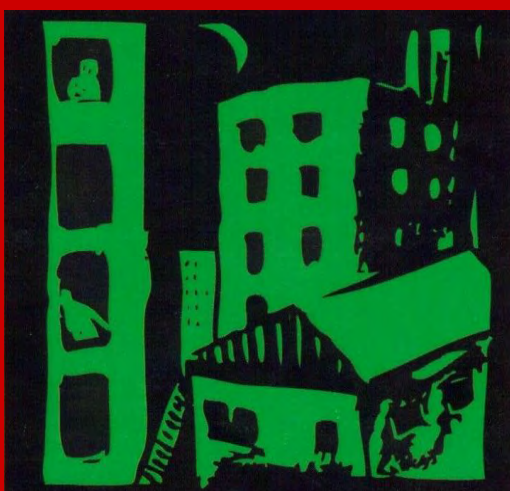
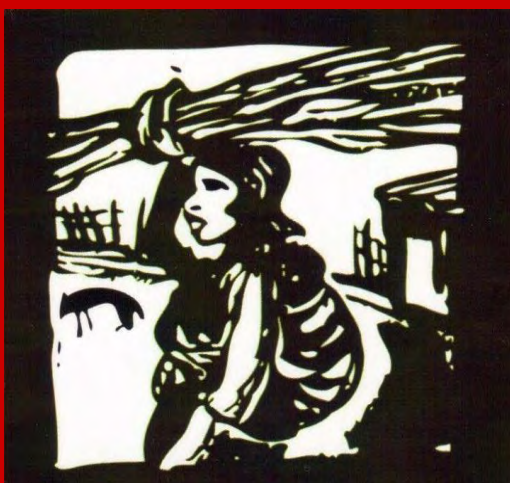


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Advocating for mediation as a way to de-escalate conflict, with a focus on medico-legal claims: The anatomy of human conflict

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ABSTRACT

The incidence and extent of medico-legal claims in South Africa has increased exponentially over the past number of years. Conventionally, medical negligence claims follow the civil litigation route, while alternative, perhaps better-suited, dispute resolution techniques and mechanisms are seldom considered. Where the occasional disputant does opt for mediation instead of civil litigation, mediators are not adequately versed in the human behavioural factors of conflict, even though these are crucial in establishing an appropriate strategy to de-escalate conflict and achieve settlement. Paying particular attention to medical negligence claims, this article draws on interdisciplinary sources to propose practical guidelines for mediators, whether existing or aspirant, to develop their mediation styles and strategies with regard to the thought processes and psychological factors behind disputes. This occurs against the backdrop of the current failure by formal legal education and vocational training curriculums to equip lawyers and mediators with even a basic understanding of the anatomy of human conflict. Incorporating such teaching into our

curriculum could go a long way towards greater and more effective use of mediation to settle disputes, instead of summarily opting for the adversarial, costly and time-consuming route of civil litigation.

Keywords: medical negligence claims; mediation; civil litigation; human behaviour; dispute resolution.

1 INTRODUCTION

Medico-legal claims in South Africa have increased significantly in both incidence and extent over the past few years.¹ The most recent figures put the contingent liability for the state for the 2020/21 fiscal year at R120.3 billion, while provincial health departments spent R1.74 billion on medical negligence payouts for the financial year ended 31 March 2021.² Traditionally, medical negligence claims are dealt with by way of civil litigation through a settled (adversarial) process. This process leaves little to no room for alternative, perhaps better-suited, dispute resolution techniques and mechanisms.³ It is not concerned with the theory and psychology behind the causes of disputes, or how conflict may be de-escalated. Instead, trial lawyers often use human emotions, a powerful driver in most private disputes,⁴ to escalate conflict instead of containing it.⁵ In cross-examination, emotions are often harnessed in a negative way to cause confusion, uncertainty and anger in witnesses,⁶ and lawyers exploit those emotions for the “gains” inherent in the adversarial civil process.⁷ Overly emotional

¹ Dhai A “Medico-legal litigation: Balancing spiralling costs with fair compensation” (2015) 8(1) *South African Journal of Biomedical Ethics and Law* 2 at 2–3; Malherbe J “Counting the cost: Consequences of increased medical malpractice litigation in South Africa” (2013) 103(2) *South African Medical Journal* 83 at 83–84; South African Law Reform Commission *Medico-legal Claims* Issue Paper 33 Project 141 (2017); Ellis E “Move to fight spiralling medico-legal costs” (2019) 29 August 2019 *Herald Live* available at <https://www.heraldlive.co.za/news/2019-08-29-move-to-fight-spiralling-medico-legal-costs/> (accessed 27 July 2022); Broughton T “Gauteng to make doctors, nurses pay out of own pockets for liability claims” (2019) 3 September *Sunday Times Daily* available at <https://select.timeslive.co.za/news/2019-09-03-gauteng-to-make-doctors-nurses-pay-out-of-own-pockets-for-liability-claims/> (accessed 27 July 2022).

² Ensor L “No need to wait for new law to manage medical negligence, experts say” (2022) 25 January *Business Day* available at <https://bd.pressreader.com/article/281633898619587> (accessed 26 January 2022)

³ See Muller EC *Mediation as an alternative to litigation, with special reference to medical negligence claims* (unpublished PhD thesis, University of the Free State, 2022).

⁴ Jones TS “Emotional communication in conflict: Essence and impact” in Eadie WF & Nelson PE (eds) *The language of conflict and resolution* (2000) at 81.

⁵ Ury W *Getting past no: Negotiating with difficult people* New York: Bantam Books (1991) at 149–153.

⁶ Marnewick C *Litigation skills for South-African lawyers* 2nd ed Durban: LexisNexis (2007) at 335–342.

⁷ See Feehily R “The role of the lawyer in the commercial mediation process: A critical analysis of the legal and regulatory issues” (2016) 133(2) *South African Law Journal* 351 at 352.

responses by witnesses in the adversarial process may lead to unfavourable court findings, as testimony may be labelled as unreliable and untrustworthy.

