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**A CRITICAL EVALUATION OF NURSE'S LEGAL
KNOWLEDGE AND ITS IMPACT IN PREVENTING NURSING
MALPRACTICE IN SOUTH AFRICA**

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A dissertation in partial fulfilment of the academic requirements for the degree of
Master of Laws in Medical Law

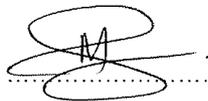
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DEDICATION

This dissertation is dedicated to my husband Ronald, my children Xarion, Xeria - Alegna and my mother Rosy in acknowledgement of their unwavering belief in me, their continuous encouragement, support and immeasurable sacrifices made during the course of this study.

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CHAPTER 1

OVERVIEW OF THE STUDY

*"The safety of the people shall be the highest law"*¹

1.1 Introduction

Nursing is a vital part of the health care system and nurses are described as the "heartbeat of healthcare."² They direct their energies towards the prevention, promotion, maintenance and restoration of the individual's health. Expansive knowledge is required for nurses to perform their duties and render holistic patient care competently, ethically and legally. The nurse's role has expanded within the past two decades and includes wider specialisation, greater autonomy and more accountability.³ Nurses pledge to take responsibility for the care they provide and answer for their own judgements and actions that they perform these actions according to the requirements of their professional bodies and the law. This approach to holistic care includes aspects such as legal issues surrounding patient care in the healthcare environment. This principle encompasses accountability and responsibility. When a nurse is sued or trialled for malpractice, they are being sued for negligence. That is, "the doing of something which a reasonable prudent person would not do, or failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence."⁴ It is the failure to use ordinary or reasonable care."⁵

1.2 Justification of the Study

In South Africa (SA), there has been an alarming increase in medical malpractice litigation in both the public and private healthcare sector. According to Aon insurance company in South Africa, claims in excess of five million rand have increased by 900% and on average, one in every five claims are in excess of one million rand,

¹ M T Cicero. (n.d) AZQuotes.com [Accessed 14 November 2016].

² T Botha "Nurses are the Heartbeat of Healthcare" (2014) *The Gremlin*.

³ R Scivener "Accountability and Responsibility: Principle of Nursing practice B" (2011) *Art and Science, Nursing Standard* 25(29) 35-36.

⁴ RC Ashley "Understanding negligence" (2003). 23 (5) *Legal Counsel, Critical Care Nurse*, 72.

⁵ *Ibid.*

representing a 550% increase in the last decade.⁶ In a public address in March 2015, the Health Minister, Mr Aaron Motsoaledi stated that medical litigation has reached crisis levels calling it an “explosion” of medical malpractice litigation.⁷

The South African provincial departments are facing negligence claims amounting to over R1.28 billion for the 2012 / 2013 financial year and the cases leading to these exorbitant malpractice claims include media headlines such as: “A child's penis was amputated by mistake.” Babies are born brain-damaged after their mothers are not properly cared for during labour; an infant went blind after health care professionals failed to diagnose a problem at birth”; babies born with cerebral palsy as a result of poor monitoring and assessment by nurses.⁸ The common reasons for such negligence can be attributed to staff constraints, skills shortages and insufficient knowledge of legal responsibilities amongst others. Due to the severity in the nature of the harm suffered, it is therefore necessary for the law to regulate such actions so that a reasonable standard of care is maintained. For example, when facing an emotionally and physically charged event such as childbirth, it can undoubtedly be said that the law should serve to create boundaries, and regulate actions so that the sequence of activities and overall plan for this event for all parties is realised at a reasonable standard.

1.2.1 Fundamental Requirements

It is imperative for nurses to know and understand the legal environment in which they practice.⁹ The current healthcare challenges of resource deficiencies, high acuity patients, more complex information, advanced technology and more challenging disease profiles means the nurse must know and understand the legal rights and implications essential for them to practice. These legal aspects include the legal environment, regulation of nursing practice, standards of care, prevention of malpractice, professional liability, insurance and issues related to nurses as witness

⁶ Aon “Soaring medical malpractice claims demand statutory intervention”. Available at <https://www.aon.co.za/index.php/en/news-articles/302-soaring-medical-malpractice-claims-demand-statutory-intervention>. Accessed [15 March 2017].

