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MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM IN MEDICAL NEGLIGENCE CASES IN ZAMBIA: A COMPARATIVE STUDY OF INDIA AND AUSTRALIA.

BY:

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2025

DECLARATION

I declare that this dissertation entitled**, MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM IN MEDICAL NEGLIGENCE CASES IN ZAMBIA.A COMPARATIVE STUDY OF INDIA AND AUSTRALIA** which is hereby submitted in partial fulfilment of the requirement for the award of a Bachelor's Degree at the university of Lusaka is my own original work and it has not been previously submitted for the award of the degree at the university or any other tertiary institution completely understand what plagiarism entails and I'm aware of the university's policy in this regard. Thus, where other people's work is cited have duly acknowledged. The errors and omissions made in this work are solely mine.

MAJORY SYAMASONTA

……

2025

RECOMMENDATION

I **THERESA LUMBAMA KAPUTO** recommend that this dissertation prepared under my supervision by **MAJORY SYAMASONTA**, entitled **MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM IN MEDICAL NEGLIGENCE CASES IN ZAMBIA: A COMPARATIVE STUDY OF INDIA AND AUSTRALIA** be accepted for examination. I have checked it carefully and I'm satisfied that it fulfils the requirement pertaining to the format laid down in the regulations governing directed research.

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T. LUMBAMA-KAPUTO

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DEDICATION

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ABSTRACT

This thesis was on mediation as an alternative dispute resolution mechanism in medical negligence cases in Zambia. Pitfalls and benefits. A comparative study of India and Australia. The purpose of this study was to understand the underscoring problem of medical negligence claims in Zambia which has been on the rise leading to an increase in deaths due to medical negligence. The objectives of this study included providing a detailed analysis of the regional and international legal frameworks that regulate medical negligence claims in Zambia. Secondly, to equally provide a detailed analysis of Australia and India's legal frameworks and to draw lessons from the same.

The methodology of this report is as follows; this research was a qualitative mode of research as data was gotten from statutes, reports, internet sources, text books, journals and articles and case law.

The major findings of this research were that the basis of escalating gun culture is due to the fact that our pieces of legislation being the penal code chapter 87 of the laws of Zambia and the health practitioners Act 17 of 2024 is not comprehensive and is silent on medical negligence cases as it does not provide stringent regulatory measures for dealing with negligent practitioners and how such claims are to be handled and it does not provide for stiff punishments for persons that contravene provisions of these Acts.

CHAPTER ONE

1. INTRODUCTION

In the complex intersection of healthcare and jurisprudence, a silent epidemic of medical negligence cases continues to unfold, leaving in its wake a trial of shattered lives, eroded trust and unanswered questions. The consequences of medical negligence can be devastating, resulting in physical harm, emotional trauma and financial burdens on patients and their families.[1] As the healthcare landscapes evolves, the approaches to resolving disputes that arise must evolve too. Mediation, a process usually employed in family disputes, commercial grievances and community disputes is being recognized as a possible game changer in the realm of medical negligence cases and it is part of the third wave in the world wide access to justice[2]. By facilitating open communication and fostering a collaborative environment, mediation offers a unique opportunity for healthcare providers, patients and stakeholders to work together towards a mutually beneficial resolution and promote a more constructive dialogue.[3]

Zambia has seen a sharp deterioration in its health care systems both hospitals and clinics. This is marked by a shortage of medicine, broken equipment and inadequate provision of staff among others. This situation is serious to an extent that constitutionally protected rights such as access to healthcare services and patients dignity are compromised daily. These situations create room for negligent behaviours thereby leading to litigation. Furthermore, there is a huge plea for an alternative to litigation in medical negligence cases. It is an undisputed fact that the world of medicine will always have challenges and the medical world is fraught with various emotions from the parties involved as doctors and hospitals often get it wrong and relatives of the victims are left to deal with the devastating consequences. Litigation focuses on the rights and wrongs of the parties and the whole process takes a lot of time to reach a decision based on the balance of probabilities and it might never get

[1] Dinah Weinberg Brin (Best response to medical error) 2018 https://aihcp.net/2023/05/12/how-to-prevent-and-deal-with-a-medical-malpractice-case accessed 5th May 2025

[2] Capelletti M 'Alternative Dispute Resolution Process Within the framework of the World Wide Access to Justice Movement'

[3] Hall 2005 DePaul Law Review 303.

to the true root of the initial problem. The litigation process might destroy a career or make a hostile situation even worse and can become time consuming. On the other hand, mediation conserves relationships, gives the control and voice to the parties in dispute and maintains confidentiality.[4]

1.1 BACKGROUND OF STUDY

Dispute resolution has evolved significantly over centuries transitioning from adversarial methods such as duels and rudimentary tribal adjudication to the institutionalized legal systems seen today. One of the most notable developments in contemporary dispute resolution is alternative dispute resolution. In the Zambian healthcare landscape, medical negligence cases have emerged as a disturbing concern which threatens the doctor and patient relationships thereby affecting the quality of healthcare delivery. As Zambia strives to strengthen its healthcare system, it faces the challenge of balancing quality medical care with the increasing claims of medical negligence cases. The traditional litigation process, characterized by its adversarial nature, can exacerbate the situation, leading to defensive medicine, erosion of trust and significant emotional and financial burdens on patients and healthcare providers alike.

There are various cases and tragic incidents involving medical practitioners with regards to medical negligence which have highlighted the gravity of medical negligence in Zambia. Notable health care facilities that have been dragged to court for issues to do with medical negligence include Levy Mwanawasa Hospital and University Teaching Hospital. This follows certain reports like were a woman sued Levy Mwanawasa Hospital for leaving a surgical gauze in her abdomen and also cases were the University Teaching Hospital has been sued in several cases over medical negligence[5].

Against this backdrop, mediation offers a more promising avenue for resolving medical negligence disputes in a more effective, efficient and compassionate manner with its potential to facilitate open communication and foster a collaborative environment that can help parties involved to work towards mutually beneficial resolutions. Moreover, medical practitioners in most cases get away with medical negligence thereby leaving

[4] Christopher 'The prevalence and reporting of medical errors among medical personnel at Kitwe teaching hospitals' Clin Res 5 (2021) : 30853

[5] Carol Liebman et al.Health Aff (Millwood) 2004 https://www.healthaffairs.org/doi/10.1

the affected parties with so much pain and vengeance. It is not always that the affected parties seek compensation or punishment of the health practitioner as these are the only remedies that litigation offers. In most instances, affected parties are driven by a desire to understand what went wrong, how their relative died and this requires them to be granted an opportunity to be heard and mediation is the best alternative to litigation as it takes into account a person's emotional needs. Affected parties often seek closure and accountability which is difficult to achieve through traditional litigation. Mediation, with its focus on empathy and understanding, offers a unique opportunity for healthcare providers to acknowledge mistakes, apologize and explain the circumstances surrounding a medical error. By prioritizing transparency and emotional support, mediation can help heal the medical wounds of patients and families and providing a culture of quality improvement in the healthcare sector.

1. 2 STATMENT OF PROBLEM

Medical negligence cases pose a significant challenge to Zambia's healthcare and legal systems due to the emotional, costly, and time consuming nature of traditional litigation This prolonged process delays justice, erodes doctor-patient relationships and places a financial strain on the healthcare system as the medical environment has great potential for conflict, because even the best trained physicians can commit errors that can result in medical disabilities and death.[6] The conflicts that flow from these errors are usually fuelled with emotions prompting concerns that echo sentiments of Honourable Dobby who stated that 'keep doctors out of courts and lawyers out of hospitals.[7] This is particularly relevant in a country like Zambia were medical negligence litigation is on the rise thereby not being in line with general trends in medical practice. **Article 118(2) d of the Constitution of Zambia** promotes the use of alternative modes of resolving disputes, these mechanisms do not expressly apply to medical negligence cases.[8] Nevertheless, the broad frame work provides a more efficient and empathetic avenue for resolving claims of medical malpractice, particularly for vulnerable populations who face barriers to pursuing justice through courts.

[6] Fortunate Thobeka Nkabinda (Mediation: An alternative dispute resolution in medical negligence cases, LLB, university of south Africa)https://umkn-dsp01.ac.za

[7] http//www.publications.UK./pa/cm200102/cmhansrd/vo020117/debtext

[8]Act No.18 of 1996

In furtherance of the above various scholars have discussed issues to deal with medical negligence claims and their adverse effects. Van Ven Heaver stated that the number of affected parties who seek compensation for medical negligence claims is far less than the number of people who are entitled to the compensation. It substitutes the need to find a viable solution in respect of litigation of the aforesaid reinforced by the need to ensure that people who bring such claims are given an opportunity to be heard as litigation for such cases is very unbalanced and the process is unsatisfactory and very long while leaving people emotionally exhausted without even gaining anything in some case Furthermore, Oosthuizen and Carsterns illustrate that money is not always the motivation for injured parties and the reason for instituting a medical negligence claim can be influenced by how the practitioner subsequently managed the situation after the occurrence of the adverse event. Although **S199 (1) of the Penal code** relates to the negligent act of legal practitioners that causes death, it underscores the gravity of medical negligence thereby showing the importance of parties seeking justice. [9].

However, the **health professions Act regulates the health professionals** and complements the legal standards on medical negligence, aiming to protect both patients and medical practitioners. In S66 of the Act, it talks about professional misconduct and medical negligence falls under this section. The Act creates a professional conduct committee for its members who are found in breach of the required standards and it further, allows people affected to lodge complaints against the health practitioner and sanctions follow. Additionally, due to lack of explicit law that discusses how medical negligence cases are to be handled, litigation stands out as the way such claims are to be resolved.[10]Additionally, the **health practitioners Act**[11] and the **nurses and midwifery Act**[12] provide for professional standards, ethical obligations and disciplinary procedures that health practitioners must adhere to. These pieces of legislation do not however state that mediation can be used in medical negligence cases as our laws governing medical negligence are borrowed from English tort law principles

[9] Penal code chapter Act, Chapter 27 of The Laws of Zambia

[10] Act No.12 of 2024
[11] Act No.17 of 2024
[12] Act No.10 of 2019

In light of the above, this study aims to critically examine the viability of integrating mediation into the resolution framework for medical negligence cases. Furthermore, it will explore the legal, institutional and cultural factors influencing the adoption of mediation, assess its effectiveness compared to traditional litigation and identify best practices from jurisdictions were mediation has been implemented successfully. The scope encompasses a comprehensive analysis of existing legal frameworks, stakeholder perceptions and potential barriers to implementation, with the ultimate goal of proposing actionable recommendations for policymakers and legal practitioners.

1.3.0 GENERAL OBJECTIVES

This study is aimed at examining the potential role and effectiveness of mediation as an alternatives dispute resolution mechanism in addressing medical negligence cases further discussing its benefits and pitfalls.