Against this backdrop, we propose that opting for mediation as an alternative may provide greater opportunity to manage emotions and thereby de-escalate or at least contain the conflict that has caused the dispute. Other authors have given adequate arguments in favour of mediation as a suitable alternative to civil litigation in medical negligence claims.⁸ Our contribution goes deeper, by discussing and proposing practical guidelines for mediators and aspirant mediators to help them develop their individual mediation styles and strategies. Neither the mediation process, nor mediator accreditation and training in South Africa, are statutorily regulated. We propose that mediator training should include the behavioural science patterns that we term “the anatomy of a dispute”.⁹ This investigation is significant because, although not all mediators are legal professionals, the majority ultimately come from the ranks of the legal profession. We argue that lawyers’ formal legal education and vocational training do not address the dimensions of human behavioural science involved in conflict and disputes, even though understanding the thought processes of those engaged in a dispute is crucial for effective mediation.

We present our argument for the need to include human behavioural patterns when in dispute with others against the general validation of the mediation alternative to alleviate the medical negligence claims conundrum in South Africa, which we explain. We therefore argue that this contribution is timely.

2 THE MEDIATION PROCESS

It is beyond the scope of this contribution to provide a comprehensive description of the mediation process, but the essential highlights of it below will be enough to contextualise the views that we express in the sections that follow. The mediation process comprises a pre-mediation and mediation phase. The former begins with a pre-mediation conference. If this is successful, it culminates in a signed agreement to mediate.¹⁰ During this conference, the mediator typically has both joint and individual

⁸ Pepper MS & Slabbert NM “Is South Africa on the verge of a medical malpractice litigation storm?” (2011) 4(1) *South African Journal of Biomedical Ethics and Law* 29 at 29–35; Oosthuizen WT & Carstens PA “Medical malpractice: The extent, consequences and causes of the problem” (2015) 78 *Journal of Contemporary Roman-Dutch Law* 269 at 269–284; Walters J “Mediation – an alternative to litigation in medical malpractice” (2014) 104(11) *South African Medical Journal* 717 at 717–718.

⁹ See, for example, <http://www.lawatwork.uct.ac.za/lw/courses/mediation> (accessed 9 February 2023); http://www.ufs.ac.za/docs/librariesprovider21/short-learning-programmes-documents/introduction-to-mediation-slp-new-dates.pdf?sfvrsn=8ddf6020_2 (accessed 9 February 2023); Government Gazette 2014: 854 (38163). The course content presented by these mediation training providers, as well as the gazetted accreditation standards for mediators, has generic conflict management components. None of it, however, is as comprehensive and medical-negligence-claim related as proposed in this article.

¹⁰ Similar to the procedure proposed in Rule 78(1)(b) of the Magistrate’s Court Rules, but with the further aim of identifying and refining the issues in dispute. See also Boule L & Rycroft A *Mediation: Principles, process, practice* Durban: Butterworths (1997) at 89–90.

sessions with the disputants, so as to gather as much information as possible and ensure productive engagement at the mediation itself. "Information" here extends beyond substantive knowledge of the facts, however. Importantly, and of particular relevance to this article, it includes knowledge and insights into the human behavioural patterns and the reactions behind the facts. The mediation phase, in turn, involves the following broad steps:

- Preliminaries, where the mediator receives the parties at the venue, seats them, and does the necessary introductions.
- The opening by the mediator, aimed at explaining the main features and aims of mediation and the proposed sequence of events. Here it is important to remind the disputants that they agreed to have their dispute mediated, which is an early prompt for them to assume an accommodative instead of a confrontational stance in order to craft their own solution.
- Determining and obtaining consensus among the disputants on the ground rules for the mediation, particularly on a basic norm of respectful behaviour towards one another.
- The parties' opening statements, in a joint session. The aim here is for the parties to inform the mediator and other participants of the facts that brought them to the mediation table and of the nature of their respective claims.
- Private side sessions and further joint sessions, in order to move towards more detailed discussions. At this point, the mediator starts using subtle diplomacy. Nothing that is said in a private session is conveyed to the other disputant without the express consent of the disputant making the communication. If these engagements are sufficiently accommodative, they serve as "building blocks" for a potential settlement.
- Recording and finalising decisions, when the mediator helps the parties narrow down the list of proposed solutions. The mediator facilitates the negotiations through cooperative problem-solving, with the ultimate aim of recording the terms and resolving the dispute by way of a written settlement agreement.
- Closing statement and conclusion of the meeting.¹¹

Collectively, these different stages are aimed at constructing a conducive space for the mediator to facilitate negotiations between the disputant parties in an accommodative spirit.

¹¹ Patelia E & Chicktay MA *Appropriate dispute resolution: A practical guide to negotiation, mediation and arbitration* Durban: LexisNexis (2015) at 30; Brand J, Steadman F & Todd C *Commercial mediation: A user's guide to court referred and voluntary mediation in South Africa* Cape Town: Juta & Co (2012) at 36; Boule & Rycroft (1997) at 91.

3 THE ANATOMY OF HUMAN CONFLICT

3.1 Defining conflict and the role of mediator in “levelling the playing field”

Conflict is an inherent and inevitable part of our daily existence.¹² The *Collins Dictionary*¹³ defines it as “a serious disagreement and argument about something important. If two people or groups are in conflict, they have had a serious disagreement or argument and have not yet reached agreement.” Conflict occurs at five different levels, namely the personal, interpersonal, intergroup, inter-organisational and international.¹⁴ Irrespective of the level, however, all conflict follows the same cycle. A cause triggers the conflict and is followed by conflict behaviour (actions and reactions) between the parties, which, in turn, has results that feed back to the causes – a cycle that repeats itself numerous times between disputants.¹⁵

The main objective of the mediation strategy is, therefore, to break out of this usually confrontational and repetitive cycle.¹⁶ If the mediator does not manage to interrupt the cycle of typical conflict behaviour, both the triggers and responses are simply repeated. This means that the mediator must devise a way to elicit different behaviour (actions and reactions) from the disputants in order to make any meaningful progress towards a settlement.