⁷ “SA’s shocking medical malpractice crisis” (2015) *Health News*, May.

⁸ K Child “Hospital horrors costing SA plenty” (2014) *Sunday Times* 14 January.

⁹ R Haffiz, NH Reshi “Preparation of an information booklet and its impact on staff nurses regarding their legal responsibilities in selected hospitals of Kashmir Valley” (2016) 5(1) *International Journal of Science and Research* 1714-1717.

and when refusing an assignment.¹⁰ Nurses must be able to comprehend the law that governs their practice in order to obviate risks and law suits. This knowledge of legal responsibilities for the nurse is integral with the expanding demands in their clinical roles.¹¹ The question that arises therefore is: do nurses know all they need to know about the law and their legal responsibilities regarding their practice?

1.2.2 A Medical Malpractice Storm

South Africa is faced with a “nursing crisis” as a result of this critical human resource constraint, disinterests in the profession, lack of a caring ethos, and an apparent imbalance between the needs of the carer and the needs of the community.¹² The milieu of this nursing crisis is quadrupled by the enormous disease burden, the array of health sector reforms, gender stratification, and the existence of strong professional silos and hierarchies. Addressing these challenges is vital in order to strive towards universal health coverage (UHC) in South Africa which aims to ensure that everyone is able to access the health care services they need irrespective of their ability to pay.¹³ Healthcare clients and patients are becoming increasingly aware of their rights in the South African context of an overburdened health system with limited resources resulting in legitimate claims that need to be compensated.¹⁴ “Recent data indicate that the country may be on the verge of a medical malpractice litigation storm as the number and size of claims appear to be increasing rapidly in both the public and private sectors. In 2009 – 2010, the Gauteng Department of Health and Social Development faced malpractice claims totalling R573 million.”¹⁵ The severity of the problem is corroborated by the increasing number of unfavourable incidents resulting in malpractice. Although a risk free environment is impossible, avoidable risks can be eliminated or reduced through application of knowledge and execution of reasonable standards of care.¹⁶

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² LC Rispel “Transforming Nursing policy, practice and management in South Africa” (2015) 8(10) Global Health Action 127-139.

¹³ *Ibid.*

¹⁴ MS Pepper, MN Slabbert, Is South Africa on the verge of a medical malpractice litigation storm? (2011) 4(1) SAJBL 29.

¹⁵ *Ibid.*

¹⁶ JP Beckmann “Nursing Negligence: Analysing Malpractice in the Hospital Setting” (1996) 1-12.

The concern and significance of nursing malpractice in South Africa is compounded by the reports in the media where headlines are concentrated on patient injury due to health professionals' errors. The Gauteng Health Department dismissed four nurses for professional misconduct and medical malpractice. They were found guilty of neglecting a pregnant mother resulting in her giving birth on the street outside the clinic in the Tshwane district. In another incident, a midwife was dismissed after failing to properly diagnose a pregnant mother and provide the necessary care.¹⁷ According to the MEC, in 2012, 373 cases were recorded. From January to September of 2013, 532 cases were recorded. The majority of these cases were in Gauteng's public hospitals. The main complaints included negligence, sexual assault, lack of skills, system failures and errors.¹⁸

1.2.3 An Overburdened Workforce

As a result of the rapid expansion of the scope of nursing care and knowledge, nursing staff face greater responsibilities and require increasingly more skills. New specialities develop and nursing professionals rightly call for appropriate remuneration, authority and status. There is a need for more training and proficiency as the risk of legal liability increases.¹⁹ Historically, there was a distinct difference between the roles and functions of a nurse and a physician. The nurse functioned within a delimited framework where it was adequate for the nurse to wait for the doctor to prescribe the order and medical treatment regime before they would follow that order. The nurse was expected to assist the physician and not question the physician's order, his practice or competency.