1.3.1 SPECIFIC OBJECTIVES

The following are specific research objectives;

(i).To critically analyse the current legal framework in Zambia for resolving medical negligence claims through litigation.

(ii)To discuss the current legal framework in India and Australia

(iii).A comparative study of how medical negligence is managed in India and Australia.

1.3.2 RESEARCH QUESTIONS

(i).What is the current legal framework in Zambia for resolving medical negligence claims?

(ii).What are the legal frameworks governing medical negligence claims in India and Australia

(How medical negligence cases are handled in India and Australia compared to how they are managed in Zambia.

1.4 SIGNIFICANCE OF STUDY

This research aims to suggest a workable alternative to the current litigation system in respect of disputes in medical negligence cases as it will delve into exploring the

potential of mediation to offer a more efficient, cost effective, and less adversarial approach to resolving medical negligence disputes. Traditional litigation in such cases often leads to prolonged court battles, emotional distress for both patients and healthcare providers and strained doctor patient relationships. By evaluating the role of mediation, this research contributes to the broader discourse on improving access to justice and enhancing the quality of healthcare disputes resolution mechanism. This study will further provide valuable insights and practical recommendations to benefit legal practitioners, health institutions, policy makers and patients by proposing a framework that balances accountability with reconciliation and healing.

1.5 SCOPE OF STUDY

The study area is Zambia and it will be based on the **Constitution of Zambia** as well as the **High Court Act**[13].Furthermore, reference will be made to **Industrial Relations Act**[14]and the **Subordinate Court Act**[15].**The health Practitioners Act**[16]. It is limited to mediation and does not include conciliation or arbitration.

1.6 DEFINING OF KEY TERMS AND ACRONYMS

Mediation-it is a confidential and informal way to resolve a dispute with the help of a neutral third party who from the outset, encourages each party to attempt to understand and evaluate the interest of the other parties

Medical Negligence-When medical practitioners fail to exercise the reasonable competency of skill and care in their profession[17].

Litigation-The process of taking legal action by resolving disputes through the court system

Alternative Dispute resolution –a range of processes and techniques used to resolve disputes outside of traditional litigation, including mediation, arbitration, negotiation, and other collaborative approaches[18].

1.7 LITERATURE REVIEW

A review on literature on the phenomenon of using mediation in medical negligence cases was undertaken.

[13] Chapter 27 of the laws of Zambia
[14] Act No.13 of 1994
[15] Chapter 28 of the laws of Zambia
[16] Act No.17 of 2024
[17][1954]2 ALL ER 131
[18]SA LRC 'Alternative Dispute Resolution'13

There has been an increase of medical negligence cases which are to be litigated thereby leading to an increase in the number of scholars all over the country and around the world to have varying opinions on this matter. However, the absence of clear statutory definitions and clear comprehensive rules leaves medical negligence disputes heavily reliant on interpretation, disciplinary measures and criminal liability rather than an accessible remedial pathway for patients, This gap therefore underscores the need for mediation for resolving such cases.

In an article prepared by **Breda Mitchel**[19],she argues that there is need to introduce mediation at an early stage if it is to be used in medical negligence cases looking at the nature of such claims as in most cases, patients and families seek explanations, apologies and changes in practice and not just money. She further advocates for a shift to a more facilitative, people centred mediation model that emphasizes restorative justice and recommends a coherent, government supported strategy to promote early, meaningful mediation with increased public awareness.

A known scholar **Sohn**[20] discussed that medical negligence occurs as the result of failure to provide a standard level of care, resulting in substandard treatment leading to patient harm. Aligning with findings of National Academy of sciences which note that medical errors cause more death annually thereby demonstrating the urgency of reforming the way such cases are handled. There are a number of cases that further highlight specific issues that could have been resolved through mediation looking at the amount of years it takes to resolve cases which further demonstrates complexes' of medical negligence cases. **Robbenolt**[21] argues that emotional closure is a primary need for the injured patients and affected families and they experience fallout from these incidents and looking at the nature of litigation, it cannot offer the same as it is focused on finding liability and compensation.

Another scholar named **Pillay**[22]noted that there is a huge plea for an alternative to litigation in medical negligence cases as litigation for medical negligence cases does not only pose financial risks but tends to be emotionally draining

[19] Breda Mitchel-journal of mediation and applied conflict analysis,2021 vol 2,No 1
[20] Sohn 2013 int J Gen Med 49-56.
[21]Jennifer k Robbenolt 'Apologies and settlement' 2004
[22] Pillay in M v Member of the executive council for health no (14277/2014 14-3-2016).

Classen[23] goes further to discuss that it is an undisputed fact that the world of medicine will always have challenges and it fraught with emotions from parties as doctors often get it wrong and relatives of the patients are left to deal with the devastating consequences. This simply shows that there is need to employ mediation in such cases as it provides opportunities to resolve disputes and conflicts through the utilization of a process best suited to a particular dispute or conflict as litigation takes time and might not even reach the root cause of the problem.

Furthermore, another scholar named **Botes**[24] discussed that use of alternative means to resolve disputes related to medical negligence presents the best option for such claims compared to litigation as both parties to the disputes agree on one thing and **Sir William** discussed further that once there has been a medical negligence case, trust is broken between the victims and the doctors. The only way this can be resolved is by the use of mediation which further focuses on preserving relationships. What kind of a world will it be if patients do not have any trust left in their doctors? Litigation is not always the answer for such claims therefore.[25]

Matthew Garling argues that mediation in medical negligence cases is very beneficial to the plaintiff as there is no requirement in mediation for plaintiffs to give evidence or face the defendant, which is usually a traumatic and emotional experience in a court setting. Mediation is cost effective and is not a lengthy hearing which can be beneficial to both parties.

Moreover, **Todd Hendrickson** is of the view that mediation offers a promising alternative to traditional litigation in medical negligence cases and it is crucial for parties to understand the process and work closely with their legal team, to achieve a fair and timely resolution, potentially easing the burdens of one's claim and moving forward[26].

However, a famous scholar known as **Jordan B** wrote that, mediation is said to offer a collaborative flexible constructive alternative which focuses on the future by

[23] Classen 2016 SAJBL 7.
[24] Botes 2015 De Rebus

[26] Todd Hendrickson 'Understanding-mediation-in-medical-malpractice-cases, https://hendricksonlaw.com

seeking creative solutions in a trusting, unthreatening environment and it should be the first step and litigation should only come in when this fails.[27]

Another scholar named **Fisher P** wrote that a formal mediation process trumps litigation each time in terms of better satisfactory outcome and cost. Trial takes great emotional toll and is riskier than mediation.[28]

Moreover **Cohen D** wrote that mediation is to be taken step by step and not rushed as patience and time prove valuable investments in the process of working through issues and learning important facts.[29]

Medical negligence claims are traumatic for parties involved thereby creating a need to resolve their dispute in a dignified, on-threatening environment, on a level playing field is something litigation can never produce a mediation focuses on the parties needs and interests and not a winner as discussed by **Levitt R**[30]

Additionally, **Gene Moen**[31] wrote that medical negligence cases are often so complex especially for the plaintiff who has to prove causation and negligence making mediation a better option and **Randall c Jenkings**[32]stated that mediation must be prioritized as it helps to resolve conflicts promptly and to avoid the uncertainties of litigation.

1.8 LITERATURE GAP

Given the diverse perspectives and existing advocacy for mediation as an efficient and less adversarial alternative to litigation in medical negligence cases, significant literature gaps remain. Current research highlights mediations potential to reduce costs, expedite settlements, and improve communication between parties involved .However, there is a limited scholarly attention on mediations structural limitations, such as the non-binding nature of mediated agreements, various challenges faced in serious injury cases. Furthermore, mediation puts into account the psychological

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[27] Jordaan, B, Access to court or access to justice? Mediation in medical negligence cases, https://www.conflictsdynamics.co.za /news Article/medical negligence claims and the value of mediation

[28] Fisher,P,All You- Need To Know About But Didn't know to ask .A-Parachute for parties in litigation, November 2000 , https://mediate.com (accessed 28 July 2016

[29] Cohen,D,Mediation As an Alternative to therapy, https://mediate.com (accessed 27 July 2016)

[30] Levitt, Understanding the emotions of Dispute resolution, August 8, 2011, https://rogerlevittmediation.co.uk. /category/role/-of-the-mediator/qualities-of-a-good-mediator,(accessed 30 July 2016)

[31] Gene Moen mediation in medical negligence cases https://cmglaw.com/Articles/1995/06/mediation-in-medical negligence cases(accessed on march 13,2019)

[32]Randall Jenkins and firestone(mandatory pre-suit mediation for medical malpractice) https://flbog.sip.ufl.edu

and emotional impacts, remains underscored. This study aims to provide clarity by examining the legal framework governing medical negligence claims in Zambia, as well the litigation process and the potential role of mediation.

1.8.0 METHODOLOGY

1.8.1 RESEARCH APPROACH

This research will employ a qualitative research methodology. Taking an analytical approach, the research will evaluate, examine and critique existing Legislation, judicial decisions, international instruments, books, articles, journals and other scholarly work, publications by experts in the field to heighten the validity of this study. This information will be sourced from both primary and secondary sources mentioned above.

1.8.2 RESEARCH DESIGN

The research will adopt an integrated approach, primarily focusing on desk research and library for data collection, and the data analysis process entails a critical and thorough review and description of applicable legal provisions.

1.8.3 ETHICAL CONSIDERATIONS

In order to conform with ethical requirements of research: first permission will be sought from UNILUS research ethics committee; secondly, permission will be sought from organizations; thirdly, permission will be sought from individual research subject; lastly, researcher will endeavour to follow academic writing requirements like referencing and acknowledgements of other peoples works.

1.9 RESEACH OUTLINE

CHAPTER ONE, stands as an introduction for this research as it introduces the research topic and discusses the statement of the problem and the approaches adopted to achieve the purpose of the research.

CHAPTER TWO, will focus on the legal and institutional framework for resolving medical negligence claims in Zambia thereby exploring the concept of medical negligence and how it is looked at, a brief history of medical negligence claims in Zambia with practical examples from Zambian case law and analyse the current litigation process used to address medical negligence cases, including its benefits and pitfalls. It will further discuss the impact of traditional litigation on patients and healthcare providers and healthcare systems in Zambia today.

CHAPTER THREE, will provide a comparative analysis of the legal frameworks regulating medical negligence claims in South Africa and Australia. This framework will be shaped by various legislation which includes the South African consumer protection Act, 2019[33]the role of mediation in medical negligence cases going further to discuss mediation and differentiating it from other ADR methods. It will evaluate the suitability of mediation for medical negligence claims taking into consideration of emotional, legal and practical dimensions. It will further access the perceptions and experiences of key stakeholders and identify the challenges, limitations and necessary safeguards when using mediation in sensitive health related cases.

