GUIDANCE FOR THE PROPER CONDUCT OF PERSONAL INJURY CLAIMS

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1. TAKING INSTRUCTIONS

1.1 It is entirely within the discretion of the practitioner as to whether an initial consultation in a potential personal injury is free of charge or not.

1.2 Practitioners are referred the ruling of the Society regarding the referral of claims from accident investigators and assessors. Failure to follow the ruling may constitute unprofessional conduct.

1.3 A client is entitled to take a second opinion from a practitioner, even if already represented. It

is suggested that, as a matter of courtesy, the client be requested to advise the practitioner already instructed that a second opinion is being sought, prior to the consultation.

1.4 If a practitioner takes over a matter from another attorney at the instance of the claimant, no steps should be taken before the prior mandate is terminated. The client should also be advised, fully, of the cost implications of changing attorneys, in particular, that there will be an additional attorney and client element, for example, for re-perusing documents. If relevant, the practicalities of changing attorneys from a geographical point of view should also be discussed.

1.5 The practitioner should, at the initial consultation, canvass fully the basis upon which an instruction will be accepted and, in particular, the customary fee structure of the practice.

1.6 If the practitioner requires a client to fund any disbursements as and when incurred, this must be fully explained to the client with a likely time frame and amounts involved.

1.7 The potential client should be advised of the basic principles of a delictual claim (no merits, no claim), the procedures involved and the likely time frame for finalising the claim. The risks of litigation should also be canvassed and the consequences of an adverse costs order.

1.8 If the practitioner is prepared to accept the instruction and the client willing to mandate the practitioner, a fee agreement or power of attorney setting out the attorney and own client fee structure of the practice and the arrangements regarding disbursements should be signed at the initial consultation. The client should be advised of the difference between attorney and own client costs and party and party costs and the impact that this will have, in due course, upon the capital amount recovered. A copy of the signed fee agreement or power of attorney should be given to the client either at the time of signature or, if for any reason it is not practical to do so then, within a reasonable time thereafter. It is suggested that a record be kept of the fact that a copy was given to the client.

1.9 No steps should be taken on behalf of a potential client until such time as a clear mandate to act has been obtained by the practitioner.

1.10 The practitioner should try to determine as soon as possible whether the claim has any merit and the prospects of success. If the prospects are poor, the client must be advised of this, as

soon as is practicable, so that an informed decision can be made regarding the further conduct of the case. If the practitioner is of the view that the claim is spurious or vexatious, the practitioner has a duty, as an officer of the court, to withdraw.

1.11 If, in due course, the requirements stipulated in the Contingency Fee Act are met and the practitioner is prepared to act on a contingency basis, the significance of this must be fully explained to the potential client, in particular, that the customary fee will be doubled in the event of success, subject to the maximum deduction of 25% of capital recovered, as provided for in the Contingency Fee Act.

1.12 If, at the initial consultation it is apparent that the claimant is under a disability and cannot furnish instructions, a curator *ad litem* should be appointed. The client and those assisting the client must be counselled on the implications of this and that the curator *ad litem*, when appointed, will assume the role of the "client". In the case of a minor, the practitioner must take instructions from the claimant's guardian and, failing a natural guardian, must appoint a curator *ad litem*. The procedure in the Magistrate's Court Act and Rules may be utilised, where practical, in appointing a curator *ad litem* to a minor.

1.13 When acting for an injured minor whose parents are separated or divorced,it is suggested, if practical and necessary, that the practitioner obtain a mandate from both parents so as to avoid possible conflicting instructions and/or claims to the proceeds of the final award and/or a dispute regarding the practitioner's fee structure.

1.14 If, during the conduct of the matter, it becomes apparent to the practitioner that the claimant/client is not *compos mentis* and/or does not satisfy the test laid down in Jonathan's case for *locus standi litigandi* (see page 9), a curator *ad litem* must be appointed. Often, this is only apparent once the appropriate medical reports have been obtained, much later in the conduct of the case. A curator *ad litem* has the power to ratify, confirm and approve all steps taken prior to his appointment, provided that the curator is satisfied that these are in the best interests of the client/patient.

1.15 Once an instruction has been accepted and/or a mandate obtained, comprehensive instructions should be taken from the client and/or the witnesses, particularly in regard to merits, as early as possible in the proceedings. If the claim is against the Road Accident Fund, inquiries should be made immediately as to whether the insured driver/owner/vehicle

has been identified and if not, the claim should be treated as a “hit and run” and the appropriate regulations followed.