The role of the nurse has dramatically changed since this time. The locus of authority for the patient care decision making is now a shared function. The nurse's responsibility has been increased to encompass the actual examination, diagnosis and treatment without direct supervision of a physician. As a result of the higher acuity level of patients, the development of highly specialised technology and a heightened emphasis on independent nursing practice, the present position of nurses has increased accountability with a corresponding increase in legal liability. The increased utilization of less skilled personnel, in an attempt to meet the health

¹⁷ "Gauteng doctor, midwives fired for malpractice" (2014) News 24: City Press 31 March.

¹⁸ See note 77.

¹⁹ T Verschoor, GH Fick, RM Jansen, DJ Viljoen "Nursing and the Law "(2007) 3.

needs impact on quality patient care. These personnel are used outside their scope of practice, creating a high risk environment for patients and health care workers.²⁰ Therefore, there must be comprehensive education on legal aspects that guides nursing practice and a thorough understanding of the law must be achieved for nurses to be adequately protected and held properly accountable for their legal obligations.²¹ The Nursing Update (2011)²² reveals that patients' risks in a healthcare setting are increasing dramatically. Excessive and increased workload, a decrease in support services, an increase and advancing technology and lack of material resources have been identified as contributing to professional negligence.

There has been a series of adverse events in healthcare in South Africa recently which has led to litigations arising from multifactorial issues.²³ An announcement made by the Minister of Health, Mr Aaron Motsoaledi, confirmed that there have been an alarming number of medical lawsuits that have been paid out by the various Provincial Departments. In the past seven years, an amount of R1.7 billion in pay out for damages has been documented.²⁴ Some of the contributory reasons from nurses raised when asked to defend themselves have been staff shortages and adverse working conditions as aggravating factors.²⁵ These have been identified as barriers to complaints of failure to continuously assess, monitor and evaluate the wellbeing of the client or health care user. The nurse practitioner argues that they have carried out the task but failed to record same due to their attention being diverted to emergencies and other care priorities. The delivery of quality care is jeopardised as a result of workforce demands in a resource deficient environment. The increased work load leads to low morale which may then lead to low standard of care delivered which then constitutes malpractice.²⁶ Therefore, it can be emphasised that nurses empowered with the relevant legal knowledge will be able to identify boundaries and potential difficulties and thus base their decisions and actions in the interest of safety for both the patient and themselves.

²⁰ AJ Dorse "Legal and Ethical aspects of nursing practice in selected private hospitals in the Western Cape Metropolitan Area" (2008) University of Stellenbosch 86.

²¹ FJ Cavico, NM Cavico "The Nursing Profession in the 1990's: Negligence and Malpractice Liability" (1995) 43(4) *Cleveland State Law Review* 557-626.

²² Nursing Update November 2011.

²³ Maphumulo City Press 13 November 2011.

²⁴ Maphumulo City Press 13 November 2011.

²⁵ C Selebi, A Minaar "Job satisfaction among in Public hospital in Gauteng" (2007) 30(3) *Curationis* 53-61.

²⁶ M Nyathi, K Jooste "Working conditions that contribute to absenteeism among nurses in a provincial hospital in the Limpopo Province" (2008) 31(1) *Curationis* 28-37.

1.3 Background

“Many negligence cases in both the private and public health sectors are caused by poor standard of care by nurses.”²⁷ Arguments are made of under-qualified nurses working in intensive care units in private hospitals or where only one specialised nurse is monitoring four babies, instead of one on one nursing. Other incidents of delayed or substandard nursing care have been reported whereby the nurse had failed to listen and attend to a mother in labour resulting in the birth of the baby dropping to the floor and sustaining brain injury.²⁸ Other malpractice cases include misdiagnoses, the administration of the wrong medication, surgical swabs or instruments left in the patient during surgery, and hip replacements that are not done according to standard. These examples of negligence substantiate the lack of awareness of the legal responsibilities the nurse has, and therefore they are not fully aware of the legal implications of their acts and omissions in the wider context of the law.

