

A Critical Evaluation of the Committee of Preliminary Inquiry of the Health Professions Council of South Africa, with Specific Reference to Maxillo-facial and Oral Surgery (Part 2)

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Consider the following public statements by prof N Padayachee, president of the HPCSA:

“...The majority, on panels investigating allegations of misdemeanours by doctors, will be community representatives, and they are going to be chaired by people who are not doctors...”¹

“...We have ... seen a steady increase (27% during the last financial year) in the amount of complaints... ..We are however cognisant of the current limitations in our processes that sometimes lead to long drawn out procedures and delays in dispensing with justice...”²

INTRODUCTION

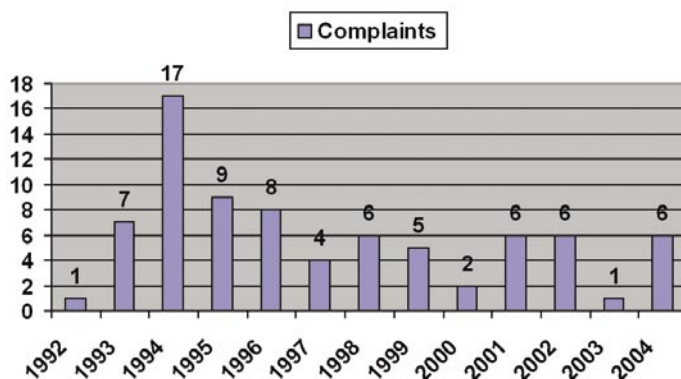
This study was done in order to evaluate the effectiveness of the committee of preliminary inquiry of the Health Professions Council of South Africa (HPCSA), with specific reference to maxillo-facial and oral surgery. An investigation was done at the legal department of the HPCSA regarding complaints that were lodged against Maxillo-Facial and Oral Surgeons for various claims of alleged unprofessional conduct. Furthermore, a study was conducted to determine the legal framework in which this committee are supposed to function. The purpose of this study is to offer ethically and legally justifiable recommendations to the current investigative system of the committee of preliminary inquiry (PRELIM).

CASE STUDIES

The extent of the cases brought before the PRELIM is overwhelming. The rulings made in the vast majority of cases, such as fraud and false declarations/certificates, do not justify any further comment, as they were clearly based on sound judgment by the committee and are actually a matter of *res ipsa loquitur*, which seldom create difficulty of interpretation.^{3,4}

The records of the Dental PRELIM of the legal department of the HPCSA indicated that it had investigated 78 complaints against 47 Maxillo-Facial and Oral Surgeons during the period from January 1992 to October 2004. There are still 12

cases that have not been resolved as yet. These records further indicated that it took an average of 16,7 months for the remaining 66 cases to be resolved.⁵



Procedural	57		
Competence	35	Over-service	1
Insufficient care	7	Operation without consent	1
Bad communication	5	Supersession	1
Certificates/Reports	3	Discrimination	1
Covering	2	Impeding	1
Administrational	21		
Fees/Accounts	18	Advertising	3

It appears that more than 70% of these complaints focused on the alleged unprofessional conduct (in the context of medical negligence) of practitioners when treating their patients. This is also in accordance with the majority of complaints received by the Dental Protection Society against the dental profession as a whole in South Africa.⁶ In this regard it appears that two issues are becoming very relevant to the patient: (a) did my doctor inform me of all the relevant aspects of the treatment, and, (b) in the event of an unfavourable outcome, who will testify whether my doctor’s conduct was unprofessional or not.⁷ As there is often a marked, albeit bona fide difference of

opinion on various aspects of surgical treatment (some experts favour drastic interventions; others prefer more conservative options), it follows that there is a decided unease about the reliability and objectivity of expert witnesses.

The records of the legal department indicate that 6 cases were referred to the PCC of the MDPB for disciplinary investigation. It was noted with concern that an unacceptably high percentage of cases (50%) were eventually found not guilty by the PCC. The reason for this can be two-fold: (a) the high acquittal rate may of course testify to the advantage of good-quality defence-lawyering, or, (b) questions must be raised with regard to the effectiveness of the investigative function of the PRELIM, as they apparently found *prima facie* evidence of professional misconduct in all of these cases and subsequently recommended that disciplinary inquiries be held. Considering the latter, it is very unfortunate and simply not fair towards the accused practitioner as well as the patient, as inquiries are time consuming and often very expensive.