CHAPTER FOUR, Will undertake to do a comparative insight from India and Australia and this chapter will provide an overview of how mediation has been integrated into the resolution of medical negligence cases in India and Australia. It will further analyse the legal, institutional and procedural approaches adopted in both jurisdictions. Additionally, it will discuss the successes, challenges and the impact of mediation in these contexts thereby drawing lessons on how best practices from India and Australia can be adapted to other legal systems.

CHAPTER FIVE, in light of the preceding paragraphs, it will summarize the discussion in the preceding paragraphs. Additionally, it will provide recommendations that will aid in solving the legal problem identified.

[33] Act No.68 of 2008

CHAPTER 2

LEGAL FRAMEWORK GOVERNING MEDICAL NEGLIGENCE IN ZAMBIA

2.1 INTRODUCTION

This chapter will undertake a comprehensive analysis of the legislative and judicial framework that governs medical negligence within the Zambian jurisdiction as well as other jurisdictions that resolve medical negligence claims using mediation as they will be of great contribution, to the growth of jurisdiction in Zambia concerning the need to introduce mediation in medical negligence claims looking at the nature of such claims

HISTORICAL OVERVIEW OF MEDICAL NEGLIGENCE IN ZAMBIA

Medical negligence in Zambia is closely tied to the jurisprudence developed around the tort of negligence particularly professional negligence as it applies to medical practices. The cornerstone legal framework used by Zambian courts in medical negligence cases is the **bolam test**[34], a principle borrowed from common law jurisdictions.

This test assesses medical negligence based on whether a medical practitioner acted in accordance with a practice accepted as proper by a responsible body of medical opinion. Furthermore, the landmark case that shaped medical negligence law in Zambia is ***Duff Kopa Kopa V University teaching Hospital***[35]. The Supreme Court in this case clearly addressed medical negligence, clarifying that medical negligence is a subset of professional negligence under the broader tort of negligence. The court upheld the application of the Bolam test within Zambia, providing a clear standard for assessing liability in medical negligence claims. This case remains a leading authority in Zambia and has guided subsequent legal practice and judgements

Furthermore, the judgement in Duff Kopa case emphasized the necessity for certainty in the law to protect both victims of medical negligence and medical practitioners. It reinforced that despite variations in other common law jurisdictions, Zambia continues to apply the Bolam test in medical negligence claims. Early cases in Zambia, such as ***Cicuto V Davidson***[36]also contributed to the foundational understanding of medical

[34] [1957] 1WLR582
[35] SCZ Judgement No.8 of 2007
[36] [1968] ZMCH 6 of 1968

negligence, highlighting the duty of care owed by medical practitioners to patients and the serious nature of negligence allegations against professionals.

Overall, Zambia's history of medical negligence law is characterized by the inherited British legal common law system. Medical negligence jurisprudence in Zambia has evolved through judicial decisions grounded in established principles of negligence law, with the bolam test being the predominant standard upheld by the courts.

2.2 LEGISLATIVE FRAMEWORKS ON MEDICAL NEGLIGENCE IN ZAMBIA

INTRODUCTION

There has been an increase in the number of medical negligent cases in Zambia today but despite this, there is no one specific statute that talks about medical negligence in Zambia explicitly, some statutes however consider the question of medical negligence but the law that governs this area of law is borrowed from English common law.

2.3 THE CONSTITUTION OF ZAMBIA

Chapter 118(2) of the Constitution allows for the use of alternative methods to resolve disputes in Zambia[37]. The constitution of Zambia establishes the supreme legal foundation upon which all other laws are based. There are certain rights in the constitution which when viewed collectively, constitute the right to health. In relation to medical negligence, two key constitutional rights are relevant which include the right to life, the right to health and the right to access to healthcare services enshrined in Part iii of the Zambian constitution and it places a duty on the state to promote and protect these rights.

The above mentioned rights are usually the basis of most medical negligence claims and are thus of particular significance in the medical context. Additionally, when preparing a possible medical negligence claim, lawyers start by looking at the constitutional rights in order to see if any of them have been violated before proceeding to the specific legal issues that are applicable to the particular case. It is not therefore the aim of this research to discuss cases that were argued on the basis of a violation of constitutional rights but it is vital to state that the constitution is always the starting

[37] Chapter 28 of the Laws of Zambia

point whenever a medical claim arises, whether it ends up in court or the aggrieved party decides to settle out of court.

2.4 CRIMINAL LIABILITY UNDER THE ZAMBIAN PENAL CODE

Within this legal framework, the Zambian penal code sections 199,207, and 210 provide the criminal law overlay addressing negligent acts that result in serious harm or death.

S199 of the penal code provides that: **Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed "man-slaughter". An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm[38].**

The above section criminalizes causing death through unlawful acts or omissions, encapsulating scenarios were medical negligence leads to patient's death without the actual intent to kill but due to reckless or careless actions by the healthcare providers. The presence of criminal liability in such cases underscores the gravity of professional duties and the consequences of breach through negligence.

In medical negligence cases, this section establishes the strict legal framework that criminalizes negligently causing death of another person by a medical practitioner. This section however demonstrates why effective dispute resolution mechanisms like mediation are necessary to relive the formal courts and to provide remedies were the court process is complex and intimidating to parties. This is so as most cases to deal with medical negligence are minor and interpersonal cases that can easily be resolved out of court. Mediation can therefore be appropriate for disputes covered under this section in order to encourage dialogue and reconciliation between parties, provide quicker and less costly resolution and to relieve the courts so they focus on more serious crimes.

Furthermore, **S207 of the Penal code** clarifies that liability in medical negligence cases goes beyond immediate causation. It recognizes that in many medical cases, multiple factors may contribute to a person's death, including underlying illnesses and

[38] Chapter 27 of the Laws of Zambia

medical interventions. This provision is critical in medical negligence cases, were the link between practitioner conduct and the patients outcome is critical and multifactorial.

This section demonstrates the complexities that come with medical negligence cases thereby creating a need to introduce mediation in such cases as it can aid or complement judicial processes in dealing with nuanced causation and medical intervention issues.

Additionally, **S210 of the Penal code** highlights the specific legal responsibility of care providers which extends to medical practitioners such as nurses and doctors in charge of patients. Failure on their part to maintain this attracts a sanction

Moreover, the sections above establish important principles on liability and causation for instances of medical negligence complementing civil law claims and professional regulations such as the Health Practitioners Act.

The legal framework in Zambia governing medical negligence claims creates a dual system were medical negligence can lead to both civil compensation and criminal prosecution, highlighting the significance of clearly establishing fault and causation in medical negligence disputes. These sections further highlight why mediation is suitable for resolving any of such claims as a complementary dispute resolution tool offering alternatives to litigation looking at the complexities that come with such claims.

2.5 THE HEALTH PRACTITIONERS ACT

The Health Practitioners Act regulates the conduct of healthcare providers and safeguards the patients' rights. It further aims to recognize the rights set out in the constitution by creating a framework for a regulated and informed health system in the country. By setting professional standards and codes of practice, the Act protects patients from negligence, malpractice, and unprofessional behaviour. It further recognizes certain rights set out in the constitution which includes the right to health care services and it further provides for procedures and sanctions for professional misconduct. Among other things, it sets out the disciplinary architecture and party

representation before a Professional Conduct Committee, with powers to regulate procedure and impose sanctions where professional standards are breached.[39]

This Act further sets out that health practitioners owe a duty of care to patients, requiring them to act with reasonable care, skill and knowledge in diagnosis, treatment .It further establishes the Health Professions council of Zambia, which monitors, investigates and acts on complaints of medical negligence or malpractice. In essence, this act creates a regulatory framework to hold medical professionals accountable, protect patients, and prevent negligence thereby complementing civil and criminal measures in medical negligence cases in Zambia.

2.6 NURSES AND MIDWIVES ACT

For nurses and midwives, the Nurses and Midwives Act empowers the General Nursing Council and its Disciplinary Committee, including rule-making on infamous conduct in a professional respect and detailed procedure for hearings (notice, representation, public hearings, and recorded findings).[6] Subsidiary legislation (e.g., the 2002 Regulations) fleshes out disciplinary processes[40].

The Health Professions Council of Zambia (HPCZ) Code of Ethics interprets “infamous conduct” consistently with classic common-law formulations.[41]. The Health Professions Council of Zambia (HPCZ) Code of Ethics interprets “infamous conduct” consistently with classic common-law formulations (e.g., Lord Scrutton’s definition as “serious misconduct judged according to the rules, written or unwritten, of the profession”). This guidance identifies ethical failings (privacy breaches, false certification, etc.) that may overlap with medical negligence.

Negligence. Professional processes are disciplinary and protective and are not therefore designed to compensate patients or restore trust, and the public health Act also governs conduct of medical practitioners.

[39] Act No.17 of 2024
[40] Chapter 300 of the Laws of Zambia
[41] (1944) 2K.B 421

2.7 THE HEALTH PROFESSIONS COUNCIL OF ZAMBIA

This body is established by the Health Professions Act and it is responsible for monitoring the conduct of health practitioners and ensuring that healthcare services are delivered in an ethical and competent manner. It further sets standards and codes of practice and protects patients from negligence and unprofessional behaviour. Additionally, the health practitioners Act empowers this body to institute disciplinary action. In this way, the Health Professions Act directly supports the constitution right to health while also shaping the legal environment in which medical negligence claims can be addressed. Its emphasis on accountability and patient's protection makes it an important legislative foundation for the use of mediation as an effective tool for resolving medical negligence cases in Zambia.

While the Act itself does not explicitly provide for mediation as a way to resolve medical negligence claims, the framework it establishes for conflict handling and disciplinary proceedings creates space for mediation to operate as a mechanism used to resolve medical negligence claims.

2.8 CASES ON MEDICAL NEGLIGENCE CLAIMS IN ZAMBIA

DUFF KOPA KOPA V UNIVERSITY TEACHING HOSPITAL

The case involved the death of Chuubo Kopa Kopa, an 8year old boy who swallowed a coca cola bottle top lodged in his esophagus.Medical procedures to remove the foreign body were conducted but the boy died due to heavy bleeding. The family later sued the University Teaching Hospital alleging negligence by the hospital staff. Evidence showed the procedures followed were typical medical practice at the time, though unfortunate in outcome. Expert evidence indicated the oesophagus perforation causing bleeding could be from either the sharp body or the procedure. The court found no negligence on the part of the University Teaching Hospital since the doctors acted within the accepted medical standard despite the tragic outcome[42].