The challenge lies where the boundaries between healthcare staff continue to shift. Registered nurses execute tasks previously performed by other healthcare practitioners while ancillary staff performs roles usually associated with registered staff. There has been a revolution in the past ten years in legal responsibilities of nurses as these reforms have led to attitude changes toward nurses by the legal, medical, and public realms. To avoid legal charges of negligence, nurses must keep abreast of the rapidly changing areas of technology, documentation, and patient care. Regardless of the health care setting, professional nurses are morally, ethically, and legally accountable for their nursing judgments and actions. When nurses are aware of their legal responsibilities and obligations, they will be better prepared to care for clients and it will help in achieving better productivity and quality in their service delivery.²⁹ Similar to medical malpractice involving doctors, in the nursing profession negligence occurs when nurses fail to competently perform their duties and that failure harms the patient.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ R Mali, NR Mali “Effect of self-instruction module on knowledge regarding medico legal responsibilities amongst Nurses” (2014) 3 (3) *IJSR*, 617 -618.

Nurses have a crucial role in a patient's care and failure to carry out their duty may result in the nurse being liable for their acts and omissions. Therefore empowering the nurse with the relevant legal knowledge from foundational levels is a vital and essential component in preventing incidents of nursing negligence. If the nurse is not knowledgeable of the laws governing their practice, the rights and laws protecting the patient, and that which govern and regulate the healthcare institution, there is likelihood of execution of undesirable nursing care delivery that may result in harmful consequences for the patient, the institution, and the nurse.

The escalating incidence of medical malpractice in South Africa was the motivation of this study. The intention therefore is to address the area of knowledge and understanding of health and related law and practice for the nurse. The study critically evaluates if the nursing knowledge base regarding legal aspects, healthcare law and other related laws amongst nurses is sufficient in a dynamic and contemporary healthcare environment, where medico legal incidents occur. The nurses' roles and responsibilities are complex and challenging. In order for the nurse to be safe and competent in carrying out their role to the benefit of all stakeholders in the health care environment, the nurse requires knowledge and skills on all domains that facilitate a clinically sound, legal, and ethical standard of care to be delivered.³⁰ The aim of the research therefore is to examine whether the nurse has sufficient legal knowledge regarding healthcare and related laws that affect their practice in order to prevent nursing malpractice.

1.3.1 The Legal Foundation of Nursing

1.3.1.1 Nursing

Nursing has existed for as long as human existence is known and it is from these beginnings that nursing has developed into a recognised profession providing a unique contribution to the healthcare system.³¹

One of the oldest definitions of nursing dates back to the 20th century. A stalwart in the nursing profession, Virginia Henderson defined nursing as: "the unique function

³⁰ A McCallin, C Frankson "The role of the Charge nursing unit manager: A descriptive exploratory study" (2010) 319-325.

³¹ Mellish, JM. Oosthuizen, A. Paton, F. *An Introduction to the Ethos of Nursing* 3rd ed Cape Town Juta, (2010) 3.

of a nurse is primarily assisting the individual (sick or well) in performance of those activities contributing to health or its recovery (or to peaceful death) that he would perform unaided if he had the strength, will or knowledge.”³² Professor Mellish and the International Council of nurses further define nursing as including advocacy, participating in health policy and health systems management, research and education.³³

1.3.1.2 Nursing as a Profession

There has been a long standing debate about recognising nursing as a profession. The arguments against this have included criteria not fulfilled by nurses during training. Amongst these are that not all nurses are educated at university, the majority are not self-employed or independent fee for service practitioners and only a very small percentage of nurses have attained high intellectual status through writing, research and other leadership as well as it lacks a theoretical base and the nurses are largely dependent on doctors for its practice.³⁴

Contrary to this argument, nursing has satisfied the critics as the criticism against it exists in other professions as well. And therefore these cannot be used as criteria to categorise a profession. In South Africa, statutory provision has given nurses and midwives independent practitioner status with personal accountability. The South African nurse has a dependent function on the law which authorises her practice.³⁵

1.3.1.3 The Dependent Function of the Nurse

Searle (1987) describes the nurse’s dependent function as “it is based on the law, as well as the common law and relevant statutory laws. It is not based on that which the doctor prescribes requests or directs for the patient.”³⁶ Searle further explains that in accepting such direction or prescription, the nurse acts as a professional person and is responsible and accountable for their acts and omissions. Without the adherence of the provisions of the Nursing Act, the nurse becomes criminally liable and without the adherence of other health related legislation, the nurse may become civilly or

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Searle, C. Human, S. Mogotlane, SM. (see note 22:7).