PROPOSALS CONSEQUENTIAL TO THIS STUDY

The evaluation of the investigative system of the PRELIM preceding inquiries into complaints against registered practitioners of the HPCSA has revealed certain shortcomings. The following proposals have been made (in order of most importance):

1. The PRELIM should abide by the rules of natural justice.

Discussion

The HPCSA and its attendant PCC, in its capacity as statutory authority exercising an administrative function, is obliged to discharge its statutory duties by PRELIM, as its primary function is to establish whether *prima facie* evidence exists to justify a disciplinary inquiry into the conduct of a practitioner. It is therefore on the PRELIM's recommendation that the whole disciplinary process is started. It is accepted that the disciplinary process is of a quasi-criminal nature, requiring stricter adherence to ordinary rules of procedure and evidence if justice is to be done to all parties involved. Criminal courts have the advantage of avail-

ability of findings in reported cases, and are bound by these preceding findings in respect of similar current cases.⁸⁻¹⁴ It appears that the HPCSA, through its PRELIM and subsequent PCC, very seldom act accordingly. It therefore raises the inevitable concern about whether the PRELIM did in fact make an unbiased, legally-valid decision when referring a case for further disciplinary investigation.

Greater transparency in judicial proceedings and freer access to courts due to legislative prescriptions will probably lead to more cases that was finalised at the HPCSA being taken to a higher tribunal for review and/or appeal, and possible rejection of its findings.¹⁵⁻²⁴ The importance of an objective and legally justifiable investigative/evaluation system can thus not be emphasised enough.

2. Establishment of a Forum of Expert Witnesses (with the required skills) that will evaluate all cases of alleged professional misconduct and negligence pertaining to the field of maxillo-facial and oral surgery after being evaluated and referred by the Ombudsman.

Discussion

The records of the Dental PRELIM indicated that, since January 2000, 21 cases have been investigated against maxillo-facial and oral surgeons. It took an average of 8,4 months (1-18 months) to resolve 12 of these cases, with the remaining 9 still under investigation. There are also 3 earlier cases that have apparently not been resolved as yet.⁵ Against this background it is highly significant to note that the current president of the HPCSA has already publicly admitted that the current procedures of their PRELIM and PCC are inadequate. With reference to the appointment of external agencies to handle the current backlog of complaints against practitioners,² one can only but speculate about the additional time and money needed. The assessment of expert evidence is crucial to a finding of fault on behalf of a practitioner. The primary function of the medical expert is to guide the court to a correct decision on questions falling within the expert's specialised field. The value a court should attach to expert medical evidence with regard to the proof of medical negligence is contentious, especially

in those cases where the court will find it difficult to draw its own reliable inferences due to the technical nature of the testimony. This is particularly the case where medical experts have conflicting opinions or represent different but acceptable schools of thought in medical practice.^{15,16,25-29} Accordingly, the Supreme Court of Appeal in the case of *Michael & Another v Linksfield Park Clinic (Pty) Ltd*³⁰ has set, in principle, the boundaries for expert evidence in support or defence of medical negligence.³¹

The solution to the problem should come from the profession itself. All cases of alleged professional negligence must be referred to a Forum of Expert Witnesses with the purpose of streamlining and promoting expert testimony. Panellists of this Forum must include the Academic Heads of Department of all the Training Institutions in South Africa, as well as at least two credible, practising clinicians in full-time private practice. In fact, invitations should be extended to all practising clinicians to join the panel on a rotational basis, based upon collegial relationships and clinical excellence. The selling point of this service will be that this panel consists of practising physicians acting as *diligens paterfamilias*, and not only as professional witnesses. It follows that, where applicable, appropriate training should be provided in order to assure a high quality of expert evidence.

In the end the true test for expert testimony rests upon its objective and clinical reflection of the standard and norms of accepted practice, with consideration of comparative risks and benefits of all treatment options in the particular circumstances.

3. Appointment of a maxillo-facial and oral surgeon as Ombudsman to evaluate all cases pertaining to the field of maxillo-facial and oral surgery brought before the PRELIM.