This is a key Zambian supreme court case illustrating the legal approach to medical negligence as it clarified that the law governing medical negligence in Zambia employs the bolam test, which assess whether a medical practitioner acted in accordance with a practice accepted as proper by a responsible body of medical opinion. The Supreme

[42]SCZ No. 8 of 2007

Court of Zambia has consistently applied this test in medical negligence claims reaffirming its applicability and to ensure that medical practitioners act according to the required standards set and if they do not meet these standards, they are to be held accountable. It further sets out key principles that guide how courts in Zambia handle medical negligence claims and became the standard in Zambia for determining medical negligence.

In a nutshell, this is a Supreme Court case that has become binding precedent when it comes to medical negligence cases and courts in Zambia continue to refer to this case when it comes to medical negligence issues. This case strikes a balance as it protects patients from careless or incompetent medical treatment and on the other hand, it protects doctors from liability if they acted within accepted medical standards. This case further forms the legal framework for medical negligence claims in Zambia by affirming the duty of care owed by medical practitioners to their patients which is done by using the bolam test in order to assess breach of standard of care which requires causation and proof on a balance of probabilities. This case remains the cornerstone for any litigation that involves medical negligence

WANG V HEALTH PROFESSIONALS COUNCIL OF ZAMBIA

This case set out requirements that the plaintiff or their representative bringing out a claim of medical negligence must prove. It went further to discuss that no reasonable person would expect a responsible medical man to give a guarantee on account of their medicine, though a highly skilled profession, it is not generally regarded a science. The first element being that there was a duty of care owed by a medical practitioner to the plaintiff. Secondly, that the standard of care was breached by the medical practitioner and that due to that breach, there was a death or injury of the patient and lastly, damage occurred. The standard of proof set out in this case is on the balance of probabilities meaning it was more likely than not to occur

In this case, the courts affirmed that doctors owe a duty of care to patients and that this duty arises automatically once a medical practitioner agrees to provide treatment. They further stated that a doctor’s conduct is not negligent if a responsible body of opinion supports their conduct. The courts are to check if a reasonable competent doctor in the same field, under similar conditions would have acted in the same way.

If the answer is in the affirmative, then that medical practitioner is not liable. This is the test that has become the standard for determining medical negligence claims.[43]

ROSEMARY BWALYA V UNIVERSITY TEACHING HOSPITAL

Furthermore, the Case of Rosemary Bwalya is yet another case that shapes medical negligence cases in Zambia. It further provides insights into the legal duty and standard of care expected under Zambian Law. It highlights the role of expert testimony in establishing whether the standard of care was breached. Additionally, this case dealt with assurance issues and informed consent, which are increasingly important in Zambia's legal framework governing medical negligence, showing the courts approach to patients' rights[44]. This case also sets out important elements needed to satisfy a medical negligence claim as it adopts the position of the bolam test further confirms the idea that a medical practitioner is not negligent if they act in accordance with a practice accepted as proper by a responsible body of medical professionals. It also clarifies that adverse outcome like failure of medical treatment is not sufficient to prove medical negligence. There must be breach of a duty of care and causation.

It further illustrates how courts deal with situations where medical treatment fails despite apparently proper procedures thereby distinguishing between natural risk and negligence .This case showcases a great example of cases that should be mediated. The applicant in this case just required information from the respondent. There was no question of law that needed determination. Had the case been mediated, the outcome was most likely going to be different as the parties would have been in full control of the proceedings and they would ask questions were necessary and give clarification. Additionally, the parties would have saved money and time.

J LUNGU V FRED MATENDA

In this case, the court stated that negligence in relation to a medical practitioner has to be ascertained or established in accordance with the generally accepted principles and tests for the determination of professional liability with specific reference to alleged medical negligence. The claimant has to show that what occurred was a result of an

[43] 2012/HK/339
[44] S.C.Z Judgement No.164 of 2005

error and that such error was one that a reasonable, skilled and careful practitioner would not have made.

The above cases demonstrate the complexities of medical negligent cases. These cases further highlight how litigation takes away the victims power. The appellants in the cases above had no choice but to adhere to the courts finding as it was binding on them. They demonstrate how the law favours medical practioner and how they are rarely held liable even in cases of clear negligence on their part.

2.8 CHALLENGES IN THE CURRENT LEGAL SYSTEM WITH REGARDS TO MEDICAL NEGLIGENCE CASES

There are various challenges with the current system when it comes to the law that governs medical negligence claims in Zambia some which include the application of the bolam test in medical negligence cases as it is a test applied in law of tort but medical negligence claims are very complex in nature which make application of this test hard and leads to uncertainty.Furthermore,there are no proper laws that govern medical negligence making it hard for victims to bring claims.Additionally,due to inadequate laws governing medical negligence, doctors easily escape liability in most cases and doctors defend themselves using the same bolam test to say even a reasonable medical practitioner would make the same mistakes even in clear cases of negligence and most victims lack knowledge of their right to sue medical practitioners due to lack of adequate laws and this is true because of only a few medical negligence cases are taken to court despite the number of reports and due to the nature of such cases, victims fear the court system too.

2.9 CONCLUSION

Bringing a medical negligence claim in the current dispensation is a huge task that requires financial and human resources and time among other things. As demonstrated by legislation and case law above, the current litigation system regarding medical negligence claims exhibits various complications such as unnecessary long procedures, limited precedent and uncertainty among others that make arguments for its dislodgement very necessary. Zambia does not have a single comprehensive piece of legislation that exclusively governs medical negligence

Instead, the legal framework heavily relies on common law principles, judicial precedent and general provisions under tort law to address such claims. This fragmented approach leaves significant gaps in clarity and enforcement, often making it difficult for aggrieved patients to receive timely and effective remedies. As a result, there is growing recognition of the potential role of alternative dispute resolution mechanisms particularly, mediation in the absence of dedicated statutory framework.

3.1 CHAPTER 3

3.2 THE LEGAL FRAMEWORKS IN INDIA AND AUSTRALIA GOVERNING MEDICAL NEGLIGENCE

INTRODUCTION

This chapter examines the legal framework of medical negligence in India and Australia, two jurisdictions with distinct but evolving and effective approaches. In India, medical negligence is addressed through a combination of civil and criminal liability frameworks under various statutes, including the consumer protection Act and the Bharatiya Nyaya Sanhita.Additionally, case law plays a crucial role in balancing the rights of patience and healthcare providers. Australia on the other hand similarly employs tort law principles in addressing medical negligence disputes with its reliance on mediation to resolve such disputes. This chapter will therefore discuss laws governing medical negligence claims.

3.3 BRIEF HISTORY OF MEDICAL NEGLIGENCE IN INDIA

Historically, India has had different dispute resolution mechanisms, such as ***panchayats*** which are a system used in rural areas to resolve disputes consisting of elders within that village who are tasked with settling conflicts amicably. However, during British rule, the adversarial court system became dominant, side-lining mediation practices. At first, claims with regards to medical negligence only came under the purview as a criminal offense and claims were made under the Indian penal code to deal with complex cases of bodily harm caused to patients. The case of **Juggankhan V State of Madhya Pradesh**[45] can be taken as a prime example; where a homeopathy doctor had prescribed an Ayurveda medicine which turned out to be poisonous was held liable of causing death to the patient due to gross negligence.

3.4 THE CURRENT LEGAL FRAMEWORK ON MEDICAL NEGLIGENCE CASES IN INDIA

Since India's independence, mediation has gained formal recognition, especially with the introduction of court annexed mediation centers.When it comes to the healthcare sector, mediation is gaining transaction as an effective method for resolving disputes,

[45]Juggankhan v state of Madhya Pradesh AIR 1965 SC 831

reducing litigation burdens and improving doctor to patient relationships.[46] The consequences of medical negligence in India can be divided into monetary liability, criminal liability and disciplinary liability.[47]

Most medical negligence cases will either have a claim of compensation by the relative of a patient who died out of medical negligence of a medical doctor or by a patient who complains of physical, physiological and emotional damage allegedly because of a medical doctor's negligence. Medical negligence disputes are emotionally complex and personal. In Indian legal system, they are treated like ordinary consumer disputes which go on to appeal over multiple forums and become expensive dispute resolutions.

The landmark case of ***Jacob Matthew*** decided by the Supreme Court of India in 2005 finally laid the guidelines governing the laws of medical negligence in India[48].This case not only established the guidelines governing negligence, but also provided remedies to the claimants by giving them the liberty to claim compensation for injuries sustained and file a criminal complaint to prosecute the doctors for negligence under criminal law.

However, the current issues that the judiciary are facing is that they interpret the words 'rash' or negligent under S.304A of the IPC, 1860 as grossly negligent. This interpretation makes it difficult for claimants to prove that doctors acted in a negligent manner and in addition to that, the courts tend to use this interpretation whilst deciding claims made by aggrieved parties for cases of ordinary negligence. Furthermore, there is a thin line between civil liability and criminal liability, and no sufficiently good criteria is yet been devised by the Hon''ble supreme court to help provide clear and explicit guidance.

There are three essential components the courts consider to prove whether the standard of care expected from a competent professional was clearly established and whether it was deviated from in the specific circumstances. The elements are ;duty of care being a duty that health practitioners owe to patients, breach of duty which is simply about the failure on the part of a medical practitioner to act as a reasonable

[46] Drarvindersingh.com https://drarvindersinghthe role of mediation in resolving healthcare disputes in india
[47] The constitution of India 1950
[48] .Jacob Matthew V State of Punjab and another 2005

person in a similar situation and damage or injury sustained by a patient. India has a unique healthcare system which involves regulation of private individual and corporate and public hospitals and doctors.The constitution of India provides universal healthcare access through the public health sector as it recognizes the right to health. In a medical negligence case, it falls upon the judiciary to balance the interest of all stakeholders. The patients, doctors and healthcare industry without jeopardizing any of the parties. This is important in order to protect the relationship of the parties involved in a medical negligence claim who are mostly healthcare practitioners and the patients or even the relatives to the patients. It should be noted that the burden of proof lies on the claimant to show that the breach of duty caused the resulting harm.

3.5 Monetary liability

Prior to 1986, such liability arose from civil claims in medical negligence under the law of tort. The Indian courts often applied the Bolam test from English law in order to determine if a case fell under medical negligence.[49]Furthermore, the enactment of the consumer protection Act, brought about a change from the tort based approach of handling medical negligence disputes to the consumer based approach. This established a three tier dispute redressed system at the district, state and national levels. The case of ***Indian Medical Association v V.P shantha*** first brought medical negligence disputes under the purview of the Consumer protection Act.[50]It clarified that medical services qualify as 'services' under S2 (1) of the Act, allowing patients to file complaints against medical practitioners for negligence.

