARD OF CARE…

- **How would a reasonable competent practitioner in that branch of medicine have acted in a similar situation in the same context?**
- <u>Therefore:</u>
  - Average
  - General level of knowledge, experience and skill
  - Training

PREVENTION OF NEGLIGENT HARM

DUTY OF CARE

NURSING ACT

SCOPE OF PRACTICE

ACTS AND OMISSIONS

ALL OTHER APPLICABLE ACTS & PRINCIPLES

PATIENT SAFETY

UP TO 80% OF HARM IS PREVENTABLE.

https://www.who.int/news-room/fact-sheets/detail/patient-safety

ETHICAL PRACTICE

https://www.sermo.com/resources/ethical-issues-in-healthcare/

EFFECTIVE COMMUNICATION

- Ineffective communication among HCP is one of the **leading causes of medical errors and patient harm.**
- Communication failures were implicated at the root of over **70% of sentinel events**.

EFFECTIVE COMMUNICATION STRATEGIES

- Complete, detailed and comprehensive handoff between HCP.
- Respond to the concerns, calls, questions.
- Comprehensive patient education and health education on discharge.
- Build report ~ Staff attitude and conduct
- Incident reports (near miss/medical error) ~ learning opportunity ~ facilitate root cause analysis ~ improve quality of patient care.
- Comprehensive clinical recordkeeping

VALUE OF COMPREHENSIVE CLINICAL RECORDKEEPING

PRINCIPLES OF RECORDKEEPING

- Correct chart, date and patient identification (on every page)
- Legible entries
- Signature (all entries, including corrections)
- Timelines (especially during resuscitation)
- Factual, descriptive, comprehensive and chronological records ~ problem orientated
- Document nursing actions, reasons for not taking action and outcomes
- Document all communications to other healthcare professionals and family

PRINCIPLES OF RECORDKEEPING

- Chart the time, dosage and route of administration of medication and the patient's response (Infusion site NB!!!)
- Chart patient care at the time you provide it.
- Late entries
- Photograph incidents such as bedsores, infiltrations etc.
- Do not use shorthand or abbreviations not recognized
- Do not alter medical records/chart care not done
- Keep a diary/incident reports
- Safekeeping of documents ~ medical records becomes evidence

PATIENT ADVOCACY

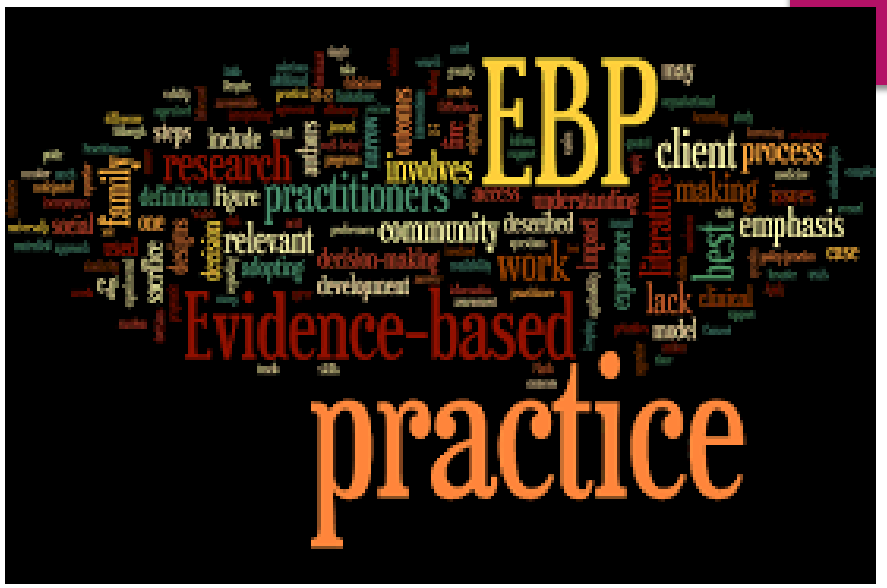
DOCTOR-NURSE RELATIONSHIP

- Partnership that should be aimed towards the holistic well-being of the patient.
- Nurses often work under the supervision of doctors **but** they are professionals in their own right.
- **"A nurse cannot escape legal liability by stating that a doctor should have corrected her/him where the procedure was within the competence of a reasonable competent person in their branch of the profession."** (McQuiod-Mason & Dada, 2017)
- Failure to act as a advocate when harm is probable may amount to professional negligence.
- May not act outside your scope of practice.
- Duty to act in the best interest of the patient.

BACK TO BASICS: MONITORING

- Have policies and protocols pertaining to monitoring responsibilities.
- Identify early warning signs.
- Report deviations to the appropriate person (doctor, shift leader, unit manager).
- Document and act timeously
- Functional equipment ~ maintenance, troubleshooting, use of equipment
- Setting appropriate alarm limits.
- Treat patients and not monitors ~ look at the patient, use logical reasoning

EVIDENCE BASED PRACTICE



- PROTOCOL, POLICIES AND SOP'S
- IMPLEMENTATION INTO PRACTICE
- IMPLEMENTATION OF QUALITY IMPROVEMENT INITIATIVES

ALTERNATIVE DISPUTE RESOLUTION ~ MEDIATION

LITIGATION – THE JUDGE DECIDE

MEDIATION – PROCESS WHERE BOTH PARTIES GETS THE OPPORTUNITY TO STATE THEIR CASE. ISSUES ARE RESOLVED IN A INFORMAL AND SAVE ENVIRONMENT.

RULE 41A OF THE UNIFORM RULES OF COURT

- Rule 41 A is an amendment to the Rules of Court which imports **mandatory mediation as a precondition for case allocation in court.**
- Mediation are therefor preferred for solving medical negligence disputes.
- Parties need to state reasons for not mediating a matter ~ cost implications.

GENERAL PRINCIPLES OF MEDIATION

- **Impartial** – Mediator is an independent facilitator assisting parties in dispute to achieve an amicable solution in a safe environment. Mediator does not give an opinion or advice.
- **Confidential** – all parties are bound by a confidentiality agreement
- **Without prejudice** – will not be used in court should the mediation fail.
- **Non-binding** – nothing is binding until such time that it is written and all parties have signed.
- **Voluntary process**

BENEFITS OF MEDIATION

- Early intervention is possible
- Dignity invasions are addressed.
- Relationships are restored
- Both parties are in control and have the opportunity to tell their side of the story.
- Each party find their own solution and negotiate to come to an amicable solution that is of benefit for both parties.
- Reduced time and cost
- Size of the pie increase
- Value added solutions, not only monetary
- Parties can also reach partial agreement - settle certain issues = save costs.

Consider early Mediation as an effective communication process to re-establish trust and restore relationships.

ALTERNATIVE DISPUTE RESOLUTION

THE QUESTION OF JUSTICE…

- **What is justice?**
- Achieving outcome that is morally right and fair and in accordance with the law.
- Placing the parties in a better position than before.

- **MEDIATION**

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