Cerebral palsy: Constantia Insurance and University of Pretoria join hands in caring

Medical academics, healthcare practitioners, lawyers, as well as representatives from government and Constantia Insurance Company Limited gathered this month to apply their minds to averting the prospective collapse of maternal and child healthcare services, due to the epidemic of medicolegal claims - often without merit - brought against both public and private healthcare providers.

The two-day conference, co-sponsored by Constantia Insurance Company Limited and the Paediatric Department of the University of Pretoria and held at CSIR conference centre on the 8th and 9th of March, focused specifically on cerebral palsy (CP), which has seen a massive increase in litigation for alleged negligence, despite evidence that CP is largely caused by factors unrelated to obstetrical care.

Visiting from Canada was Professor Michael Shevell, chairman of the Department of Paediatrics at McGill University Health Centre in Quebec and well-known voice on the diagnosis and treatment of CP, who outlined the many pre-, peri- and postnatal causes of this condition, as well as pathological findings. Periventricular leukomalacia (a form of white-matter brain injury characterized by necrosis or coagulation of white matter near the lateral ventricles) and intraventricular haemorrhage, both common features in CP, are associated with prematurity and can occur before the birthing process and irrespective of the care provided by the obstetric team. Similarly, vascular infarcts are known to occur at any stage of neurological development. In many cases, there is a complex interplay of genetic, medical and environmental factors.

Prof Keith Bolton concurred that, in the South African context, there is a higher incidence of CP than in developed countries, caused largely by events before labour: “Multiple factors are at play, and they can add up in a summative way. Infection plays a significant role in our population, and in the cases I see, close to 40% of the mothers are HIV positive,” he said, adding that HIV is linked to chorioamnionitis, a known risk factor for CP. Even in cases where there is intrapartum hypoxia, antepartum risk factors for CP commonly exist.

This complex nature of CP and its multifactorial aetiology pose a significant challenge in the resolution of medicolegal disputes relating to alleged birth asphyxia, with members of the legal profession often not appreciating or ignoring the interplay and multitude of determinants of CP.

Prof Bolton said that in the cases of alleged CP-related medical negligence in which he had provided expert opinion, the cause of CP was complex and unclear in about one third. In another third he deemed the claim to be unmeritorious.

Geneticist, Professor Arnold Christianson, from the Department of Human Genetics at Wits University, also shared his experiences as an expert in CP-related medicolegal claims. In over 25% of cases that he has assessed for the various departments of health in medical
negligence matters, an obvious congenital disorder or genetic risk factor like Down’s Syndrome was present. Yet, when the particulars of a claim were studied, the cause was always identified as intrapartum asphyxia. The conclusion that can be made is that these particular cases had no merit, and he was of the opinion that plaintiff attorneys should have had these matters assessed by appropriately qualified, unbiased and experienced medical practitioners before applying their minds to whether instituting an action for damages was appropriate.

In assessing these cases, an MRI scan should be a basic requirement before litigation is pursued. In the USA, a certificate of merit confirming that medical negligence may have occurred is required. Failing this, costs may be awarded to the defendant.

“If current trends continue, there will soon be no specialists to deliver babies in the private sector “, warned Prof Bolton, adding that “whilst it has never been safer to have a baby, it has never been more dangerous to be an obstetrician”. Bearing in mind that a large proportion of claims against the State, which stand at more than R55billion, are related to multi-million-rand CP claims, the litigation landscape is threatening to destroy the public healthcare sector in its entirety. As there are no separate budgets for the settlement of successful claims, these are paid from the specific hospital’s budget, resulting in the drawing of funds from essential services.

The devastating impact of litigation on the sustainability of obstetric care was further highlighted by Dr Johannes van Waart, obstetrician and gynaecologist and past president of the SA Society of Obstetricians and Gynaecologists (SASOG). For many practitioners in private practice, professional indemnity insurance now costs approximately R950 000 a year. “Medical aids pay about R5000 per delivery; I need to do 19 deliveries a month just to pay the insurance premium,” he said.

To ensure fair assessment of complaints, SASOG provides a panel of three recognised experts in the adjudication of medicolegal disputes. The organisation strongly supports mediation before litigation, said Dr van Waart. More buy-in from paediatricians, hospital groups and patients was still needed.

Advocate Alan Nelson SC, co-founder of ‘Mediation in Motion’, agreed that mediation is by far the best alternative to litigation, observing that in the Western Cape High Court division, Judge President Hlophe recently announced he would not allocate judges in medical negligence cases unless the parties have made meaningful attempts to try and mediate their dispute. Judge President Hlophe reasoned that medical malpractice cases take years, when often all the patient wanted was an apology, compensation for pain and suffering, or repayment of lost wages because of having to provide full-time care to a disabled child. To this end, judges are to be trained in mediation.
Outlining the many benefits of mediation, Advocate Nelson pointed out the much-reduced cost of mediation, that it can be implemented promptly, curtailing time delays in accessing essential remedial care. “Once agreement is reached in writing, it is as binding as a court ruling”, he said. “Mediation focuses on people’s needs, their concerns and the interests of the CP child. In litigation, the focus is only about the amount of money being claimed.”

Addressing the litigation epidemic from an insurer’s perspective, CEO of the Constantia Insurance Group, Volker von Widdern, looked at a number of sustainable financial models while ensuring that CP patients receive the best care. Being of the view that there is a paradox in what are deemed to be successful settlements, he pointed out the disproportionate spend on patient benefits versus fees in terms of achieving such benefit, particularly in contingency arrangements and in the context of lump sum settlement payments.

“The prolonged legal process of 5-10 years removes most of the opportunity for rehabilitation of a child with CP; we have learnt from previous speakers that the best rehab opportunity exists during a child’s early development”, he posited. The fact that many adults who receive lump sum payments are known to become insolvent further puts the child’s future well-being at risk.

“If we had a fast-tracked settlement model aligned to minimum guarantee/no fault settlements, the money could get to the patient, in structured directed payments, quicker and in a significant way,” he said, adding that this would also reduce the stress on insurance fund resources. In arguing against the lump sum settlement approach, he pointed to the Life Assurance industry that has successfully provided for disability benefits in various forms for decades, customising pay-outs in line with patients’ evolving needs.

In discussing sustainable models of CP care in the context of economic and clinical considerations, Mr. von Widdern also referred to the importance of group care models. One such example was presented by Christina Mahlangu, a physiotherapist at Steve Biko academic hospital with a special interest in paediatric neurology and founder of the award-winning NGO Ntuthuko community-based stimulation centre, which caters for children with special needs. With limited resources and minimal financial support but with a commitment to bring hope to the hopeless, she has managed to bring care in its true sense to those in greatest need.

Inspired by the passion of all speakers and the robust nature of interactive sessions, delegates left the conference energised in their quest to find ways to avert the medicolegal crisis and improve the care of all CP children. As Prof Christianson observed, “at the moment, the situation we face is untenable, and as a result, health services for the majority of the population are at risk. We need a new, inclusive approach if we are to come up with a solution”.

*By Helen Grange, journalist*