3.6 Criminal liability

Criminal liability for medical negligence is datable since no mala-fide intention to cause harm to patients can be established against doctors. Motivating the parties towards choosing ADR, the Madhya Pradesh high court in ***shrichand Bhau v the state of Madhya Pradesh*** emphasized that a medical negligence disputes should always be referred to arbitration or civil proceedings or mediation rather than going for direct criminal prosecution.[51]

The ***Bharatiya Nyaya Sanhita,2023*** which means Indian justice code is India's current criminal code, replaced the Indian penal code of 1860.The Bharatiya Nyaya

[49] [1957] 1WLR 582
[50](1996) AIR 550 (SC)
[51] The penal code of India

Sanhita provides that *'**whoever causes the death of another person by a negligent act not amounting to culpable homicide, shall be liable*** **'and if such an act is done by a registered medical practitioner while performing *medical procedure, he shall be punished with imprisonment for a term which extends to two years or shall be liable to pay a fine***.

Moreover, this can be seen as a progressive step that an exception has been carved out for doctors. Still, the punishment of two years persists, and the threat of culpability in a criminal complaint acts as an extreme deterrent for doctors to perform their duties to the best of their ability and intuition

3.7 Disciplinary Action

The Indian medical council (I.M.C) (Professional Conduct, Etiquette and Ethics) Regulation, 2002, formulated under the I.M.C Act, 1956, governs professional misconduct by medical practitioners.

In cases of alleged medical negligence, a complaint may be filed before the state medical council, which will then conduct an inquiry after providing an opportunity for both parties to put their case forward in person or through a pleader. The decision must be pronounced within six months. If the doctor is found guilty of medical negligence, disciplinary measures are taken against that doctor which may include temporal removal or suspension of the said medical practitioner.

The only other best evidence that the complainant can use is res ipsa loquitor which entails that the facts by their very nature speak for themselves. An example on this is proof of a syringe being left in the patient's body after an operation.[52] The procedures needed to prove medical negligence claims are problematic hence the introduction of other alternatives like mediation in India.

A study that was taken by Vidhi centre for legal policy in 2016 highlighted the role that a referral judge can play in moulding the party's perception about using mediation in medical negligence cases. Which in turn influences the party's willingness to use mediation and to cooperate during the process. It was also noted that in order to effectively mediate a medical negligence claim, the mediator must have the basic

[52] (2015) SCC online NCDR (3095)

understanding of the medical terminologies used and the problems involved. Lack of understanding of medical terms could reduce the possibility of a medical negligence claim being settled via mediation.[53]

3.8 THE COMMERCIAL COURT ACT

Section 12A of India's commercial court Act[54] provides for pre-institution mediation and settlement. This section makes it compulsory for all suits which do not contemplate any urgent interim relief under the Act, not to be instituted unless the plaintiff exhausts the remedy of pre institution mediation in accordance with such manner and procedure as prescribed by the rules made by the central government. The central government may be notified for the purposes of pre institution mediation and they are to complete the process of mediation within 3moths as per subsection (3) and the period may be extended by further 2months with the consent of parties. Subsection (4) within the same section goes further to state that if the parties to the dispute arrive at a settlement, it has to be reduced to writing and signed by the parties to the dispute and the mediators and subsection (5) states that if a settlement is reached, it shall have the same effect and status as if it was an arbitral award on agreed terms.

The above section in itself makes it compulsory for medical negligence disputes in India to be resolved through compulsory mediation first before taken to court because they are not considered as urgent matters under this section and they are commercial disputes under the consumer Act and only in circumstances were mediation fails can they resort to mediation.

3.9 THE CONSUMER PROTECTION ACT 2019

Medical negligence claims in India are addressed as consumer disputes as patients fall within the definition of consumers in the Act. Therefore, the consumer protection Act recommends mediation and provides the structure through consumer mediation cells in chapter V of the Indian Consumer Protection Act[55] to help the parties to peacefully resolve the dispute. Such mediation is conducted under the aegis of the

[53] Kaya s ,Routledge(consumer alternative dispute resolution in emerging economies) pp 154-169
[54] Commercial court Act 2015
[55] Consumer protection Act,2019

mediation Act [56],the Medical council of India or the Consumer mediation cells as explained below.

Given the scale of complexity that comes with medical negligence claims, the Oregon model is employed to resolve such claims which has 3 stages used for dispute resolution created for medical negligence cases with stage one being compulsory negotiation followed by compulsory pre-litigation mediation which should be implemented, with litigation as the last resort in situations where the first two stages fail.

STAGE 1:COMPULSORY NEGOTIATION-This is the first and primary step that parties to a medical negligence dispute are to use to resolve the dispute and it is a must to start with negotiations which is the primary form of ADR mechanisms. During this stage, parties have to sit around the table and discuss the issues surrounding that medical negligence claim with the object of reaching an understanding and a mutually acceptable solution. The parties here interact and the medical practitioner(s) explain what transpired and what went wrong. If they fail to settle the dispute herein, the parties proceed to the next stage.[57]

STAGE 2:COMPULSORY PRE-LITIGATION MEDIATION –If the case is unresolved at the end of stage one, then parties are provided with mediators who are specifically trained for dealing with such sensitive cases being medical negligence cases in this matter. It should be noted that compulsory pre litigation mediation is already part of the Indian legal system and has been recognized in the Constitution of India by the Supreme Court **in Section 12A of** the commercial courts Act.[58]Therefore, parties to a medical negligence dispute must go through mediation before resorting to litigation and only in exceptional circumstances were they fail to settle their dispute through mediation can they go to the last stage which is litigation as a requirement in S5 of the mediation Act of India.

STAGE 3:LITIGATION-This will be the default recourse only if the parties have failed to settle the medical negligence dispute via mediation and it is the last and final resort

[56] ,The mediation Act,2023
[57] Act No.35 of 2023
[58] Commercial court Act

were the dispute is resolved using the court system and whatever decision the judge passes becomes binding on the parties.

This model inherently allows for an apology to be rendered to the aggrieved party during the first two stages, as both these processes are confidential and without prejudice to the rights of the parties. It should also be noted that the mediation processes are not bound by civil procedural law, rules of evidence, or assumptions inherent in adversarial proceedings. However, this model has a few challenges in implementing tithe first being the resistance from patients themselves as they believe that such a system to resolve the medical negligence claim is unfair and they believe they can only get the justice they want from the court. Another notable challenge is disparities of interest's and bias from the mediators and medical practitioners due to their professional ties or fear of rejection by the medical community thereby giving biased testimony in favour of the medical practitioner thereby disadvantaging the patient.

4.1 LEGAL FRAMEWORK FOR MEDICAL NEGLIGENCE CLAIMS IN AUSTRALI

HISTORY OF MEDICAL NEGLIGENCE IN INDIA

Medical negligence claims in Australia have a notable legal history which is marked by key developments and cases shaping the principles of duty of care, breach of duty of care, causation and damages which was shaped by common law principles of tort law. The foundational case is ***Rogers V Whitaker***[59], which established important principles on informed consent and material risks, confirming that doctors must warn patients of significant risks associated with treatment. The evolution of this field has been influenced by landmark court cases and various legislative acts in the early 2000s.

Over the decades, Australian courts have dealt with a variety of cases dealing with medical negligence with significant cases like ***Scripathi V central coast local health***[60] which dealt with medical negligence claims and also certain legislative reforms like the civil liability Act were enacted across Australian states to manage

[59] [1992] HCA 58-175 CLR 479;23 NSWLR 600;109 ALR 625
[60][2024] NSWSC 243

claims and liability limits. Despite increasing adverse medical events, negligence claims have shown varying trends, influenced by legal reforms and court interpretations.

4.2 CURRENT LEGAL FRAMEWORK GOVERNING MEDICAL NEGLIGENCE IN AUSTRALIA

For over 30 years, Medical negligence claims have been rising dramatically with the introduction of new technologies and medicines which have brought about various complexities in healthcare and almost every claim of medical negligence is referred to mediation by court order or by consent. In Australia and they have been handled using tort law principles. However, due to the difficulties that come with medical negligence claims and proving the elements of negligence, medical negligence cases are settled out of court using mediation and informal settlement conferences.[61]

THE CODE OF CIVIL PROCEDURE

Following the introduction of the code of civil procedure, it has been made a mandate to consider the use of alternative dispute resolution mechanisms before instigating litigation in various civil cases which include medical negligence cases. Mediations now well established in Australia in various divisions of the state. The legislated pre litigation ADR mechanisms which were introduced over the last decade are designed to pressure lawyers into litigating much earlier in the litigation cycle. This requires different mediation style but mediation in medical negligence cases as it is relationship based, facilitative and focuses on the soft skills of the mediator.

Mediation is generally, takes place within about a year or 18 months of the commencing of proceedings. Parties further attempt to use small panels of mediators, most of whom are senior counsel. The chosen mediator then gives directions to prepare the matter for mediation. Additionally, a draft index of the mediation bundles is circulated and agreed on by the parties to the claim. This consists of pleadings and medical reports to be relied upon.

[61] Tego insurance, 'Mediation is the key in medical negligence cases' (Tego insurance,19 January 2025) https://tego.com.au/learn/mediation-is-the-key-in-medical-negligence-cases/ accessed 14 October 2025

In the opening session, the mediator explains the process which is absolutely confidential and generally urges the parties to compromise their respective positions in order to resolve the matter. After the opening session, the parties return to their respective breakout rooms with various offers being made in an attempt to resolve the matter. If an agreement is reached, the appropriate documentation is drawn up so that the court can make orders formalising the agreement between parties.

PERSONAL INJURIES PROCEEDINGS ACT

Under this Act, parties to a medical negligence claim are required to satisfy the pre proceedings requirements by participating in a compulsory conference before commencing court proceedings which can be done without a mediator or by way of mediation with a mediator. This occurs at a time and place agreed upon by the parties. It should also be noted that in Western Australia, the district court rules require that all matters progress through an ADR process, either a pre-trial conference or mediation. The conferences are listed around 12 to 18 months after a matter has been issued. There is a registrar present to assist parties to mediate if the matter reaches an impasse.

In New South Wales, approximately 80% of matters resolve at mediation or shortly afterwards .In Western Australia the resolution rate is close to 90% from the final pre-trial conference while in Queensland, very few medical negligence cases proceed to hearing after compulsory mediation**.**

4.3 CONCLUSION

Medical negligence cases attract the procedural laws of civil procedure in most countries despite having human life and health at stake. They fall within the categories of cases that come with power imbalance, heightened emotions and compensation and cannot be calculated in monetary claims. In most cases, the stakes involved are so high, diverse and sensitive pointing to a need to have such claims resolved out of court through mediation which is victim centred.