1.16 In limited claims for passengers against the Road Accident Fund, the practitioner should advise the client of his common law rights as against the driver or owner of the vehicle in which he was travelling as a passenger during the initial consultation.

2. HANDLING THE CLAIM

2.1 The practitioner should ensure that adequate notes are kept of all attendances and the time spent on the conduct of the case by any attorney or member of staff.

2.2 If the claim is against the Road Accident Fund, it is suggested that a copy of the Form 1, as lodged, is sent or handed to the client with a letter or at a consultation, explaining that the amounts claimed are estimates only, as it is required, in terms of legislation, that the claim be quantified in the claim form.

2.3 The practitioner should report progress, from time to time, to the client and respond as promptly as is reasonably practicable to any enquiries made by a client regarding the conduct of the case. The client should be made aware that such attendances are often not recoverable as party and party expenses from the defendant and will thus increase the client’s attorney and own client charges.

2.4 If a deposit has been taken to cover disbursements, interim accounts, from time to time, should be furnished to client, particularly after disbursements have been paid out of the deposit.

2.5 In claims against the Road Accident Fund, once attorneys are appointed to represent the Fund, a practitioner representing the claimant should not deal with any Fund official, directly, even if an unsolicited approach to the practitioner is made by the official, unless the Fund has notified its attorney, in writing, and has furnished the practitioner with a copy of such notification.

2.6 If the practitioner who took the initial instruction from the client delegates the entire handling of the matter to another practitioner or becomes unavailable to handle the matter, personally, for

any reason, the client should be notified as soon as is practicable as to the identity of such other legal practitioner attending to the matter.

2.7 It is inadvisable to attempt to quantify any claim until the appropriate expert reports are obtained. A client should be advised against accepting any offer before a medical report has been obtained. If the client insists on settling the claim before medical or other expert opinion has been obtained on quantum, the practitioner should ensure that a comprehensive note is kept of the advice to client and that client is clearly warned that the practitioner can accept no responsibility for the settlement.

2.8 Before any report is referred to the defendant, the content thereof should be traversed fully with the client, unless it is impractical or impossible to do so.

2.9 Should it become necessary to institute proceedings, either in court or the Arbitration Forum, the client should, within a reasonable time, be advised of this fact and furnished with a copy of the particulars of claim.

2.10 Practitioners should endeavour to co-operate with each other in the conduct of disputed claims with a view to curtailing costs and expediting finalisation of claims to the mutual benefit of their respective clients.

2.11 Practitioners, when consulting with lay witnesses, should clearly state what their interest is in the matter and whom they represent, if this does not constitute a breach of attorney/client confidentiality. It may be unprofessional conduct to require a witness to depose to an affidavit unless so required by law or statute.

2.12 If a practitioner wishes to consult an opponent's witness, after that witness has been subpoenaed and/or a summary of the witness' evidence has been served, the practitioner shall give reasonable, written notice thereof to the other side.

3 SETTLEMENT OF CLAIMS

RECEIPT OF OFFER

3.1 All offers (on the merits and quantum) must be put to the client, within a reasonable time of

receipt;

3.2 it is within the judgement of the practitioner as to whether a binding offer has been made or not i.e. a statement that an amount will be recommended as a settlement is not an offer;

3.3 it is recommended that when the practitioner consults client on any binding offer, if the offer is in writing, a copy be given to the client;

3.4 the practitioner should keep a detailed note of the consultation with client on the offer. It is recommended that, in any contentious settlement, the practitioner's motivation for either recommending or rejecting the offer be recorded fully, in writing, either by way of written advice to client or a file note;

3.5 in quantum offers, if possible, the client should be given an indication of what net amount will be paid to client, after all attorney and own client costs have been deducted, taking into account the provisions of any fee agreement that may have been entered into;

3.6 the client should, once again, be advised of the difference between party/party and attorney/own client costs and the impact that this will have on the client's net award;

3.7 if the offer is accepted and agreement is reached, then and there, with client on attorney/own client fees, this should be recorded in the consultation note and confirmed by letter to the client, thereafter;

3.8 if client requires an attorney/own client bill to be drawn, either in terms of the fee agreement or on tariff, the full implications should be explained to client and the instruction to draw the bill confirmed in writing by way of a letter to client;

RECEIPT OF TENDER

3.9 client should be advised as soon as possible of the receipt of a tender and the implications thereof. A copy of the tender should be given to client;

3.10 if counsel is involved, it is recommended that the tender be put to client in consultation with counsel;

3.11 if the tender is rejected, a full note should be made of the consultation with client and the advice given by the practitioner and counsel (if applicable);

3.12 if the tender is accepted then 3.4 to 3.8 above apply.