In a medico-legal sense, for instance, the patient seeks redress for harm allegedly suffered at the hands of a medical practitioner or service provider, who, for whatever reason, rejects the claim. Simply put, the parties have different beliefs about the cause of the alleged harm suffered. Here, the mediator must prompt the disputants to see the “bigger picture” through careful and sensitive questioning. The mediator may, for example, enquire about the availability of staff and resources when the incident occurred. If, in this scenario, the patient starts to realise that the best possible medical care was indeed provided, they may accept that they were treated fairly and with dignity. Similarly, if the medical practitioner or service provider could be made to understand that the patient is not primarily interested in financial gain or reward, or damaging the practitioner’s professional reputation, but rather in restoring their own sense of dignity, the mediators have moved closer to a settlement.¹⁷

¹² Boule & Rycroft (1997) at 4.

¹³ Available at <https://www.collinsdictionary.com/dictionary/english/conflict> (accessed 29 November 2019).

¹⁴ Deutsch M “Sixty years of conflict” (1990) 1(3) *International Journal of Conflict Management* 237 at 237–263.

¹⁵ Wall JA & Callister RR “Conflict and its management” (1995) 21(3) *Journal of Management* 515 at 516.

¹⁶ Wall & Callister (1995) at 523.

¹⁷ See Oosthuizen & Carstens (2015) at 391; Meruelo NC “Mediation and medical malpractice: The need to understand why patients sue and a proposal for a specific model of mediation” (2008) 29(3) *Journal of Legal Medicine* 285 at 293; Pepper & Slabbert (2011) at 32; Walters (2014) at 717 on the preservation or restoration of the doctor-patient relationship.

In medical negligence claims in particular, the claimant typically has an underlying sense of being up against a more powerful “foe” in terms of money, expertise and other resources.¹⁸ It is not difficult to understand why. These claims often arise in hospitals, with the hospital manager acting as the representative in mediation. This person may be perceived to (a) have previous dispute-resolution experience, and as a result may have developed tactics to deal with claims against the hospital, (b) be under financial pressure from shareholders, including doctors, and (c) be privy to potentially incriminating hospital records that may be intentionally withheld.

Understandably, the patient may perceive this to be an unequal playing field and may experience emotions of anger and frustration from the very start, which the mediator must carefully manage. The astute mediator, therefore, will make it explicit from the outset that – as opposed to the focus on establishing liability (or fault-finding), as in a formal adversarial litigation process – the aim of the mediation process is for the disputants themselves to work towards redress in an accommodative spirit.¹⁹

3.2 Differentiating between “conflict” and “dispute”, and what this implies for mediation

Recognising that the interchangeable use of the terms “conflict” and “dispute” may lead to confusion,²⁰ John W Burton first offered a formal distinction between the two. In short, Burton suggests that disputes are short-term disagreements that are relatively easy to resolve. Conflicts, on the other hand, are longer-term, deep-rooted problems that are seemingly not negotiable.²¹ If a difference between two parties is not negotiable, the inherent interest involved in the matter is set in the human mind and is difficult, or sometimes impossible, to change. Moreover, if a dispute is left unattended, it can escalate into a conflict, while a conflict rarely reverts to a dispute.²²

A mediator’s worst nightmare is when an initial dispute escalates into a conflict that becomes impossible to settle.²³ The first important conclusion from this distinction is that a mediator should be sensitive to disputants’ emotions and do everything possible to de-escalate them instead of allowing them to escalate. The astute mediator would use the pre-mediation conference to establish the emotions involved in a dispute. However, in disagreements based on deep-rooted matters of principle, a mediator without a

¹⁸ Bodtker AM & Jameson JK “Emotion in conflict formation and its transformation: Application to organizational management” (2001) 12(3) *International Journal of Conflict Management* 259 at 265.

¹⁹ Nelson A & Joubert J *UCT Law@work commercial mediation guide* Cape Town: University of Cape Town (2016) at 21.

²⁰ Spangler B & Burgess H “Conflicts and disputes” (2017) March *Beyond Intractability* available at <https://www.beyondintractability.org/essay/conflicts-disputes> (accessed 2 December 2019).

²¹ Keator TD “Dispute or conflict? The importance of knowing the difference” (2011) 22 August *Mediate.com* available at <https://www.mediate.com/dispute-or-conflict-the-importance-of-knowing-the-difference/> (accessed 1 December 2019).

²² Keator (2011).

²³ Boulle & Rycroft (1997) at 169.

proper understanding of human behaviour will find it particularly difficult to diagnose the causes of the dispute or conflict, which will make it virtually impossible to identify possible solutions.²⁴

4 COMMON BEHAVIOURAL PATTERNS AND TACTICS IN RESPONSE TO CONFLICT

Research suggests that disputants decide to manage and resolve conflicts for various reasons, which may relate to the causes and effects of the conflict, cost considerations, exasperation with the situation, and the changing of goals.²⁵ The aim of the mediator is to discover how disputants' thought processes and patterns can be harnessed as part of conflict management in mediation, and to adapt the style of mediation accordingly as the process unfolds.

The literature on common conflict management strategies views disputants' responses from two angles. The first is the prescriptive response, which relates to what disputants ought to do in conflict situations, and the ideal response to facilitate settlement.²⁶ The second is the descriptive response, which involves empirical observations of what disputants actually do to manage conflict. The existing body of knowledge on the descriptive response is the result of many decades of research by various scholars in observing conflict responses in families, the workplace, and globally.²⁷

The discussion below starts with the descriptive response, and then proceeds to examine what scholars describe as the "exemplary" way of dealing with conflict, namely the prescriptive response, in both instances including the implications for mediation.

4.1 The descriptive response

The descriptive response involves a range of underlying thought patterns. One such pattern is where the disputant endures or "plods through" the conflict, trying one approach to resolve the issue, and moving on to the next when the desired result is not obtained.²⁸ While moderating the dispute may be one of the goals, the disputant in this instance often still has aspirations of "achieving victory",²⁹ which runs counter to the basic tenet of mediation, and, instead, reverts to the thinking typical of adversarial litigation. Here, it will be up to the mediator to clarify to the disputants that mediation

²⁴ Patelia & Chicktay (2015) at 6–7.

²⁵ Blalock HM *Power and conflict: Toward a general theory* Newbury Park: Sage (1989) at 65–67.

²⁶ Wall & Callister (1995) at 538.

²⁷ Wall & Callister (1995) at 538.