³⁶ C Searle “The dependent, independent and Interdependent functions of the nurse practitioner – A legal and ethical perspective” (1987) *Curationis* 19.

criminally liable. The law comprises of a system of rules and regulations that provides order in professional practice. "It is the law, and only the law, that authorises her professional acts." ³⁷ The nurse is dependent on the law, as well as the auxiliary legislative authority namely the professional registration and controlling authority, the South African Nursing Council (hereinafter referred to as the SANC) for every aspect of their professional role and function, and it is the law that empowers the nurse to practice.³⁸

1.3.2 Regulation of the Profession

Regulation of nursing encompasses the welfare of the public through the improvement of education standards; practice standards and delivery of care to patients by ensuring that competency on all domains are inherent by nurses in order to provide quality care to all. It ensures professional identification of nurses who meet the criteria for registration and provides for disciplinary hearings of those who wilfully or negligently harm the health of their patient.³⁹

The state as the chief custodian of its people has to ensure that those who are responsible for the welfare of the nation have the essential knowledge, skills, and ethical integrity necessary to ensure safe health care delivery standards. In the 19th century, the registration of doctors and nurses was inaugurated. The regulatory control was provided through an Act of parliament. The profession was granted the right to a regulatory authority which was to ensure that all its actions were in the public interest. Through the delegated function, parliament was thus assured that it was and is currently carrying out its responsibilities to the citizens. This authority comprises accountability and responsibility. In South Africa, this regulatory body is the SANC. The nurses have the autonomy to determine quality of care rendered, and is accountable for their professional actions to the SANC, or to the courts for alleged breach of the law and vice versa. However, the SANC is in turn accountable to the state through representatives of the people. The minister designated in the Act its responsibility to parliament for this.⁴⁰ The regulatory mechanism of the nursing profession in South Africa is through a register. The register is the locus of control of

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Searle, C. Human, C. Mogotlane, SM. (see note 22:6-7).

⁴⁰ *Ibid.*

any profession as it gives identity to the body of persons with specialised knowledge, skills, standards and ethical integrity within the profession and makes control over such persons possible and whose names are open to public scrutiny.⁴¹

1.3.3 The Influence of the Law on Professional Practice

Laws and legislation are endorsed to regulate and control the practice of health professionals. Such statutes and legislature form the protective framework for the health, safety and welfare of the citizens of a country so that they are protected against unauthorised, unqualified and improper practice by the health professional. This legislation stems from the concept of justice for all, because it provides for the protection not only of the health users, but also for the health professional as it defines the parameters of their practice.⁴²

Justice is a fundamental component for the attainment of social peace and human welfare. Legislative instruments influence social control for rules of action as they are binding and enforced on all citizens of the country. In a profession, the law identifies who shall serve in such a profession and enforces its member's acts and omissions.⁴³

1.3.4 The Impact of the Law on Nursing in South Africa

It is imperative that nurses understand how the law affects nursing and to know the other related Acts that impact nursing practice in South Africa.⁴⁴

The initial main sources of South African legislation were Dutch – Roman and English common law inherited from Dutch settlements and British colonialism. In the recent past, international law has influenced the development and interpretation of South African law and continues to be utilised. The Constitution of the Republic of South Africa of 1996 (hereinafter referred to as the Constitution) defines the structure of the judicial system and guarantees the independence of the courts. “There are three levels in South African legislation: The National Assembly of South Africa that produces national and secondary legislation applicable to the country; the nine

⁴¹ S Armstrong, B Bhengu, W Kotze, L Nkondo-Mthembu, E Ricks, E Stellenberg, D Van Rooyen, S Vasuthevan “A new approach to Professional Practice” (2013) 73.

⁴² Searle, C. Human, C. Mogotlane, SM. (see note 22:149).