Discussion

The HPCSA has announced the appointment of an Ombudsman once the Minister of Health has published the regulations that give effect to his appointment.³² However, with specific reference to maxillo-facial and oral surgery, the main concern is that the professional skill of the Ombudsman and

the accused practitioner is often poorly matched, with disadvantage to both parties. It follows that there is considerable risk that the main performance of the Ombudsman could only be to either suggest that the patients simply accept the points of view presented by the accused specialist, or that the case be referred for disciplinary action, merely due to the complex nature of the scope of this specialty, albeit the fact that it is not necessarily indicated as such.

The MDPB of the HPCSA must appoint a maxillo-facial and oral surgeon to act as an Ombudsman to evaluate all cases in respect of this specialty, as well as assist in selecting and obtaining the services of surgeons for expert evidence. It follows that such a person should be amongst the more senior members of the profession. Ideally, he/she should be a retired Head of an Academic department who can provide great insight into cases reported to the HPCSA, based on both his/her academic and clinical experience. He/she should have an inherent integrity, sense of equity and objectivity.

4. Acceptance of the proposed test of medical negligence, i.e. the 'reasonable doctor's / expert's test'.

Discussion

As far as private law in South Africa is concerned, the so-called 'reasonable person's test' has been widely accepted and adopted.^{16,33-35} The norm of the reasonable person is no absolute measuring instrument but serves as a standard in relation to which a court can make a finding and through which a court can place itself in the same position as the defendant with due allowance for all the circumstances of the particular case.³⁶⁻⁴⁰ Fundamentally this test for negligence is an objective one insofar as the hypothetical person sets the standard, but it also contains a subjective element inasmuch as it requires that the reasonable person be placed in the same situation as the defendant found himself or herself at the time of the incident in question.^{33,35,41,42}

In the landmark case of *Castell v de Greeff*^{25,43} it was again stated that the 'reasonable doctor's' test is one that is well established in our law and is applied to both medical diagnosis and

treatment, affording the necessary flexibility, and, if properly applied, does not leave the determination of a legal duty to the judgement of doctors. Referring to the classic formulation of the test for medical negligence found in the case of *Mitchell v Dixon*:⁴⁴ the Cape High Court recently held in *Oldwage v Louwrens*⁴⁵ that 'medicine is still not – and probably will never be – an exact science comparable to mathematics'. Accordingly the court reaffirmed the principles laid down in the *Mitchell*-case and reiterated the governing test for professional medical negligence being the standard of conduct of the reasonable practitioner in the particular field, thus accepting that the term 'reasonable person' embodies an objective criterion.

5. Introduction of a proper patient's consent form in order to obtain effective consent. It follows that the legal requirements, especially in cases of extensions and deviations of medical interventions, must be adhered to.

Discussion

There are obvious legal requirements in regard to effective consent in the medical and dental context that must be adhered to. Similarly, there are definite legal prescriptions with regard to deviations or extensions in this regard. A legitimate patient consent form should preferably be included in all patients' files for medico-legal purposes. However, the design of such a form might change from time to time, based on facts evolving from new cases brought before the PRELIM due to unforeseen and unknown complications that might have arisen as clinical practice advances, only to reveal a new set of risks.⁴⁶⁻⁵⁰

6. It is advisable to belong to an organisation providing indemnity cover in order to receive proper assistance in the handling of these cases of alleged unprofessional/disgraceful conduct.

Discussion

The value of sufficient legal representation with regard to claims of unprofessional and/or disgraceful conduct is self-explanatory. It is therefore advisable to belong to an organisation providing indemnity cover (such as Medical/Den-

tal Protection Society) in order to receive proper assistance in the handling of these cases right from the start. Such assistance should preferably be in person by the aforementioned indemnity organisation.

CONCLUSION

The situation in South Africa with regard to malpractice litigation is hardly comparable to other developed countries, such as the USA. However, increased consumerism and the introduction of new legislation demand adjustments in our current systems, as a definite growth in the number of medico-legal claims has been noted. The HPCSA, through its PRELIM, is therefore in a unique position to play a fundamental role in this expected increase in complaints. However, it appears that the PRELIM's investigative function, especially in the more complex cases, is not as effective as it could be.

The purpose of this study is to offer ethically and legally justifiable recommendations to the current investigative system of the PRELIM, as it can obviously only be in the best interest of all parties concerned that it casts objective decisions on all cases brought before them. Furthermore, it will also provide a cost-effective and time-effective system for the PRELIM in order to handle the so-called 'nuisance' cases that are brought before them.

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