²⁸ Pinkley RL "Dimensions of conflict frame: Mediator and disputant interpretations of conflict" (1990) 75(2) *Journal of Applied Psychology* 117 at 117–131; Pinkley RL & Northcraft GB "Conflict frames of reference. Implication of dispute processes and outcomes" (1994) 37(1) *Academy of Management Journal* 193 at 193–205.

²⁹ Pinkley & Northcraft (1994) at 193–205.

involves an intentional shift away from an adversarial “me versus you” approach to an accommodative “together we will resolve this” approach. This would have been firmly established already during the pre-mediation conference, and may need to be reiterated at a joint session during mediation.

Also of particular relevance in mediation are cultural practices. The South African mediator may find that disputants from a culture that advocates harmony may be inclined to take a non-confrontational stance in dispute resolution.³⁰ However, this may change if met with confrontation from the other disputant party. In this regard, tapping into African culture may be helpful in swaying disputants from an adversarial to an accommodative attitude.³¹ Framing the mediation within the cultural practice of seeking harmony may well cause South African disputants to perceive the mediation as uniquely African, and so encourage them to take ownership of the process.

Human behavioural scholars have also recorded some general behavioural patterns in disputants’ descriptive response that may provide further insight to mediators. Five styles of managing interpersonal conflict are identified: forcing, avoiding, compromising, problem-solving, and accommodation.³² A disputant may subconsciously employ a particular style in response to the perceived cause of the conflict, which normally manifests in emotions such as anger or indignation. However, it may also be employed consciously as a deliberate attempt to achieve strategic advantage.³³

When viewing these styles in terms of gender, empirical studies have found that men are prone to use forcing as a style, while women generally opt for less aggressive strategies.³⁴ In scenarios of a power imbalance between disputants, such as in a workplace, superiors lean towards forcing, and subordinates, towards avoidance or compromise.³⁵ When examining conflict-response style in terms of its effect on the opponent, parties appear to mirror the style of their opponents, opting for a “tit-for-tat” approach. It makes sense, therefore, that if disputants can be swayed to take an

³⁰ Kriesberg L *De-escalation and transformation of international conflicts* New Haven: Yale University Press (1992) at 471–491.

³¹ Faris J “Rethinking restorative justice for the South African context” Opening address and paper delivered at the Lawyers as Peacemakers Conference (2015) at 5.

³² Van der Vliert E & Prein HCM “The difference in meaning and forcing in the conflict management of actors and observers” (1989) 1 *International Journal of Conflict Management* 51 at 51–63.

³³ Antonioni D “Relationship between the big five personality factors and conflict management styles” (1998) 9(4) *International Journal of Conflict Management* 336 at 336–337; Weider-Hatfield D & Hatfield JD “Relationships among conflict management styles, levels of conflict and relations to work” (1995) 135(6) *Journal of Social Psychology* 687 at 695–697.

³⁴ Rahim MA “A measure of styles of handling interpersonal conflict” (1983) 26(2) *Academy of Management Journal* 368 at 368.

³⁵ Morley DD & Shockley-Zalabak P “Conflict avoiders and compromisers: Toward an understanding of their organisational communication style” (1986) 11(4) *Group and Organization Management* 387 at 387; Putnam LL & Wilson SR “Communication strategies in organizational conflicts: Reliability and validity of a measurement scale” (1982) 6(1) *Annals of the International Communication Association* 629 at 629.

amenable approach, particularly in the first joint session, the tone of the entire process may be more accommodative.³⁶

Finally, with reference to the context of the conflict, studies suggest that where substantive issues are at stake, disputants tend to prefer a confrontational approach, whereas compromise is the preferred approach in disputes on less substantive issues.³⁷ For the mediator, being aware of these patterns and styles is important in guiding the disputants towards mutually acceptable remedies or relief.

4.2 The prescriptive response

The prescriptive response refers to what scholars consider the model of behaviour that disputants should demonstrate when attempting to resolve their conflict. Deutsch argues that disputants ought to be aware of the causes and effects of conflict, as well as of the alternatives available to these causes and effects. In this regard, the mediator may, from time to time in the course of the mediation process, need to remind the disputants of the inconvenience, time, cost and acrimony inherent in formal litigation. In addition, disputants should be led to view the situation from the opponent's perspective.³⁸

Along similar lines, various other scholars propose the following mindsets as ideal behavioural patterns that disputants ought to exhibit if they have a genuine desire to settle their dispute:

- reasonableness in expressing their disagreements;
- open-mindedness about the dispute and the process to resolve it;
- avoiding assigning blame;
- benevolence in their approach to the dispute by considering the adversary's position; and
- displaying a give-and-take attitude, which necessarily includes considering making concessions.³⁹

³⁶ Cosier RA & Rubie TL "Research on conflict-handling behaviour: An experimental approach" (1981) 24(4) *Academy of Management Journal* 816 at 816.

³⁷ Witteman H "Analyzing interpersonal conflict: Nature of awareness, type of initiating event, situational perceptions, and management styles" (1992) 56(3) *Western Journal of Communication* 148 at 259-260.

³⁸ Deutsch (1990) at 237-263.

³⁹ Tjosvold D, Dann V & Wong LC "Managing conflict between departments to serve customers" (1992) 45(10) *Human Relations* 1035 at 1035-1054; Eiseman JW "Reconciling 'incompatible' positions" (1978) 14(2) *Journal of Applied Behavioral Science* 133 at 133-150; Gray B "Conditions facilitating interorganizational collaboration" (1985) 38(10) *Human Relations* 911 at 911-936.

Importantly, the way in which disputants ultimately deal with their conflict is largely determined by the mediator's actions and aims during pre-mediation and mediation. To this end, the astute mediator will include the above patterns of ideal behaviour in the mediation agreement, asking the disputants to undertake to do everything in their power to adhere to these ideals.

5 CONTRIBUTORS TO CONFLICT

A better understanding of the various contributors to conflict will enable the mediator to formulate more appropriate ways to respond to and manage conflict.⁴⁰ Because a dispute involves two parties, the individual characteristics of each will, to a greater or lesser extent, contribute to the conflict.⁴¹

Mediators ought to acknowledge these characteristics, signalling to the disputants that they are genuinely recognised and that the issues at stake are fully understood. The mediator may, for example, summarise the opposing parties' respective positions to show that both are heard. In return, the disputants will perceive the mediator as properly engaged and focused on the dispute. In the following paragraphs, we list some of the major contributors to conflict, which, if identified timeously by the mediator, may be positively managed.