RECEIPT OF CAPITAL

3.13 if capital is not paid in time, interest should be claimed. It is suggested that, at the time of settlement, the debtor be put on terms to pay within a stipulated period, failing which interest will run. In the case of a tender and/or claims against the Road Accident Fund, the relevant legislation and/or court or Forum rules should be adhered to;

3.14 upon receipt, client should be advised that the capital has been paid;

3.15 immediately, any substantial capital sum is received (unless client is to receive a payout forthwith), it should be invested in a 78 (2A) interest bearing trust savings account, the interest to accrue to client. The practitioner should ensure, when taking instructions that the client authorises this, in writing. It is suggested that an appropriate provision is contained in the initial power of attorney or fee contract signed by client when the instruction is first accepted;

3.16 all disbursements due and payable should be paid and thereafter an accounting rendered to client. If the settlement arrived at is inclusive of costs, a final account in respect of fees and disbursements should be rendered to client after payment of the disbursements;

3.17 if agreement has been reached with client on attorney and own client costs, then client should, forthwith, be paid out the balance of the capital remaining, after deduction of the costs. The payment must be accompanied by a detailed accounting in respect of disbursements paid or to be paid (or provisions therefore if the accounts are not yet to hand) and the amount retained on account of fees . As client still has to be accounted to for the recovery of party and party costs, this is an interim account;

3.18 if no agreement has been reached on costs and/or the client requires a formal attorney and own client bill, the preparation of a detailed fees account/bill must be put in hand, forthwith. It is suggested that, if outside cost consultants are to be used to prepare the party and party bill

that, at the same time they be instructed to draw the attorney and own client bill, so that the recovery of party and party costs is not unduly delayed;

3.19 once the bills/accounts have been drawn, copies must be furnished to client and instructions taken as to whether the attorney and client bill can be settled and/or agreed or taxed. On taxation and/or agreement of the attorney and own client costs, the client should be paid the balance of the capital and accrued interest, after deducting the taxed or agreed sum. The payment must be accompanied by a reconciliation account.

RECOVERY OF PARTY & PARTY COSTS

3.20 Attempts should be made to finalise party and party costs as expeditiously as is possible after settlement of the claim and recovery of the capital;

3.21 client should be kept informed of progress;

3.22 accounts from experts and/or counsel should be carefully perused and in the event of an account being excessive and/or incorrectly drawn the practitioner has a duty to take this up with the appropriate party in order to protect client's interests;

3.23 if cost consultants are employed they should be properly briefed with all documents, including counsel's brief and witness/court bundles so that all legitimate party/party costs can be accurately captured and recovered;

3.24 once costs are taxed or agreed, the client should be put on terms to pay, failing which interest will run at the legal rate;

3.25 in the event of costs being settled, rather than taxed, it is advisable to prepare a brief note motivating the reasons for any major items in the bill which are abandoned and/or compromised in the settlement;

3.26 when the costs are paid, client must be advised and furnished with a final accounting.

CONTINGENCY FEE SETTLEMENTS

3.27 If the claim has been handled in terms of the Contingency Fee Act, 1997 ("the Act"), the procedures laid down in section 4 of the Act must be complied with;

3.28 a copy of the practitioner's affidavit in terms of section 4 (1) and the client's affidavit in terms of section 4 (2) must be furnished to the client. If applicable, a copy of any order made in terms of section 4 (3) must be furnished to the client;

PROTECTION OF AWARD

3.29 That an award should be protected, in the circumstances, is often apparent. The issue often is, however, whose legal responsibility is it to ensure that this takes place. If the responsibility can be visited on the practitioner, then failure to set up the appropriate mechanisms could lead to personal liability;

3.30 insistence by the practitioner that an award be protected is often met with great resistance, particularly where the award is in respect of the claimant's injured minor child. This, in turn, often leads to conflict between the client and the practitioner after the case is settled. Often there are sensitive "political" issues;

3.31 a parent, as the minor's natural guardian, is, in law, the person responsible for the child's estate. If it is apparent that the parent is ill equipped to handle the award, it is conceivable that, if the award is dissipated by the parent, once the child attains majority, a delictual claim could be brought against the practitioner for failing to take steps to protect the award;

3.32 in many cases, the issues are not clear cut. In head injuries, often, a claimant apparently functions relatively well from day to day but has impaired judgement and is, as a result of the injury, extremely vulnerable to exploitation. If the deficit is not sufficient to warrant the appointment of a curator *ad litem,* such claimant may be extremely difficult to advise. Practitioners are referred to the judgement in the case of JONATHAN v GENERAL ACCIDENT INSURANCE CO OF SOUTH AFRICA LTD 1992 (4) SA 618 (C) for the criteria laid down by the court for ***locus standi litigandi***, which, in turn, may give some indication as to the necessity for the appointment of a curator bonis/trustee and/or competence to handle large sums of money.

