



Why mediation and arbitration offer a better route to solving medical disputes

A medical scandal in South Africa, that resulted in the deaths of 94 patients with mental health disorders after they were moved from the Life Esidimeni Hospital to unlicensed facilities, is taking a new turn. Retired Chief Justice Dikgang Moseneke has been appointed to arbitrate the dispute between the Department of Health and the families of the patients who died. Judge Moseneke will make a binding award of compensation to avoid a costly legal battle. Health and Medicine Editor Candice Bailey spoke to Romany Sutherland about medical mediation.

What is medical mediation?

Mediation is one of a few alternative dispute resolutions tools. The idea behind it is that as soon as a conflict or dispute arises, an independent person gets involved to facilitate conversation between the parties. The process is voluntary, confidential and “without prejudice” so nothing that is said or conceded can be used in court later. It offers a safe space for the parties. With the assistance of a mediator they discuss their concerns and interests.

Before medical mediation was allowed, the only redress in a dispute be it after a breakdown in the patient-doctor relationship, a dispute around accounts or allegations of negligence or misconduct – was via an attorney who would investigate and litigate.

But litigating a medical negligence dispute can take seven years or even longer. And very often costs exceed the compensation sought. In addition, parties can be left despondent, emotionally exhausted and sometimes, financially ruined.

In most litigation matters there is also no platform to discuss what actually happened. Most patients pursuing litigation in medical matters need the three A’s: Answers, Accountability and Assurance – an explanation as to why the results were not as intended or predicted and what happens as a result.

The benefit of a medical mediation is that the emotional toll on both parties in the dispute is minimised.

How big is it in South Africa and elsewhere in the world?

Medical mediation is on the rise in South Africa. Roughly a quarter of all the mediators trained and working in the country are medical mediators.

There is a need to channel disputes towards mediators to try and find solutions inexpensively and quickly. This is particularly important because government health departments are in financial distress and are facing a medical malpractice litigation storm. In the country’s wealthiest province Gauteng for

example, the department of health has had to pay out over R1 billion (US\$75million) in medical negligence claims since January 2015.

Legal claims are so high that obstetricians in the private sector have left the profession because they can't afford indemnity cover that exceeds R850,000 (USD64,000) per annum.

The South African Constitution gives everyone the right to seek legal remedy for any dispute. But the country is in the process of introducing legislation that, if promulgated, may make medical mediation compulsory before litigation is commenced.

In the rest of the world, medical mediation and alternate dispute resolution are common.

In the US several medical centres have used mediation to divert potential litigation claims. The University of Michigan adopted mediation procedures in 2002 and included a premediation agreement at its teaching hospital. As a condition of treatment, patients agree to try mediation before pursuing litigation for any potential claim. As a result the university managed to drop claims by 60% and reduce claim processing time from 20 months to nine over five years.

Australia, the UK and the US are among the few countries where sanctions are imposed if mediation doesn't precede litigation. In India, the courts/judges facilitate mediation themselves.

What is the difference between mediation and arbitration?

During mediation a trained mediator facilitates the conversation. The mediator is an independent third party with no vested interest in the outcome. The mediator doesn't give advice or make a decisions on how the matter should be settled. The parties themselves make decisions about how the matter is settled.

Also, mediators aren't allowed to give legal advice.

Arbitration can be used instead of mediation. As with mediation, the arbitrator is independent. But the arbitrator, like a judge, is given powers to make binding awards on the parties.

It's preferable for all parties to have legal representation in all alternative dispute resolutions. This is important to ensure matters are not under-settled, that patients' claim period doesn't lapse and that legal advice is on hand.

What are the dangers of mediation not being handled correctly?

Mediation works well because the process is confidential. Documents, conversations, progress, process and the outcome of a mediation is totally confidential until both parties have agreed to the terms of settlement.

This is important because it means that none of the negotiations, agreements and concessions during the mediation are binding until the matter is finalised, reduced to writing and signed by both parties.

In most mediation agreements the terms will include a further confidentiality clause that covers the settlement terms after agreement has been reached.