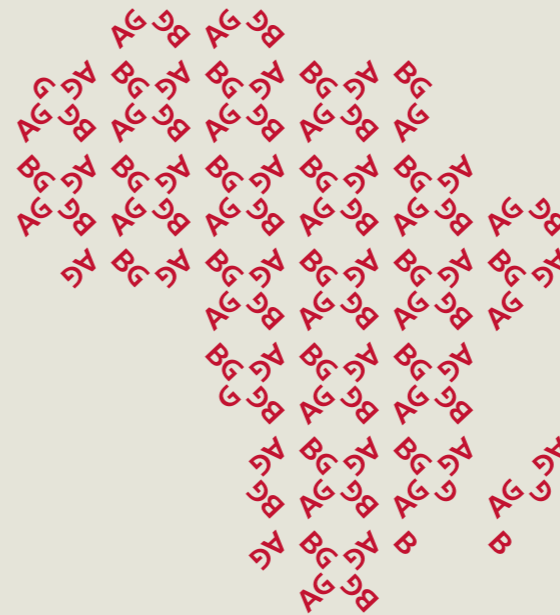


MEDIATION TO ADDRESS THE MEDICAL MALPRACTICE CRISIS

Bayer Dermatology Weekend

Presented by: John Brand

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INTRODUCTION

OUTLINE

- The scale of medico-legal claims
- Consequences of the increase in medico-legal claims
- Problems with medico-legal litigation
- Mediation of medico-legal claims
- What is mediation?
- What does mediation look like?
- Advantages of mediation
- What about South Africa?
- Conclusion

THE SCALE OF MEDICO-LEGAL CLAIMS IN SOUTH AFRICA

Medical Protection Society

- The cost of reported medical claims has more than doubled in recent years
- Claims exceeding R1 million have increased by nearly 550% compared with those of 10 years ago
- Claims exceeding R5 million have increased by 900% in the past 5 years

THE SCALE OF MEDICO-LEGAL CLAIMS IN SOUTH AFRICA

It has been reported that:

- The Gauteng Health Department is facing negligence claims amounting to R1.28 billion for the 2012/2013 financial year
- The Eastern Cape Health Department faced claims of R876 million last year, up from R4.5 million in 2006
- The North West Health Department paid out R13.3 million in November for an instance of negligence at a state hospital

CONSEQUENCES OF THE INCREASE IN MEDICO-LEGAL CLAIMS

- An increase in the cost of insurance
- Negative perception and mistrust of doctors by patients
- An increase in 'defensive' medical practice
- Doctor stress and distress

PROBLEMS WITH MEDICO-LEGAL LITIGATION

Lord Woolf, the ex UK Lord Chief Justice identified the following problems:

- Medico-legal litigation fails to meet the needs of litigants on both sides
- Legal costs are disproportionate to the damages which might be recovered
- The complexities of medico-legal litigation can result in relatively greater delays in getting to trial
- Cases without merit are often pursued
- Clear cut claims are often defended for too long

PROBLEMS WITH MEDICO-LEGAL LITIGATION

Lord Woolf, the ex UK Lord Chief Justice identified the following problems:

- The success rate (for plaintiffs) is lower than in other personal injury litigation
- The suspicion between the parties is more intense and the lack of co-operation frequently greater than in many other areas of litigation
- For both parties there are very significant costs of -
 - gathering evidence
 - preparing for trial
 - attending trial

PROBLEMS WITH MEDICO-LEGAL LITIGATION

Lord Woolf, the ex UK Lord Chief Justice identified the following problems:

- For plaintiffs, the impact on their health, financial well-being and families can be huge
- For respondents (medical professionals, hospitals), the impact also includes potential reputational harm and increased insurance premiums

OTHER PROBLEMS WITH MEDICO-LEGAL LITIGATION

- The limits of legal solutions
- Outcomes are unpredictable
- Litigation is backward looking
- Litigation delivers win/lose outcomes
- Litigation harms relations
- Litigation is rights focused
- Litigation is often a hindrance to access to justice

MEDIATION OF MEDICO-LEGAL CLAIMS

- In other countries, insurers are attracted to mediation because it gives them prompt disposal of claims at a far lesser cost than contested hearings

WHAT IS MEDIATION?

- Mediation is a voluntary process in which a mutually acceptable third party helps the parties to a dispute to try to reach an agreed settlement

WHAT IS MEDIATION?

Brassey AJ

“Mediation can produce remarkable results in the most unpropitious of circumstances... The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of strict confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.”

WHAT IS MEDIATION?