5.1 Personality type

The personality traits of an individual involved in a dispute may play a role in why the dispute arose in the first place and how (or whether) it is resolved.⁴² Wall and Callister confirm that individuals who are naturally more prone to impatience and irritability would be more likely to get involved in a conflict situation than those who by nature are more relaxed and tolerant.⁴³

Mediators with a basic understanding of the personality types of the disputants they are dealing with will curate their interactions with the disputants accordingly, ensuring that their words encourage progress towards settlement rather than escalate conflict.⁴⁴ For example, when dealing with a quick-tempered individual, instead of saying, "B has asked me to convey that he thought your responses were irrational and immature", the discerning mediator will say, "B has asked that you reconsider your responses to his conduct so that we may work towards a settlement."

⁴⁰ Boulle & Rycroft (1997) at 144.

⁴¹ Wall & Callister (1995) at 519.

⁴² Wall & Callister (1995) at 519.

⁴³ Wall & Callister (1995) at 519.

⁴⁴ Gorton KB "Attribution theory & de-escalation: Transforming concrete into abstract as a method of conflict management" (2005) 14 March *Mediate.com* available at <https://www.mediate.com/attribution-theory-de-escalation-transforming-concrete-into-abstract-as-a-method-of-conflict-management/> (accessed 18 February 2021).

The pre-mediation process may prove useful in identifying disputants' personality types. During the initial exchange of information, the mediator could include questions to achieve this goal, for instance by asking the parties to describe their personality by choosing from various potential approaches to conflict. Would they be inclined to be confrontational or rather avoid conflict? Does confrontation anger them, or does it make them feel anxious? These questions serve a dual purpose. First, they help the mediator get to know the parties and prepare strategies to deal with the disputants during the mediation. At the same time, they create rapport and a sense of trust between the mediator and the disputants.⁴⁵ In certain instances, however, mediators will encounter disputants who, despite the mediator's best efforts to understand and manage their expectations, remain intractable.⁴⁶ In these circumstances, Hoffman and Wolman suggest that co-mediating or consulting with a mental health-care professional may be useful.⁴⁷

5.2 Different cultural and personal values

Being aware of the disputing parties' cultural and personal values may help the mediator choose the most appropriate approach to "steer" the negotiations between the disputants.⁴⁸ According to research, cultural differences and personal values have a profound effect on people's propensity for conflict. Individuals from Western cultures, for example, regard conflict as a part of life, while those from Eastern cultures tend to view conflict as something to be avoided.⁴⁹ Traditionally, the African method of dispute resolution is based on seeking harmony, working from the premise that because all people are interconnected (ubuntu), a dispute disturbs the social harmony, which needs to be restored at all costs.⁵⁰

A good example of how ignorance of cultural values may have a negative effect on mediation is the Western practice to make and maintain eye contact with others. In Western cultures, this is believed to be indicative of respect, interest and active listening. In many non-Western cultures, however, the exact opposite often applies. Making eye contact is in many instances perceived as disrespectful and rude, especially when speaking to a person thought to be of a "higher status".⁵¹

Yet although cultural differences play a role in conflict and its ultimate resolution, accommodating all differences in a diverse society such as South Africa remains challenging. At best, the mediator may ask disputants during the pre-mediation

⁴⁵ Boulle & Rycroft (1997) at 90.

⁴⁶ Hoffman DA & Wolman RN "The psychology of mediation" (2013) 14 *Cardozo Journal of Conflict Resolution* 759 at 779.

⁴⁷ Hoffman & Wolman (2013) at 780.

⁴⁸ Boulle & Rycroft (1997) at 152.

⁴⁹ Wall & Callister (1995) at 519.

⁵⁰ Faris (2015) at 5.

⁵¹ Boulle & Rycroft (1997) at 59.

preparation to list the cultural practices and personal values that they regard as important and would like the mediator to be aware of. To facilitate this, the mediator may offer a list of options and ask the disputants to select those most likely to apply to them.

5.3 Different goals

Various factors relating to people's goals may determine their proneness to conflict.⁵² Naturally, if a person's sole aim is to engage in conflict with another, a dispute is likely to ensue.⁵³ Other less overt aspects that increase the likelihood of conflict include personal aspirations, previous accomplishments, social norms and perceived power.⁵⁴ The interdependence between parties for achieving their goals heightens the probability of conflict, as neither can achieve their objectives without the other's cooperation.⁵⁵ In addition, the more committed a person is to achieving a goal, the more likely conflict is to occur because of an unwillingness to compromise.⁵⁶

The goal factor is likely to be of particular relevance in a scenario involving a physician and an aggrieved patient. The physician's goal would be professional survival and avoiding reputational damage; the patient, in turn, would normally want to hold the physician accountable for perceived malpractice, or to establish the reason for something that went wrong. In practical terms, it may be worthwhile to spell out these goals explicitly to disputants in mediation, however difficult this may be, as a way to encourage them to consider the opponent's position. It is further proposed that a mediator in these circumstances should ask the disputants to explain why they hold a specific position, or in which circumstances that position could shift to facilitate a settlement. If the disputants and the mediator understand the opposing positions, this could help to steer the discussion towards common ground.

5.4 Emotion

Jones suggests that conflict does not exist in the absence of emotion.⁵⁷ Indeed, scientific evidence abounds concerning emotion as a key role-player in conflict between humans. As space does not allow an in-depth discussion in this regard, we cover, below, only the issues most pertinent to mediation. A perceived threat to one's goals, or to one's ability to realise an expectation, stirs up negative emotions, which often leads to conflict.⁵⁸ It

⁵² Wall & Callister (1995) at 519.

⁵³ Tjosvold D, Lee F & Wong CL "Managing conflict in a diverse workforce: A Chinese perspective in North America" (1992) 23(3) *Small Group Research* 302 at 302–321.

⁵⁴ Wall & Callister (1995) at 519; Kaplowitz N "Psychopolitical dimensions of international relations" (1984) 28(4) *International Studies Quarterly* 373 at 373–409.