⁴³ *Ibid.*

⁴⁴ Mellish, JM. Oosthuizen, A. Paton, F. (see note 23:166).

provincial legislatures that produce legislation and secondary legislation applicable within the relevant province; and the local government councils that produce legislation and secondary legislation applicable to the area of jurisdiction of the relevant local government.”⁴⁵

Statutory law in South Africa is included in the form of Acts of parliament. The Nursing Act is a primary legislation. Secondary legislation produced under the delegated powers of the Act provides the regulations needed to implement a particular Act.⁴⁶

1.4 Research Problem

Case law involving nurses as defendants affirm the relevance for including these health care professionals as a significant group of individuals for development in the area of law. The nurses practice and performance has a consequential effect to the entire health care environment that they confront. The growing awareness of the law by the public, forces the nurse too to expand their legal knowledge base. Although legal aspects of nursing are taught in the nurse training programmes, there is little application and emphasis given on its use. Nurses must know the law that governs the profession to avoid lawsuits, to practice safely, and to protect the patient. A thorough understanding of their legal responsibilities will better equip them to practice safely and ethically in the current health care context.

It is in light of the aforementioned that the nurse’s knowledge of legal aspects regarding legal responsibilities, health care law and other related laws impacting nursing practice will be discussed to establish whether a knowledge deficit exists that contributes to nursing malpractice. The study will also make recommendations to address the inadequacy of knowledge on the part of the nurse if it exists or if it is prevalent.

⁴⁵Mellish, JM. Oosthuizen, A. Paton, F. (see note 23:166).

⁴⁶*Ibid.*

1.5 Research Aim and Objectives

The aim of the study is to determine if knowledge regarding legal aspects amongst nurses will prevent malpractice.

The objectives may be articulated as follows:

- (i) To determine if nurses are informed and understand healthcare and related laws governing their practice.
- (ii) To determine if development in legal knowledge amongst nurses will promote safe nursing care and reduce nursing malpractice.
- (iii) To propose provisions that may need to be incorporated into nursing education programmes that will assist in ameliorating nursing legal knowledge and reducing malpractice.

1.6 Overview of Chapters

Chapter one provides an overview of the main focus and purpose of the topic. Definition of key terms and concepts are discussed. The problem of increased medical malpractice and especially nursing malpractice in South Africa is highlighted in this chapter. In evaluating the problem, the legal knowledge base amongst nurses regarding health care law, other related law and legal responsibilities is evaluated and an attempt in establishing its relationship to nursing malpractice.

Chapter two identifies the legislation and outlines the legal and ethical framework that governs nursing practice in South Africa. A discussion of the nursing regulatory body, the South African Nursing Council (hereinafter referred to as SANC), and the nursing practice standards are included here. A brief explanation of how the nursing profession is regulated, an overview of the legislation governing nursing practice provides the context which sets out the standards, rules, obligations and parameters within which the nurse must practice ethically and safely.

In Chapter three, the researcher reviews international legislation and regulations that govern the nursing profession and examines the position of nursing malpractice globally.

Chapter four is the review of case law and nursing malpractice incidents. SANC statistics of nurses that have faced disciplinary action for unprofessional conduct is

reviewed. An examination of cases of nursing malpractice and its contributory causes is also discussed. This chapter explores the idea that a lack of legal knowledge amongst nurses is the main contributing factor to nursing malpractice. Studies conducted on the value of expanding legal knowledge and increasing awareness of legal responsibilities amongst nurses will also be reviewed.

Chapter five is the concluding chapter which completes the discussion on the topic and provides a clear basis for the reader to understand the entirety of the dissertation. The main arguments will be summarised and will reiterate the importance and significance of the study. Recommendations for provisions and strategies to bridge the knowledge gap in an attempt to improve nursing standards of care and preventing and reducing incidents of nursing malpractice are included.

1.7 Definitions

The following terms and phrases require clarity for purposes of the research.

