ROUND TABLE DISCUSSION:
CHALLENGING THE COST OF CLINICAL NEGLIGENCE- THE CASE FOR REFORM

1. A round-table discussion was organised and hosted by the Medical Protection Society (MPS) on 4 October 2016 into the question of “Challenging the Cost of Clinical Negligence: The Case for Reform”. This comment has been prepared pursuant to those discussions.

2. I deal in this brief comment with the discussions specifically from a litigation perspective, and with a view to specific reforms to substantive and procedural aspects of the law. A significant number of contributions were made from the broader medical profession; however, as these comments are largely outside the direct field of my expertise, I do not deal with those contributions, save to the extent that they are relevant to this comment:-

2.1 There was much discussion about the benefits of mediation and open engagement with patients and the acknowledgement of wrongdoing.

2.2 The benefits of properly structured mediation and engagement are, to my mind, beyond question. In particular, there is no doubt that in appropriate cases it will avoid the need for expensive, time consuming and stressful litigation. However, a
note of caution should be sounded. Such engagement should be part of a properly structured process. There are a number of reasons for this; I shall restrict myself to mentioning only one: confidentiality. A crucial aspect of appropriate mediation is the preservation of confidentiality. From the litigation perspective, this protects the practitioner from well-intentioned attempts to resolve the matter later being used against the practitioner in subsequent legal proceedings. Confidentiality also facilitates open communication and builds trust.

2.3 I would therefore emphasise that attempts at mediation (or any other alternative dispute resolution) should be conducted under the auspices of an appropriate forum, with due training and accreditation on the part of the mediator. I would caution against informal attempts at dispute resolution on the part of individual medical and/or legal practitioners.

3.

MPS presented, as part of its main proposals, a suggested pre-litigation resolution framework. In particular, MPS referred to the fact that, in claims against the private sector, there was no requirement for advance notification of a claim. Allied to this was a lack of intention to reach a resolution before proceedings were issued.

In this regard, I would recommend that account be taken of certain innovative aspects of the Civil Procedure Rules which have been established by the Ministry of Justice in the United Kingdom, which were designed to improve access to justice by making legal proceedings cheaper, quicker, and easier to understand for non-lawyers. Certain aspects of these
procedures would be informative and appropriate for consideration in the South African context:

3.1. Most relevant is the existence of a Pre-Action Protocol for the Resolution of Clinical Disputes. A number of relevant and interesting provisions are contained in the Protocol including:

i) **Alternative dispute resolution.** The approach is that litigation should be a last resort. As part of the Protocol, the parties should consider whether negotiation or some other form of alternative dispute resolution (‘ADR’) might enable them to resolve their dispute without commencing proceedings. If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR, but a party’s silence in response to an invitation to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

ii) **Pre-action provisions relating to experts;**

iii) **Provisions relating to obtaining health records;**

iv) **Whether the claimant has reasonable needs that could be met by rehabilitation treatment or other measures;**
v) **Letters of Notification, Claim and Response.**

In summary, these provisions are to the following effect:

(1) **The Letter of Notification.**

Provision is made for a Letter of Notification to the defendant as soon as practicable following receipt and analysis of relevant records and, if appropriate, receipt of an initial supportive expert opinion.

The Letter of Notification should advise the defendant that there is a claim where a case relating to breach of duty and/or causation has been identified.

A copy of the Letter of Notification should be sent to the relevant medical defence organisation or indemnity provider.

On receipt of a Letter of Notification a defendant should, *inter alia*:

- consider whether to commence investigations and/or to obtain factual and expert evidence;
- consider whether any information could be passed to the claimant which might narrow the issues in dispute or lead to an early resolution of the claim; and
- forward a copy of the Letter of Notification to any relevant medical defence organisation/indemnity provider.
(2) The Letter of Claim

If the claimant decides that there are grounds for a claim, a Letter of Claim should be sent to the defendant as soon as practicable. The Letter of Claim must provide sufficient information to enable the defendant to focus investigations and to put an initial valuation on the claim. Proceedings should not be issued until after four months from the letter of claim.

The Letter of Claim should contain information such as:-

- a clear summary of the facts on which the claim is based, including the alleged adverse outcome, and the main allegations of negligence;
- a description of the claimant’s injuries, and present condition and prognosis;
- an outline of the financial loss incurred by the claimant, with an indication of the heads of damage to be claimed and the scale of the loss, unless this is impracticable;
- confirmation of the method of funding; and
- the discipline of any expert from whom evidence has already been obtained.

The Letter of Claim should refer to any relevant documents, including health records, and if possible enclose copies of any of those which
will not already be in the potential defendant’s possession, e.g. any relevant general practitioner records if the claimant’s claim is against a hospital.

(3) The Letter of Response

The defendant should, within four months of the Letter of Claim, provide a reasoned answer in the form of a Letter of Response in which the defendant should:

(a) if the claim is admitted, say so in clear terms;
(b) if only part of the claim is admitted, make clear which issues of breach of duty and/or causation are admitted and which are denied and why;
(c) state whether it is intended that any admissions will be binding;
(d) if the claim is denied, include specific comments on the allegations of negligence and, if a synopsis or chronology of relevant events has been provided and is disputed, the defendant’s version of those events;
(e) if supportive expert evidence has been obtained, identify which disciplines of expert evidence have been relied upon and whether they relate to breach of duty and/or causation;
(f) if known, state whether the defendant requires copies of any relevant medical records obtained by the claimant (to be supplied for a reasonable copying charge);
(g) provide copies of any additional documents relied upon, e.g. an internal protocol;
(h) supply details of the relevant indemnity insurer; and
(i) inform the claimant of any other potential defendants to the claim.
Finally, there are two aspects of South African Law that are, to my mind, worth specifically mentioning:-

4.1. The questions of damages and causation in clinical negligence claims are potentially extremely complex. A comprehensive statutory scheme dealing with these issues should be considered. The experience of other jurisdictions has been that these issues have given rise to challenging and, at times, contradictory approaches from the legal system.

By way of a recent topical example, in the recent decision of AD and Another vs MEC for Health and Social Development, Western Cape Provincial Government (27428/10) [2016] ZA WCHC116 (7 SEPTEMBER 2016) at [64], dealing with proposed clawback and top-up provisions in a personal injury trust the Court, although alive to the potential benefits of such schemes, held that departures from the common law are more appropriately regulated by a statutory scheme.

4.2. The question of curtailing legal costs (as opposed to the claim value of the litigation) requires specific attention.

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