⁵⁵ Anstey M *Managing change negotiating conflict* 3rd ed Cape Town: Juta & Co (2006) at 26.

⁵⁶ Wall & Callister (1995) at 519.

⁵⁷ Jones (2000) at 81.

⁵⁸ Bodtker & Jameson (2001) at 261.

also influences the way a person perceives his or her options for dealing with the conflict, which may well cause further emotional responses un conducive to settlement. In addition, emotion influences a person's decision-making ability. Most medical negligence claims are indeed highly emotional. Former patients often feel confused and angered when a medical procedure which was supposed to bring healing or improved quality of life has had the exact opposite effect. Doctors, in turn, may well feel angered when their professional abilities are questioned, and may even experience self-doubt, which could affect how they treat other patients in future.

As such, mediators should at least alert conflicting parties to the role that their emotions could play in the mediation process and ask them to remain mindful of this as the process unfolds.⁵⁹ It may also be necessary to have short breaks in the proceedings to allow overly emotional disputants to gather themselves. At the same time, mediators should guard against suppressing emotions, as this could prove counterproductive.⁶⁰ In practice, a simple observation such as "I see that you are very upset by B's last remark" shows that the mediator is engaged in the process and alert to the disputants' emotions. Yet mediators must also realise that parties often value the opportunity to express their emotions. Ideally, therefore, the mediator should allow this, but balance it by appealing to disputants' rational thinking.⁶¹ For instance, asking an emotional disputant to consider what exactly in B's remark they find so unsettling may restore balance and de-escalate highly emotive reactions.⁶²

Of course, people express their emotions in different ways. Complicating matters even further is that the way in which emotions are expressed is not necessarily a reflection of what the person truly feels. Emotion is often expressed strategically, and could be feigned or exaggerated in an attempt to gain some kind of advantage.⁶³ Therefore, a mediator may need to either trigger the actual, underlying emotion or de-escalate excessive emotional posturing to encourage a party to engage in frank and open discussion.⁶⁴

Moreover, emotional responses are sometimes caused by disputants' perceptions of fairness and morality. A mediator needs to be attuned to these individual, value-based judgements. One way for the mediator to establish what a party considers to be "justice" is to ask the disputants to explain what they regard as "fair". Confronting disputants with this question often catalyses a move towards achieving settlement. For instance, one party may believe that they were morally offended by the other's actions, while the opponent may be unaware of unintentionally having said something that caused offence.⁶⁵

⁵⁹ Boule & Rycroft (1997) at 145–147.

⁶⁰ Hoffman & Wolman (2013) at 771.

⁶¹ Boule & Rycroft (1997) at 145–147.

⁶² Gorton (2005).

⁶³ Bodtker & Jameson (2001) at 264.

⁶⁴ Hoffman & Wolman (2013) at 775.

⁶⁵ Bodtker & Jameson (2001) at 264.

In questioning disputants during the mediation process, the intuitive mediator will be quick to pinpoint the alleged offensive conduct and explain it to the offending party. In many instances, once guided to this stage, the offending party will have no qualms about expressing remorse, and the dispute may be resolved with a simple apology.

Another emotional factor to take into account in mediation is disputants' perception of how the conflict may affect their personal interests, causing a need to "save face".⁶⁶ A party may consider the outcome of a mediation to reflect badly on who they are, which could see sound offers being rejected because of a wounded ego.⁶⁷ Here, the function of the mediator is to remind the parties that the envisaged outcome of the mediation is to find common ground and achieve settlement, which in no way implies weakness. Also, since mediation is held in confidence, any attempts to save face are unnecessary.⁶⁸

5.5 Perceptions

The potential for conflict based on perceptions relates to the view that, where one party achieves their goals, this necessarily occurs at the expense of another's pursuit of their objectives.⁶⁹ As a result, the opponent's conduct is interpreted as injurious, causing a lack of trust in their intentions and an inability to understand their point of view.⁷⁰ The duty of the mediator in this scenario is to facilitate a shift away from what disputants perceive the opponent's intentions to be, to matters of common interest. To this end, the mediator may use the opening joint mediation session to sensitise parties to any perceptions that may impede progress in mediation.

5.6 Communication

Communication as a contributor to conflict cuts both ways, with both a lack of, or overly verbose, communication serving as potential triggers for conflict. In case of the former, information is perceived to be withheld, while the latter provides fertile ground for misunderstandings.⁷¹ Similarly, communication that contains insults, threats or

⁶⁶ De Dreu CKW & Van Knippenberg D "The possessive self as a barrier to conflict resolution: Effects of mere ownership, process, accountability and self-concept clarity on competitive cognitions and behaviour" (2005) 89(3) *Journal of Personality and Social Psychology* 345 at 355.

⁶⁷ Bader EE "The psychology of mediation: Issues of self and identity and the IDR cycle" (2010) 10(2) *Pepperdine Dispute Resolution Law Journal* 1 at 1-32.

⁶⁸ Bader (2010) at 24.

⁶⁹ Ausberger DW *Conflict mediation across cultures: Pathways and patterns* Louisville: Westminster (1992) at 256.

⁷⁰ Deutsch M "Educating for a peaceful world" (1993) 48(5) *American Psychologist* 510 at 516; Thomas KW "Conflict and conflict management" in Zedeck S (ed) *APA Handbook of industrial and organisational psychology* Washington DC: American Psychological Association (1976) 921.