CHAPTER 4

4.6 A COMPARATIVE STUDY OF THE LAW GOVERNING MEDICAL NEGLIGENCE BETWEEN ZAMBIA, INDIA AND AUSTRALIA

4.7 INTRODUCTION

This chapter will undertake a comparative study of the legal frameworks, procedures and regulatory institutions that govern medical negligence in Zambia, India and Australia. This chapter will also discuss the similarities and the notable differences of the laws that govern medical negligence in these countries by comparing the principles from common law that they apply in all three jurisdiction and also the various statutes used in all three jurisdictions when it comes to medical negligence claims and will also look at the procedures used to resolve medical negligence cases in Zambia, India and Australia.

The laws that govern medical negligence in Zambia, India and Australia present distinct but overlapping approaches which are from common law principles, statute based reforms as medical negligence sits at the intersection of healthcare delivery and the law, with profound implications for patients safety, dignity and trust.

4.8 DEFINITIONS AND SCOPE

In Zambia, medical negligence falls within the purview of professional negligence and it is given the same definition used for tort law of negligence were a medical practitioners act or omission fall below the accepted standard of care for their profession and thereby causing damage to the patient.[62]This definition is borrowed from the law of tort. On the other hand, medical negligence in Australia is defined using tort law principles from the bolam test[63] as a breach of duty of care by a healthcare professional thereby causing harm to a patient. India however defines medical negligence as the failure of a medical practitioner to perform his duty with care thereby causing harm to consumers(patients) [64]It is clear that in all the three jurisdictions and in their definition of medical negligence, there is a failure on the part of a medical practitioner to perform his duty with care and Zambia and Australia borrow principles

[62] (1993) Z.R 105 (H.C)
[63] [1975] 1 WLR 582
[64] Act No.35 of 2019

of tort law in their definition while India encompasses the consumer perspective to define medical negligence as patients are looked at as consumers.

4.9 LEGAL BASIS

Zambia relies on fragmented statutory instruments and common law thereby leaving patients vulnerable, undermining both justice and public health. Medical negligence law in Zambia is primarily based on tort of negligence as medical negligence claims are viewed from the perspective of negligence under tort law. Furthermore, the Zambian framework that governs medical negligence claims is influenced by common law principles particularly the bolam test.[65] This test assesses whether a medical practitioner acted in accordance with a responsible body of medical opinion. This test sets the standard for medical negligence claims in Zambia were it checks if a reasonable medical practitioner being in the position that the accused medical practitioner was in would have acted that same way too.

Furthermore, the landmark case of ***Duff kopa kopa v university Teaching hospital***[66] remains authoritative, affirming the application of the bolam test to establish duty of care, breach of the duty of care and causation.Additionally,zambias legal framework governing medical negligence cases is also supported by various provisions of the Zambian constitution which safe guard the right to health and also criminal law provisions that criminalize negligent acts (S199,S207,S210) of the Zambian penal code .[67]Furthermore. Regulatory statutes like the health practitioner's act[68] and the nurses and midwives act[69] supplement the Zambian laws that regulate medical negligence by imposing professional standards and disciplinary procedures.

However, Zambia does not have a single comprehensive statute dedicated exclusively to medical negligence, leading to fragmented regulation and significant challenges for victims seeking redress.

[65] [1975]1WLR 582
[66] SCZ judgement N0.8 of 2007
[67] Chapter 27 of the laws of Zambia
[68]Act No.17 of 2024
[69] Chapter 300 of the laws of Zambia

Similarly to the Zambian system, indias legal framework combines civil and criminal liability doctrines under several statutes, including the consumer protection Act and the recently enacted ***Bhartiya Nyaya Sanhita***[70] In the past, medical negligence was addressed as a criminal offence under their penal code which is still the case in Zambia when it is looked at from a criminal law point under the Zambian penal code which is not the case in India as it stands. Medical negligence disputes are looked at from a consumer perspective after the introduction of the consumer protection Act[71] which provided civil remedies positioning medical negligence as consumer disputes. Similarly to the Zambian framework that governs medical negligence were they have cases like ***Duff kopa kopa v the university teaching hospital*** which has set precedence for medical negligence cases, India also has a Supreme Court case of ***Jacob Matthew***[72] which sets as binding precedent for medical negligence cases in India. In this case, the courts clarified legal standards and remedies, balancing criminal and civil liabilities.

India's framework uniquely mandates pre-litigation mediation for medical negligence cases. Unlike the Zambian framework governing medical negligence cases which only provides for litigation, India's framework by providing for a pre-litigation mediation, it provides for litigation as the very last resort thereby promoting victim based reforms which are not provided for in the Zambian system. It also provides for a confidential process for the victims which is not the case in Zambia as the court system used in Zambia in open to everyone and there is no confidentiality. Furthermore, professional disciplinary bodies for medical practitioners play a huge role in imposing sanctions for medical negligence cases to medical practitioners in India which is not the case in Zambia as the courts are the only ones in charge of imposing such penalty to health practitioners.

However, Australia has a well-established common law tort system for resolving medical negligence cases. Moreover, this is not the case in Zambia as the law

[70] No.45 of 2023
[71] Act 5 of 2019
[72] (2005) 6 SCC 1

regarding medical negligence is not well established in the laws of Zambia as principles the courts apply to resolve medical negligence disputes are borrowed from tort law under negligence. Australia uses foundational cases such as ***Rogers's v Whitaker***[73] which sets the duty of care and informed consent standards. Zambia uses the Bolam test to check if a reasonable medical practitioner would have acted in a way the negligent medical practitioner acted.

Additionally, Australia has legislative reforms which includes civil liability acts across its states which manage liability and compensation frameworks.Australias key feature is strong judicial endorsement of mediation and ADR, with courts mandating mediation before litigation in medical negligence cases. It should be noted that unlike the Zambian system that only provides for litigation as the only way to resolve medical negligence cases, Australia and India have a compulsory and mandatory pre-litigation mediation for medical negligence cases. They have made it a mandate to resolve medical negligence cases through mediation and litigation only kicks in as the last resort if mediation has failed and they have well established laws that govern these processes unlike the Zambian laws which are silent.

Moreover, Australia's main feature is strong judicial endorsement of mediation and ADR with courts mandating mediation in medical negligence cases before litigation. The legal process in Australia incorporates pre-trial conferences, position papers and structures mediation led by experienced mediators, often senior counsel. This mediation process generally leads to high settlement rates, reducing court burdens and fostering negotiated resolutions. Despite the initial judicial scepticism of ADR, mediation has become entrenched, viewed as facilitating relationship based, confidential and efficient dispute resolution focused on soft skills and flexibility which is absent in adversarial litigation systems like that used in Zambia. The personal injury proceedings Act[74]requires compulsory pre-litigation conferences or mediation, which emphasize early resolution.

Zambia's legal framework governing medical negligence remains fragmented as it relies on the health practitioner's council of Zambia and judicial precedent. Australia and India by contrast place healthcare at the heart of their constitution by empowering

[73] (1992) 175 C.L.R 479
[74] Act 320 of 2002

the courts to treat medical negligence not only as a tort but a constitutional violation. Unlike the Zambian framework, the laws in Australia and India are clearly outlined when it comes to issues of medical negligence and how they should be handled.[75]

5.1 THE KEY DIFFERENCES AND SIMILARITIES

LEGAL BASIS

Zambia and India use the tort law approach to resolve medical negligence specifically the bolam test which looks at a reasonable medical practitioner and how they would have acted in that situation while India uses the consumer protection Act as patients are viewed as consumers and they are to enjoy certain rights and any person who interferes with their rights is held liable. Furthermore, such disputes in India are looked at under their penal code known as the Bharatiya Nyaya.However, Australias system similarly to the Zambian framework looks at such medical negligence disputes under common law specifically the law of tort and they also apply common law principles and they have the civil liability acts which provide laws and procedures dealing with medical negligence.

5.2 MEDIATION INTEGRATION

In Zambia, mediation for medical negligence cases is not statute based and it is therefore not backed up by any laws. Although statutory instrument No.73 of 2018 introduced court annexed mediation in Zambia, it makes no provision for the recognition of mediation in medical negligence cases which makes it automatic that any medical negligence claim is to be taken to court. Moreover, mediation is mandated in India as they provide for a pre-litigation mediation by statutes and it is trite law that parties to a medical negligence claim use mediation first and only when it fails can they resort to litigation as their last and only resort and they have a multi-stage negotiation mediation litigation model that clearly explains stages to be followed in medical negligence disputes. With the first being negotiation which is the primary form for alternative dispute resolution. Parties on this first step are expected to resolve the dispute without the help of a third party and to participate directly. Negotiation is about the parties trying to get the best deal possible in a given situation and they focus on solving the problem without shifting blame. However, in cases were negotiation fails,

[75] SI 73 of 2018

the parties proceed to the second stage of the process being pre-litigation mediation. This stage involves third parties who include legal practitioners and experts in a particular field. The third party helps the disputants to attempt to understand and evaluate the interests of the other party. The third parties work with both parties to help them reach a mutually agreeable solution to their differences and the outcome to this is entirely in the hands of the disputants. In a case were parties to the medical negligence dispute fail to agree, they automatically go to litigation as the last option and whatever decision the courts pass is binding on the parties.

On the other hand, Australia strongly mandates mediation as the first step to resolve a medical negligence dispute as their law strictly provides for pre-litigation mediation in all medical negligence cases and only in cases where the pre-litigation mediation fails can they resort to litigation. The laws in Australia provide for procedures to resolve medical negligence cases in Australia. Mediation is highly favoured in Australia for medical negligence cases with very high settlement rates. Zambia has the health practitioner's council of Zambia that disciplines medical practitioners for misconduct which does not necessarily point to medical negligence while India has the medical council regulations which are in charge of medical negligence claims and Australia on the other hand has the professional standards regulatory body to look at medical negligence cases and discipline health practitioners.

5.3 REGULATORY BODIES

Zambia has the medical council of Zambia which is a body created under the Health practitioners Act which I in charge of regulating conduct of health practitioner and ensuring that they follow the required procedures and handle patients with care. India on the other hand has the Indian medical council which governs professional misconduct by medical practitioners. Unlike the medical council of Zambia, India's medical council receives complaints of medical negligence and through the mahanshtra council, it resolves medical negligence claims using mediation and helps parties to reach an agreement. Australia has informal settlement conferences that hear medical negligence claims and helps parties reach an agreement.

Zambian laws do not recognize mediation to resolve medical negligence disputes which is therefore automatic that any medical negligence claim is resolved through

litigation. Additionally, India S12A of the commercial court Act[76] of India makes it a mandate to use mediation first for medical negligence claims by applying a three tier test (Oregon model) which has three stages to resolve medical negligence cases and these stages are compulsory negotiation, compulsory pre litigation mediation and only when the three stages fail can one institute litigation.