3.33 It is impossible to lay down any hard and fast rules as each case will depend on its own facts.

NON COMPOS MENTIS CLAIMANTS

3.34 This is the simplest situation. If a claimant is *non compos mentis,* then a curator *ad litem* must be appointed, failing which a special plea may be raised (as in the **JONATHAN** case). In terms of the High Court Rule (**RULE 57**), the curator *ad litem*, shall, where practicable, be an advocate and failing an advocate, an attorney. Although the appointment of a curator *ad litem* for the purposes of litigation is a *sui generis* procedure and no order is sought at this stage declaring the claimant to be of unsound mind, it is suggested that the provisions of Rule 57 be followed as the same papers can then be used, after the claim is finalised, if necessary, for the appointment of a curator *bonis*.

3.35 The curator *ad litem* has a duty to report to the court on the necessity of the appointment of a curator *bonis* to administer any award made to the patient. Care should be taken to obtain the necessary powers for the curator *ad litem* when applying for the appointment. Once this is done, the curator *ad litem* becomes, in reality, the "client" and the practitioner must take instructions from the appointed curator at all relevant stages of the processing of the claim. In addition, the claimant and/or the party who initially instructed the practitioner must be consulted and fully kept informed of progress and in so far as is possible, expression should be given to their wishes. The curator *ad litem*, however, has the final say, in the event of conflicting instructions. If the curator *ad litem* does not fulfil his role diligently, he will be exposed to personal liability for any damages flowing as a result thereof.

3.36 If, in terms of the award or settlement, the parties agree and/or it is ordered that a trustee be appointed instead of a curator *bonis*, then it is submitted that this is an acceptable alternative to adequately protecting the award and may prove a more practical and cost effective method of doing so.

3.37 Care should be taken that the trust deed is drawn adequately to protect the patient/claimant and, if the furnishing of security by the trustee is dispensed with, that the trustee appointed is not a man of straw and/or has fidelity cover or insurance sufficient to cover the administration of the award.

MINORS

3.38 If the minor has no natural guardian, then the same situation prevails as with *non compos mentis* claimants, and the same procedure should be followed.

3.39 Where a minor claimant is represented by a parent or guardian, conflict can often arise regarding the administration of the award. If the claim is before the High Court, then the Court as upper guardian of all minors could intervene and order that a curator *bonis* and/or trustee be appointed. In apposite circumstances, the Defendant, could make it a condition of any negotiated settlement that a curator or trustee be appointed, particularly if the claim is settled out of court.

3.40 If the parent or guardian insists that the award is paid over and is patently incompetent to handle the award, then, a very difficult situation arises for the practitioner, particularly where the minor will never be competent to handle the award, even after attaining majority. In these circumstances, the practitioner may have a duty to approach the High Court for an appropriate order, in most cases, for the appointment of a curator *bonis* or a direction that the award be paid into the Guardian's Fund

3.41 In other cases, to what extent the practitioner should "interfere" with a parent's wishes is an extremely difficult issue. Generally, it is submitted, that the practitioner's duty ends with a clearly recorded advice to the client that the award should be placed in a trust and/or the Guardians's Fund and/or a curator *bonis* be appointed.

UNSOPHISTICATED CLAIMANTS

3.42 Much the same considerations apply here as with minors.

APPENDIX

JONATHAN v GENERAL ACCIDENT INSURANCE CO OF SOUTH AFRICA LTD 1992 (4) SA 618 (C)

Practice - Parties - Locus standi in iudicio - Plaintiff suffering from brain damage as a result of a motor vehicle collision - In order to manage his litigation a party must be able to understand the proceedings at a level which is sufficient to enable him to play a useful and constructive role during the proceedings by giving proper instructions to his legal representatives - Party must be able to make rational decisions.

In order to have locus standi in iudicio a party must be able to manage his litigation in the sense of being able to understand the proceedings at a level which is sufficient to enable him to play a useful and constructive role during the proceedings by giving proper instructions to his legal representatives. Such a party must be able to make rational decisions.