⁷¹ Pondy LR "Organisational conflict: Concepts and models" (1967) 12(2) *Administrative Science Quarterly* 296 at 307; Putnam LL & Poole MS "Conflict and negotiation" in Jablin FN, Putnam LL, Roberts K & Porter L (eds) *Handbook of organizational communication: An interdisciplinary perspective* (1987) 549-599.

destructive criticism, even where the latter may be accurate, has a high potential for creating conflict.⁷² For this reason, the mediator must address the manner of communication between disputants early on in the mediation process. The mediation agreement may include an undertaking by the disputants to refrain from discourteous, offensive, threatening or other aggressive remarks, as well as insulting non-verbal communication.⁷³

Examples of non-verbal communication that may point to an intent to engage in conflict are crossed arms (indicating defensiveness), a tight jaw or lips (indicating anger or irritation), and a frown (showing anxiety).⁷⁴ In a private session, the mediator may sensitise a disputant to his or her body language, and explore the reasons behind it. As practical tools to facilitate constructive communication, mediators may consider asking open-ended or “what if” questions. Questioning techniques should not be aimed only at gaining information, but also at changing positional reasoning by disputants. Finally, since mediation by its nature relies on high levels of interaction, it is an established mediating technique to discontinue interaction between parties when emotional outbursts could derail negotiations, allowing participants time to regain composure.⁷⁵

6 ESCALATION AND DE-ESCALATION OF CONFLICT

6.1 Escalation

It should be the aim of any mediator to de-escalate rather than escalate conflict, thereby moving parties “from emotionality to rationality”.⁷⁶ In the introductory sections of this contribution, we mentioned that conflict is a cyclical process.⁷⁷ If the cycle is not broken, conflict often escalates, disputants tend to become more aggressive, and their perceptions of one another more negative. In short, their approach to the conflict changes from achieving their goals to destroying the perceived “enemy”. This could see them investing considerably more resources in fighting for their demands than in seeking common ground.⁷⁸

Pruitt and Rubin’s three proposed models for how a dispute may escalate could prove useful in understanding possible ways to counter escalation.⁷⁹ The first is the “aggressor

⁷² Baron RA “Countering the effects of destructive criticism: The relative efficacy of four interventions” (1990) 75(3) *Journal of Applied Psychology* 235 at 241.

⁷³ Thomas KW & Pondy LR “Toward an ‘intent’ model of conflict management amongst principal parties” (1977) 30(12) *Human Relations* 1089 at 1093.

⁷⁴ Wiese T *Alternative dispute resolution in South Africa: Negotiation, mediation, arbitration and ombudsmen* Cape Town: Juta & Co (2016) at 15.

⁷⁵ Boule & Rycroft (1997) at 146.

⁷⁶ Noll D “De-escalation: The key to peace” (2005) 12 September *Mediate.com* available at <https://www.mediate.com/de-escalation-the-key-to-peace/> (accessed 11 February 2021).

⁷⁷ Wall & Callister (1995) at 526; Anstey (2006) at 36.

⁷⁸ Wall & Callister (1995) at 526; Anstey (2006) at 36.

⁷⁹ Anstey (2006) at 36.

defender” model, where one party increases the use of adverse tactics in pursuing their goals. An example would be to refer to the opponent’s offensive conduct, which is bound to elicit a “tit-for-tat” response, intensifying the conflict.⁸⁰ The second model is the “conflict spiral”, where both parties act and react either in defence or retaliation.⁸¹ Lastly, the “structural change” model is based on “residual changes” in the parties as a result of their conflicting tactics. These changes pertain to the way in which the parties approach the conflict psychologically as well as to changes in group dynamics, causing the number of issues at stake to increase and demands to become elaborate and generalised.⁸²

To de-escalate rather than escalate conflict, a mediator should refrain from any kind of behaviour that may signal condescension, paternalism or racialism. Another approach may be for the mediator to tackle any such perceptions head-on, for instance by stating, “I realise that, because of your respective backgrounds, you may perceive one another as either privileged or suffering from a sense of unjustified entitlement. Let’s talk about it.” A failure to de-escalate the conflict may simply perpetuate it, as disputants perceive conventional litigation as their only remaining option.

6.2 De-escalation

According to Kriesberg, “conflict behaviour does not increase in magnitude indefinitely”, but at some point has to de-escalate, stagnate or stop.⁸³ The departing premise in understanding the concept of conflict de-escalation is that it should not be regarded as the mere reverse of escalation.⁸⁴ Instead, de-escalation occurs when disputants realise that they cannot or do not want to continue with the conflict, for various reasons.⁸⁵ One reason is a stalemate, when disputants come to understand that continuing with the conflict will not be worth the cost and time. This is often coupled with the realisation that combative manoeuvres – which are an inherent part of how formal litigation is often conducted – are counterproductive. In a community context, the move towards de-escalation may be further facilitated by the realisation that community support for the disputant’s cause is depleted.⁸⁶ Further reasons contributing to the de-escalation of conflict include the acknowledgement that, without a settlement, the situation may worsen and the parties may face calamity.⁸⁷

Parties who have escalated a medical negligence claim to the point of litigation may come to realise that a continued court battle would simply be too costly and time-

⁸⁰ Anstey (2006) at 36.

⁸¹ Anstey (2006) at 36.

⁸² Anstey (2006) at 36.

⁸³ Kriesberg (1992) at 163.

⁸⁴ Wall & Callister (1995) at 532.

⁸⁵ Zartman IW *Preventative negotiation* Lanham: Rowman & Littlefield (2001) at 232.

⁸⁶ Wall & Callister (1995) at 532; Anstey (2006) at 50.

⁸⁷ Wall & Callister (1995) at 532, Anstey (2006) at 50.

consuming, or may not achieve the outcome initially hoped for. Mediation in these circumstances provides the ideal forum to find a mutually agreeable solution through facilitated negotiation.

The aim of de-escalating conflict is to resolve the dispute, and not simply to stabilise it, as festering conflicts may be as injurious in the long term as those that escalate.⁸⁸ De-escalation in mediation is a gradual process that involves incremental steps.⁸⁹ Therefore, the mediator should not only conduct regular “reality checking” where needed, but also continue to enquire during private sessions whether disputants are not perhaps considering offering any apologies for untoward conduct, where applicable. Ultimately, conflict is de-escalated by one of the parties taking a step towards mollification, such as by issuing an apology.⁹⁰

The task of the mediator is to help the parties decipher all facets of their dispute and constantly search for proverbial “golden nuggets” to convey between the disputants to facilitate the negotiation process.⁹¹ This the mediator does by using techniques such as active listening – being both physically and psychologically attentive to what a disputant says. Doing so fosters confidence in the mediator and encourages disputants to raise their actual concerns in a frank manner, which, in turn, enables the mediator to identify common interests.⁹² For example, an apology made and accepted may satisfy one party’s self-esteem need, as well as the apologising party’s need to show remorse, both of which will help de-escalate the conflict.⁹³

A further aid in de-escalating conflict is to put the dispute into context for the parties, to ensure a proper, mutual understanding of the circumstances in which the conflict arose. Having a firm grasp on the context in which the conflict started, the factors that caused it, and the effects this had on the disputants, helps the mediator understand the “bigger picture”.⁹⁴ For instance, in the event of a medical negligence claim, the context will reveal the resources (or lack thereof) available to the parties. A claimant under financial pressure due to the cost of litigation may be more inclined to settle for less than he or she initially anticipated. The type and severity of the injury may also influence the number and complexity of issues required to prove the merits and quantum of a claim.