Furthermore, once a victim experiences a possible medical negligence in Zambia, they go directly to the court as the laws in Zambia are silent on medical negligence and how claims are to be instituted. Australia takes a different route to resolve such disputes as the laws clearly provide for a pre-litigation mediation therefore making it impossible for parties to go to litigation first without exhausting all the other remedies. India takes a similar approach like that of Australia as a patient who experienced a medical negligence is required to exhaust the remedies provided for in the Oregon model before they go to court. Medical negligence claims in India are reported to the police stations first before they are taken to a mediation council that is in charge of looking at such claims and the consumer courts come in to determine whether or not the patient is a consumer who's right to healthcare was violated by a negligent health practitioner. Once it is ascertained, the parties have to undergo a negotiation and if they fail to reach an agreement, they proceed to pre-litigation mediation and it should be noted that most medical negligence claims in India do not go beyond this stage as it has been seen to be very effective thereby giving the parties to the dispute more satisfying results. Only in very few cases were pre-litigation mediation fails can parties take their matter to litigation which is very rare.

REMEDIES

There are various remedies that are given in all three jurisdictions once a medical negligence claim has been proven. These remedies in all three jurisdictions are usually in favour of the complainant being the patient or their relative. In Zambia, compensation is the remedy that is given to the claimant in most cases once their claim is successful as seen from various Supreme Court cases which can be in form of and disciplinary action is given to a medical practitioner who acted negligently

[76] Act 201604 of 2015

through the health practitioner's council of Zambia. Australia however uses similar remedies once a medical negligence claim has been sustained. India's medical negligence redress system differs from Zambia and Australia, as they use consumer courts to grant compensation to the injured party and they terminate a health practitioner's license in very serious medical negligence cases.

5.4 CONCLUSION

While all three jurisdictions have recognized the importance of applying the duty of care and apply the standard set by negligence, India and Australia have however developed statutory frameworks which expressly and makes it a mandate to integrate mediation as a primary resolution mechanism in medical negligence disputes. Zambia however remains dependent on on common law principles with emerging recognition of mediations potential role. The comparative analysis further highlights evolving trends toward the use of mediation in medical negligence cases in order to balance the interest of parties by drawing upon detailed legislative, procedural insights from Zambia, India and Australia as presented above.

CHAPTER FIVE

5.7 CONCLUSIONS AND RECOMMENDATIONS

This chapter will provide a summary of all the information contained and discussed in the preceding chapters of this thesis. Additionally, this chapter will equally provide recommendations which are aimed at resolving the problem identifies in the thesis herein being the need to introduce mediation in medical negligence cases.

5.8 GENERAL CONCLUSION

From the analysis given in the other chapters, it is clear that the Zambian legal system dealing with medical negligence cases has a lot of challenges. Evidence suggests that a great number of people in Zambia suffer serious injury due to medical negligence and others have lost their lives due to the same in more serious cases due to mistakes by health practitioners during treatment. Medical negligence has been reported to be the third leading cause of death worldwide[77] which calls for concern.

This thesis however is focused on the effects of the aftermath. This research discussed the concern of the absence of proper laws to govern medical negligence disputes. The main issue however with issues of medical negligence is the way in which such claims are resolved by the courts. By looking at the very nature of medical negligence claims, it is necessary for a more victim centred way of resolving these disputes. Litigation might offer compensation to the injured or affected parties and it gives them a platform to resolve these claims while focusing on who is wrong and who is not. However, because of the complexities and reasons highlighted in this thesis, this system does not seem adequate for dealing with medical negligence disputes because it is not always the motivation of the injured person or relatives of the deceased person to get compensation from the court. They want to understand what really transpired and how their relative died as their first step to acceptance and healing but the court system is focused on finding liability and does not address their emotional needs. It is therefore safe to state that the current system in Zambia used to resolve medical negligence claims is not adequate. Therefore, mediation offers a

[77] https://journalismiziko.dut.ac.za/feature-review /doctors-are-not-perfect/ (15th October,2018)

more promising solution to problems that surround redress of medical negligence disputes.

This research therefore argued that all medical negligence disputes must be resolved by compulsory mediation and only when mediation fails can they resort to litigation. Adopting this mechanism could reduce the number of court cases and time to resolve disputes of this nature immensely. Furthermore, it is envisaged that mediation will restore fairness between the parties to the medical negligence claims and can potentially improve the relationship between the doctors and patients and the standard of care provided by medical practitioners would increase too due to an improvement in the chain of communication.

The preceding chapters demonstrated how mediation differs from litigation. The aim of litigation is to find liability on one party by a competent judge. It should be noted however that the interests of parties are not important or considered in litigation .Moreover, this is not the case with mediation. Mediation reaches an outcome by helping parties to negotiate firstly and agree on something. The interests of all the parties are put into consideration and there is no imposition from third parties as the ones that agree to a decision are the parties to the dispute and no one tells them what to agree on. This in itself makes both parties feel like they have gained from the process.

This research posits that the current system of resolving medical negligence disputes in Zambia is flawed and needs great improvement. The increase in the number of medical negligence disputes simply suggests that the current system in Zambia has failed to produce an effective solution to the situation. This calls for a need for a system that will not only provide compensation to the victims but also ensure that the interests of both parties are taken into consideration and to provide incentives for doctors and nurses so as to reduce medical negligence cases. This system should aim to protect the patient and doctor relationship and to provide for cheaper legal services. The current system in Zambia however fails to meet this standards and for that reason, two jurisdictions that are successfully using mediation for medical negligence cases were discussed mainly India and Australia and Zambia could draw lessons from these jurisdictions and improve the existing system.

An effective mediation system brings healing and closure to everyone involved. It would incorporate fair compensation, minimize harm, foster trust, and facilitate open communication between the health care providers and the patient or their relatives and to offer them an opportunity for restoration.

5.9 SUMMARY OF CHAPTERS

This research paper contains five (5) chapters which analyse the problem that relates to medical negligence claims in Zambia by analysing the legal framework used in Zambia which has proven to be inadequate with lessons drawn from Australia and India.

6.1 CHAPTER ONE

The first chapter identified the legal problem and laid a foundation for this research. The problem that was discussed in this chapter is the issue to deal with medical negligence and how the laws in Zambia are inadequate and silent which is evidenced as discussed in this chapter .Furthermore, this chapter identified the research objective which are, to critically analyse the legal framework used in medical negligence cases in Zambia and the second objective being the legal framework that governs medical negligence cases in Australia and India and the last objective undertook a comparative study of the legal frameworks that govern medical negligence in Zambia, Australia and India.Further,this chapter discussed the significance of this research paper which is the need to review, amend and revise the laws that govern medical negligence in Zambia in order to have effective laws that are clear on medical negligence in Zambia.

6.2 CHAPTER TWO

This chapter analysed the legal framework governing medical negligence in Zambia by analysing various pieces of legislation such as the constitution of Zambia , penal code of Zambia, the health practitioners Act, The nurses and midwifery Act among others. It was therefore concluded in this chapter that the current legal framework for resolving medical negligence in Zambia is inadequate and ineffective as they borrow

tort law principles which might to really be sufficient to fit the nature of medical negligence.

6.3 CHAPTER THREE

This chapter discussed the legal frameworks in India and Australia relating to medical negligence were various pieces of legislation from both jurisdictions like the consumer protection Act as patients are seen as consumers, the mediation Acts, the commercial court Acts and many other statutes that deal with medical negligence. There models that these jurisdictions use to resolve medical negligence cases such as the Oregon model of India which has a three stage tier test that makes it compulsory for medical negligence cases to be resolved through negotiation or mediation before the parties decide to take the matter to court. Australia through their laws have made it compulsory and mandatory to resolve medical negligence cases using pre-litigation mediation and only in exceptional cases where these stages fail can they resort to court.

6.4 CHAPTER FOUR

This chapter undertook a comparative insight from India and Australia and it provided an overview of how mediation has been integrated into the resolution of medical negligence cases in India and Australia. It went into detail analysing the legal, procedural and institutional approaches adopted in both jurisdictions thereby demonstrating the effectiveness of the methods used to resolve medical negligence. It also discussed lessons to be drawn from these jurisdictions.

6.5 RECOMMENDATIONS

Having discussed broadly the challenges of the current system for resolving medical negligence claims in Zambia and its disadvantages, this research paper proceeds to make recommendations accordingly. The recommendations are based on the Oregon model used in India. The following are the recommendations;

1. INTRODUCING A COMPULSORY PRE LITIGATION MEDIATION

i. A provision that can mandatory compel parties to a medical negligence claim to take their case to undergo mediation and to be resolved there and only if mediation fails can they proceed to litigation and only in exceptional circumstances.

The proposed system used to resolve the current escalation of medical negligence claims is to institute a compulsory pre-litigation mediation to be the first step towards resolving a medical negligence claim like that of Australia or India. Introducing a framework that provides for compulsory pre litigation mediation for medical negligence cases will help to resolve maters without unnecessary long procedures thereby making it possible for claims to be resolved much faster and it will be very cost effective for the parties. However, this system will help to get to the bottom of the negligence and finding the root cause so that the doctors do not repeat the same errors as mediation encourages free flow of information between health practitioners and patients. Adding mediation to the process would help in making the litigation process easier as parties will be given an opportunity to arrive at a mutually suitable solution before they decide to go to litigation. Adding mediation as an initial step for medical negligence disputes should not be a problem, especially since it is a cheaper and faster process. The legal community might not put up much resistance, as it does not require a major overhaul of their existing process.

ii. Include a provision that makes it mandatory for the complainant who has a possible medical negligence claim to provide medical reports and a written report that explains what occurred from their point of understanding.

ii. A provision that allows for the claimant to be interviewed so as to know if at all they played a role in that medical negligence claim

2. ESTABLISHMENT OF A PRE LITIGATION MEDIATION COMMISION

i. Establish an independent department or a pre litigation mediation commission charged with the responsibility of taking reports and cases of medical negligence and helping the parties throughout the process and help them to reach an understanding.

3. INTRODUCING A PRE LITIGATION MODEL FOR MEDICAL NEGLIGENCE CLAIMS

i. There are various models that can be used for mediation in medical negligence cases. The model that is suggested by this process is called the Oregon model which is based on lessons learnt from India as discussed in chapter 3 which used to resolve medical negligence cases in India. This model provides for a three stage tier test to resolve medical negligence claims and it is compulsory in India. Only if this test fails can the parties proceed to litigation. The first stage used in this test is compulsory negotiation. This is where the parties to the dispute have to talk and consider each other's interests to get the best solution. Compulsory pre litigation mediation comes in after negotiations fail. Parties to the medical negligence disputes are assisted by mediators throughout the process to help them reach an understanding. It should be noted that when the first two stages fail can the parties proceed to litigation which is rarely the case. Litigation comes in as a default procedure to resolve the medical negligence dispute and whatever decision the court decides on is binding on the parties as this is the last and final stage of this model and it is rare for medical negligence cases to reach the last stage. It only happens in exceptional circumstances.