In the instant case, where the plaintiff had been injured in a motor vehicle collision and had instituted action against the defendant for damages she had suffered in the collision, it appeared that the plaintiff had suffered brain damage which resulted in her being able to understand proceedings only at a basic level. The defendant contended by way of a special defence that in the circumstances the plaintiff lacked ***locus standi in iudicio***. The Court held that the requirement in the criminal law that an accused be capable of understanding the proceedings so as to be able to make a proper defence bore a close correlation to the test for capacity to litigate. The Court held further that the plaintiff in the instant case did not have such ability and that the defendant's special defence had to be upheld.

Case Information

Argument on a special plea that the plaintiff lacked locus standi in iudicio. The facts appear from the reasons for judgment.

Mrs J Traverso SC (with her C Webster) for the plaintiff.
P Hodes SC (with him M van Heerden) for the defendant.

Cur adv vult.

***Postea (*August 13).**

Judgment

Brand AJ:

EXTRACTS FROM JUDGEMENT

According to Dr Cluver, plaintiff suffered a severe head injury, H resulting in widespread damage to her brain which, in turn, caused functions of the brain to be affected to a greater or lesser extent. Inter alia plaintiff suffered frontal lobe damage. The function of the frontal lobe he described as follows:

'The frontal lobe is the part of the brain which distinguishes us from I other primates. It is in the frontal lobe that the very important functions of judgment and insight are situated. And that important function of constraint or inhibiting emotional responses. In addition to frontal lobe damage plaintiff also suffers from a severe impairment of her memory which, incidentally, is not a function of the frontal lobes, but a function of the temporal lobes.'

According to Mr Van Zyl, plaintiff achieved a score of 54 on the Wechsler intelligence test. She is also handicapped by a severe memory defect, problems with concentration, an inability to keep a line of thought, as well as emotional lability. He agreed with Dr Cluver that plaintiff is able to understand legal proceedings in a very basic and unsophisticated way. She is, however, unable to understand these proceedings at any sophisticated level and she is equally unable to make any informed or reasoned decision. If she were to be asked by her attorney whether a settlement offer of R100 000 should be accepted, she would be able to say 'yes' or 'no'. This, however, in his view, would only be 'an instinctive gut reaction' as opposed to 'an intelligently motivated' response.

The real issue between the parties relates to the level of understanding which is required to

establish the capacity to litigate. To this question, the authorities I have been referred to provided no direct answer.

On behalf of plaintiff it was contended by Mrs Traverso that understanding of the legal proceedings at a basic, concrete level is sufficient to satisfy the test. Defendant's contention, on the other hand, was that the test is only satisfied if the litigant concerned is able to understand the proceedings at a level which enables him to play a useful and constructive role in the proceedings in which he is involved by giving proper instructions to his legal representatives.

In the light of the proposition, which appears to be common cause, that there is a close correlation between the test for the capacity to act and the test for capacity to litigate, I agree with Mr Hodes that the authorities concerning the test for capacity to act provide a useful guide in determining the test for capacity to litigate.

I am also in agreement with Mr Hodes that plaintiff appears to suffer from the same mental handicaps as the respondent in the **Vermaak** case and that the dicta by Innes CJ in **Pheasant v Warne (supra at 488)** regarding the test for capacity to act can be applied to determine the level of understanding required to constitute capacity to litigate. According to my understanding of the dicta, the requirement is that the person concerned must have the mental capacity to understand and appreciate at a level which is sufficient to enable him to manage the particular affair in question. The question that arises, therefore, is: What level of understanding of the legal proceedings is required before it can be said that the person concerned can manage his affairs in question - namely his litigation?

I believe that the answer to this question must be that in order to 'manage' his own litigation, the person concerned must be able to understand the proceedings at a level which is sufficient to enable him to play a useful and constructive role during the proceedings by giving proper instructions to his legal representatives. Thus formulated, the requirement for ***locus standi*** in civil matters corresponds with the relevant requirements of the Criminal Procedure Act, which, in my view, is not an unsatisfactory result

For the purposes of the present enquiry, the correctness or otherwise of the learned authors' interpretation of the **Lange** case is not of cardinal importance. What is important, in my view, is

that the ability to make rational decisions is a requirement for the capacity to act.

On this basis, I am of the view that the capacity to make rational decisions should constitute a requirement for capacity to litigate as well. The proposition that a person is able to make a meaningful contribution to his litigation and to give proper instructions to his legal representative without being able to make rationally motivated decisions is, in my view, untenable.

I will however also decide the matter on the basis that this view is not correct, ie on the basis that the capacity to make meaningful and rationally motivated decisions is not a requirement for ***locus standi.***

From the evidence of the other experts it is clear, in my view, that plaintiff does not have the mental capacity which, according to my understanding of the relevant test, is necessary to constitute legal capacity, namely that level of understanding which would enable her to play a meaningful role in the litigation.