⁸⁸ Wall & Callister (1995) at 533.

⁸⁹ Maiese M & Burgess H “Limiting escalation/de-escalation” (2020) September *Beyond Intractability* available at <https://www.beyondintractability.org/essay/limiting-escalation> (accessed 18 February 2021).

⁹⁰ Wall & Callister (1995) at 532.

⁹¹ Boulle & Rycroft (1997) at 50.

⁹² Boulle & Rycroft (1997) at 155.

⁹³ Boulle & Rycroft (1997) at 50.

⁹⁴ Morrill C & Thomas CK “Organisational conflict management as disputing process: The problem of social escalation ” (1992) 18(3) *Human Communication Research* 400 at 400–428; Druckman D & Broome BJ “Value differences and conflict resolution: Familiarity or liking?” (1991) 35(4) *Journal of Conflict Resolution* 571 at 571–593.

In addition, a mediator would be well advised also to consider the environment in which the conflict is embedded, as environmental factors are known to influence the causes, effects, escalation and management of disputes.⁹⁵

In a hospital environment, an environmental factor that may need to be taken into account is hospital protocols. These protocols may escalate a conflict by requiring complicated bureaucratic red tape to obtain information relating to a claim, which may negatively affect the claimant's perception of the medical practitioner. It may also further frustrate and anger both the claimant and medical practitioner, both of whom probably want the dispute to be resolved speedily. To avoid the inaccessibility of hospital records adding unnecessary fuel to an already volatile situation, full disclosure of records may need to be agreed on between the parties at the outset.

Finally, the structural level of the conflict is worth considering. Studies indicate that what may seem like a straightforward interpersonal conflict (for example, between patient and doctor) often involves conflict at an intergroup level as well, even though the causes of the conflict are different.⁹⁶ Therefore, decisions about how to manage the conflict will require a proper investigation of the entire set of facts. To return to the hospital setting, for example, hospital management and the nursing staff may be in conflict at the intergroup level about the alleged failure to follow protocols, while the nursing staff may also be clashing among themselves about who is allegedly at fault for such non-compliance. Such internal battles tend to further frustrate the claimant's ability to access the records required to formulate a claim. Again, this issue ought to be agreed upon before the mediation gets under way.

The literature offers a number of suggested approaches to de-escalate conflict. Gorton, for instance, proposes a two-step process in which emotional conflict is first de-escalated through reframing – acknowledging emotional concerns and then reformulating them to be less confrontational. Then, once emotions have settled, parties are better able to put themselves in one another's shoes, which facilitates a move from assigning blame towards developing a mutual understanding of their respective views and promotes conciliation.⁹⁷

Noll, in turn, recommends that, at the start of the session, mediators ask the disputants to explain their perspectives of the cause and extent of the conflict. Disputants should be sensitised to the difference between personal, legal, and business or economic

⁹⁵ Sheppard BH "Conflict research as schizophrenia. The many faces of organizational conflict" (1992) 13(3) *Journal of Organizational Behavior* 325 at 325–334.

⁹⁶ Putnam LL & Folger JP "Communication, conflict and dispute resolution: The study of interaction and the development of conflict Theory" (1988) 15(4) *Communication Research* 349 at 349–359; Polley RB "Intervention and cultural context: Mediation in the US and Norway" (1988) 14(4) *Journal of Management* 617 at 617–629; Morrill C "The customs of conflict management amongst corporate executives" (1991) 93(4) *American Anthropologist* 871 at 871–893; Womack DF "A review of conflict instruments in organizational settings" (1988) 1(3) *Management Communication Quarterly* 437 at 438–455.

⁹⁷ Gorton (2005).

perspectives, and should keep this distinction in mind in their explanations.⁹⁸ This allows the parties to air their positions, vent their emotions, and then regain self-control, after which the mediator could proceed to help the disputants identify shared interests instead of getting stuck on their respective views.⁹⁹

7 CONCLUSION

The purpose of mediation is to settle disputes through facilitated discussion. The mediator faces the difficult task of persuading disputants to move away from their personal positions and instead focus on their true needs and shared interests. As pointed out in this contribution, disputants' positions and strategies during conflict partly stem from their psychological makeup and thought processes, which could influence the mediation process from start to finish. The astute mediator has the skills to identify the underlying human behavioural issues at play and set in motion appropriate de-escalation techniques to move towards settlement. In essence, this involves placating emotions by affording disputants a chance to express how they feel, and acknowledging their feelings. Then, once they are less confrontational, the process of facilitating dialogue aimed at identifying mutual interests follows.

Medical negligence claims in particular are by nature complicated and emotionally charged. To prevent a medico-legal claim from escalating, the mediator must be able to identify and accurately predict a disputant's thought process and feelings by processing vast amounts of information, which are received both verbally and through non-verbal communication. The mediator has to interpret the possible meaning and context of what is communicated, and then formulate strategies to respond rapidly and appropriately. Unfortunately, current law training fails to equip aspirant lawyers and mediators with even a basic understanding of the anatomy of human conflict. It is our view that incorporating such teaching into current curriculums could go a long way towards greater and more effective use of mediation to settle disputes, instead of summarily opting for the adversarial, costly and time-consuming route of litigation.

AUTHORS' CONTRIBUTIONS

This article is an adaptation of a chapter in the PhD thesis of EC Muller, supervised by CF Swanepoel. Both authors contributed in equal parts to the conceptualisation of the article, the research conducted for it, and its writing, editing and finalisation.

⁹⁸ Noll (2005).

⁹⁹ Noll (2005).

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