Using a model such as the Oregon model discussed above will be based on principles of mediation with restorative components. The main element of a model such as the Oregon model is that it should be the first step whenever there is a medical negligence dispute which aims at addressing any such disputes. The difference between using

the court system or this model is that the mediator will help facilitate the process and not decide anything on anyone's behalf if mediation is implemented and parties are free to communicate their needs and interests. The court system however allows for the judge to give a legally binding decision without putting into consideration the interest of the parties. There can be a commission that would be in charge of mediation for medical negligence cases which can facilitate the resolution and help parties reach an agreement that works for the. The commission created can also help with identifying possible negligence cases and they can proceed to help parties find a solution and make recommendations to avoid future occurrences of such errors. Additionally, members of the mediation commission can collaborate with health care providers so that once they mediation commission sits for a medical negligence cases and identify the errors, the commission can follow up and monitor how the health care providers are implementing their recommendations. The mediation commission members can be made up of health care specialists, legal practitioners and a few selected members of the public.

The method that can be used to report a possible medical negligence claim can be done in two folds. Firstly, a patient who faces a medical negligence can bring the matter to the commission to be reviewed so they see if there is truly a medical negligence that needs attention or a health practitioner himself can report a possible negligence claim that occurred to the mediation commission for review so that other practitioners cannot make the same mistakes in the future.

iii. Once a case has been reported to the mediation commission by the patient or health practitioner, the case can be assigned to members of the mediation commission who can interact with both parties on different days to get the facts of what transpired and how the medical negligence occurred and they would look at other underlying factors that would have caused or contributed to the medical negligence. Furthermore, the mediation commission can review the reports and facilitate dialogue between the parties to the claim so that they gain a better understanding and appreciation of how the cause of events occurred and to understand the interests of the parties and what each party wants to obtain from the mediation process. The importance of this stage is simply for the mediators or rather the members of the mediation to gain a full understanding of the accounts of the events that caused the medical negligence so that the generate adequate compensation for the injured party and to further provide

recommendations to the health practitioners involved so that they include recommendations and improve standard of care.

Zambia is facing an increase in the number of medical negligence cases today and this is evident because of the increasing number of medical negligence cases in courts today which raises concern and there is need for a solution which viable and can curb this problem today. This research paper aimed to provide a solution to address this pressing issue in Zambia.

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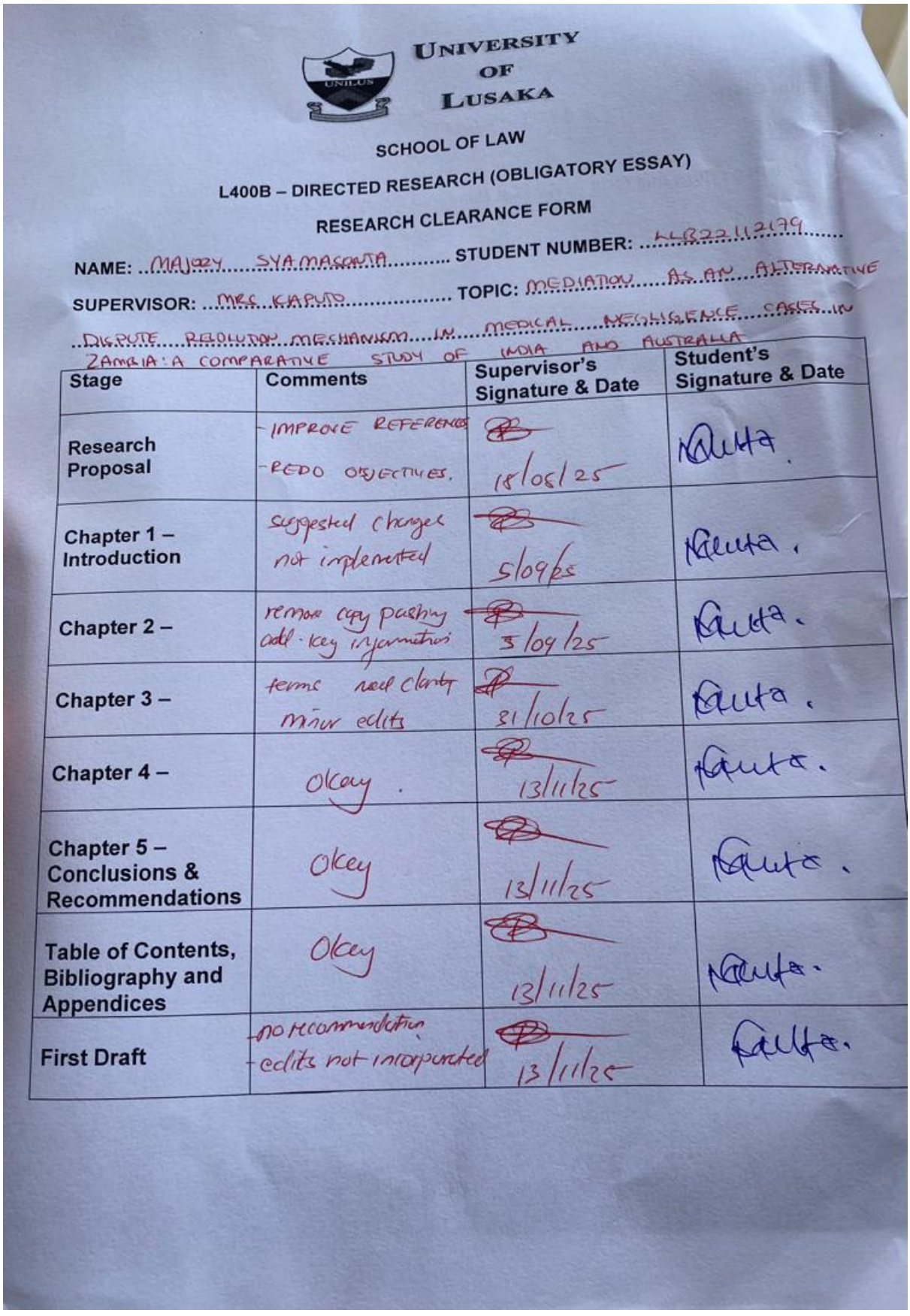

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L400B – DIRECTED RESEARCH (OBLIGATORY ESSAY)

RESEARCH CLEARANCE FORM

NAME: MAJORY SYAMASANTA STUDENT NUMBER: LLB22112179

SUPERVISOR: MRS. KAPUTO TOPIC: MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM IN MEDICAL NEGLIGENCE CASES IN ZAMBIA: A COMPARATIVE STUDY OF INDIA AND AUSTRALIA

Stage	Comments	Supervisor's Signature & Date	Student's Signature & Date
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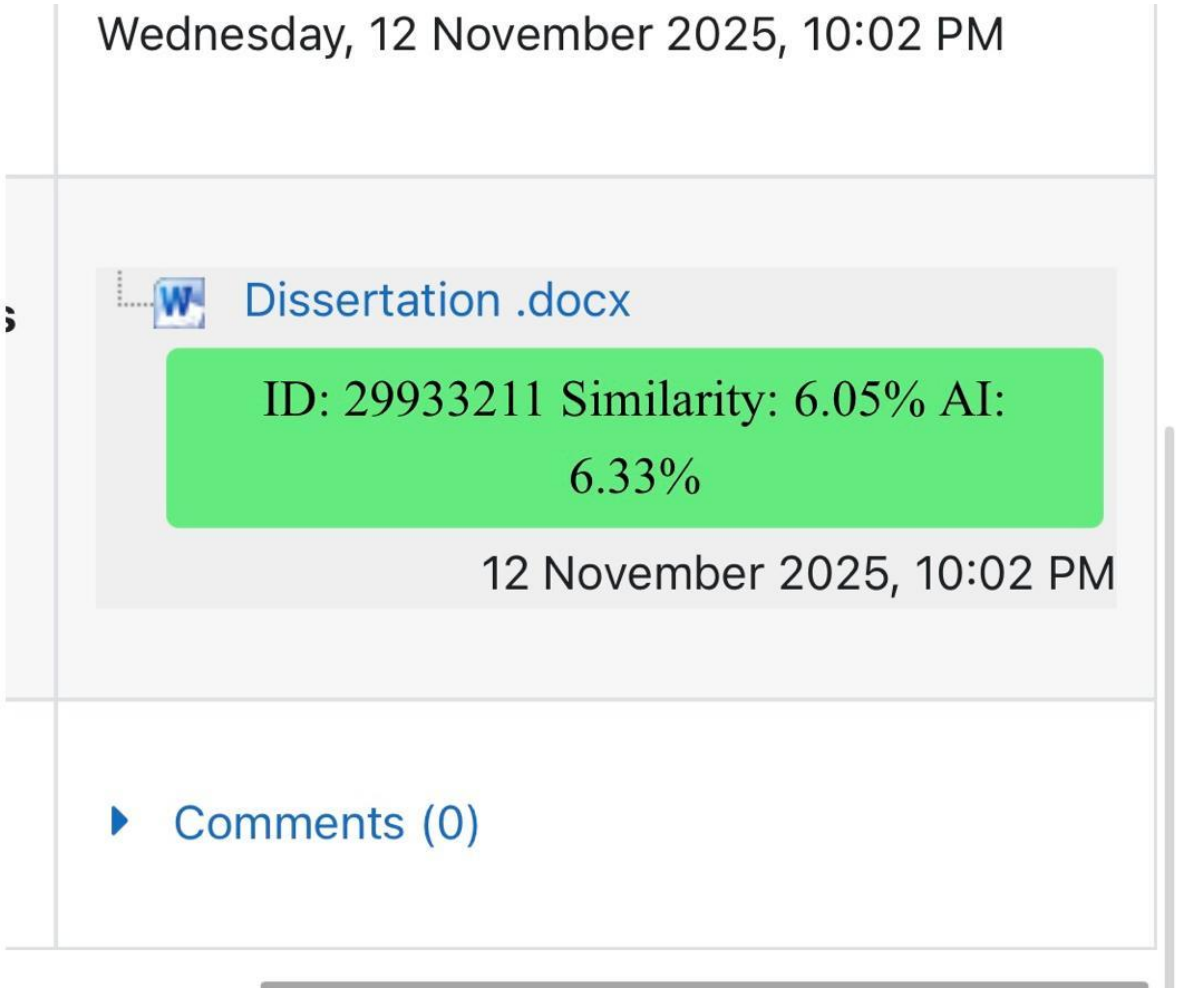
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