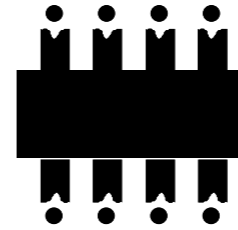
There are two relevant kinds of mediation:

- Facilitative
- Evaluative

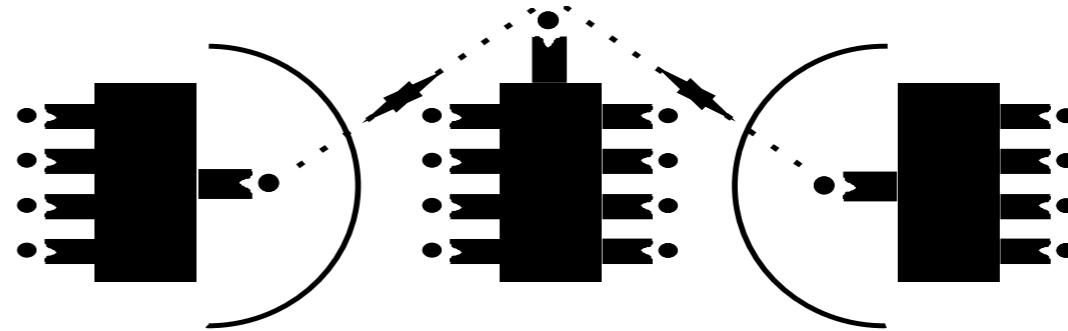
WHAT DOES MEDIATION LOOK LIKE?

CONFLICT MANAGEMENT PROCESSES

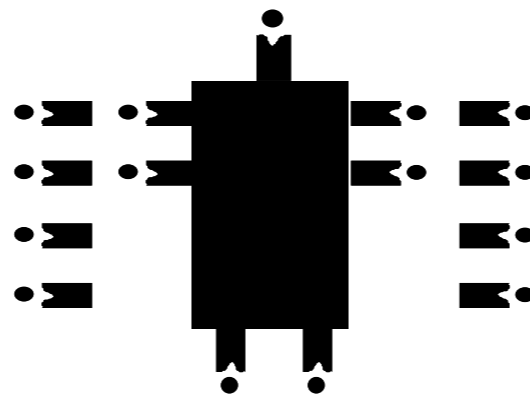
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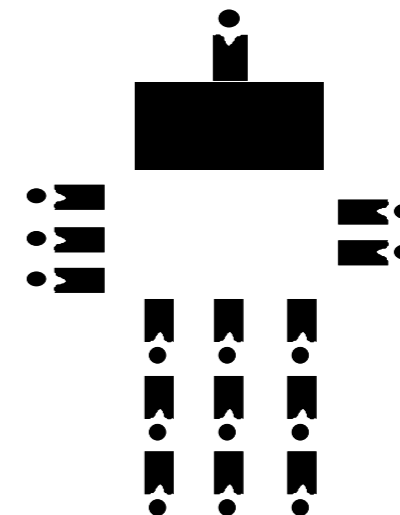
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ADVANTAGES OF MEDIATION

- Speed
 - CEDR in the UK estimates that of the +- 3000 civil disputes mediated in London each year 70 – 80% are settled within one or two days and a further 10 – 15% within a few weeks

ADVANTAGES OF MEDIATION

- Control over process and outcome
- Cost
- Positive impact on relationships
- Creativity
- Addressing of needs
- Addressing of causes

ADVANTAGES OF MEDIATION

- Management of complexity
- Delivering mutual gain outcomes
- Bridging mistrust
- Bridging poor communication
- Bridging lack of skill
- Success – generally an 80% to 90% settlement rate

WHAT ABOUT SOUTH AFRICA?

LIKE A
CHEETAH



SPRINTING
AHEAD

OR

**WHAT ABOUT
SOUTH AFRICA?**

**LIKE RIP VAN
WINKEL**



SLEEPING THROUGH A REVOLUTION

WHAT ABOUT SOUTH AFRICA?

Mediator Training

- Conflict Dynamics / ACDS training and accreditation
 - mediators to world standards

WHAT ABOUT SOUTH AFRICA?

Establishment of services

- Tokiso
- Equilore
- Cape Chamber

WHAT ABOUT SOUTH AFRICA?

Establishment of a duty to mediate

- Corporate governance
- Contract
- Pledges
- Rules

WHAT ABOUT SOUTH AFRICA?

Case law

- Brownlee v Brownlee

WHAT ABOUT SOUTH AFRICA?

Mediator advocacy training

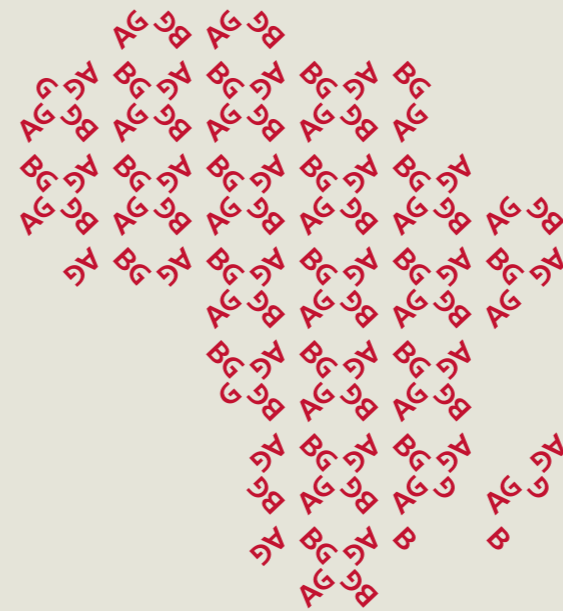
- Lawyers
- In-house Counsel
- Parties

WHAT ABOUT SOUTH AFRICA?

- Cases mediated:
 - one

CONCLUSION

- Huge potential benefits
- Rich experience to build on
- Need to keep pace with the rest of the world



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