1.6.1 Nurse practitioner – a person who is formally educated and trained to care for the sick or infirm and who is registered with a nursing council / board.⁴⁷

1.6.2 Nursing – “it is the use of clinical judgement in the provision of care to enable people to improve, maintain, or recover health, to cope with health problems, and to achieve the best possible quality of life, whatever their disease or disability, until death.”⁴⁸

1.6.3 Malpractice – refers to “negligent or intentional unlawful conduct on the part of professional persons which cause injury or damage to their client or their client’s property.”⁴⁹ It is the failure of a professional person to act in accordance with the prevailing professional standards, or failure to foresee consequences that a professional person, having the necessary skill and education, should foresee.

1.6.4. Nursing Malpractice - occurs when a nurse fails to competently perform his or her medical duties and that failure harms the patient.⁵⁰

⁴⁷ C Searle, S Human, SM Mogotlane “Professional Practice: A Southern African Nursing Perspective” 5 ed (2009) 49.

⁴⁸ S Denton, J Burns, D Rawstorne, E Warrington “Defining Nursing” (2014) Royal College of Nursing 3.

⁴⁹ D McQuiod-Mason, M Dada “ A-Z of Nursing Law” 2 ed (2011) 174.

⁵⁰ DL Reising “Make your nursing care malpractice-proof” (2012) 7(1) *American Nurse Today*, 24–28.

1.6.5 Negligence - “The act of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence.”⁵¹ Negligence is: A general term that denotes conduct lacking in due care; carelessness; and a deviation from the standard of care that a reasonable person would use in a particular set of circumstances.⁵² In other words, it is the conduct that falls below the standard of care which is established by the law for the protection of others against unreasonable risk or harm.⁵³

1.6.6 Nursing Negligence - the failure of the nurse to render care that meets the required standard.⁵⁴

1.6.7 The nursing standard of care - “A nurse is expected to possess and use the knowledge, skill, care, and diligence ordinarily possessed and employed by members of the nursing profession.” A nurse will be liable in delict if harm ensues because he or she does not have or use such knowledge, skill, care, or diligence. When a nurse acts and harm results from their action, their actions are evaluated not based upon what a reasonably prudent person would have done in the situation, but upon what a reasonably prudent nurse would have done.⁵⁵

1.8 Research Methodology

This dissertation is based purely on a literature review and is therefore desktop research. The main sources consulted are academic journal articles and related publications, textbooks, electronic books, statistics and related research, and internet resources. An analysis of official documents and codes of conduct from the SANC as a statutory body for the nursing profession and related legislation is included. The sources of data that are relevant for example the Regulation R2598, Scope of Practice and Regulation R387, Acts and Omissions for nursing practitioners under the provision of the Nursing Act 33 of 2005 (hereinafter referred to as the Nursing Act) have also been examined.

⁵¹ RC Ashley “Understanding Negligence” (2003) 23(5). *Critical Care Nurse*, 72-73.

⁵² *Ibid.*

⁵³ S Philomino “Medical Legal Aspects” Available at <https://www.scribd.com/doc/96267412/Medico-Legal-Aspects> (Accessed 16 April 2016).

⁵⁴ *Ibid.*

⁵⁵ FJ Cavico, NM Cavico “The Nursing Profession in the 1990’s: Negligence and Malpractice Liability” (1995) 43(4) *Cleveland State Law Review* 564.

1.9 Ethical Considerations

Permission for exemption for ethical clearance has been granted by the University of Kwa-Zulu Natal Humanities and Social Sciences Ethics Committee. The research study has fulfilled the requirements for exemption as it did employ a method of review of materials available in the public domain. The researcher has ensured that the documents reviewed were relevant to the research problem and purpose; and that objectivity and sensitivity was exercised in the selection and analysis of the data from the reviewed documents.

1.10 Conclusion

This chapter gives an overview of the medical malpractice problem and describes the urgency for action in protecting both the nurse and the public. Statistics reveal that complaints and malpractice have increased drastically. To protect and ensure quality nursing education and practice, professional and legal governance is required. The purpose for the research undertaken is also outlined.

CHAPTER 2

LAW AND THE NURSING PROFESSION IN SOUTH AFRICA

2.1 Introduction

Nurses in South Africa make up the main group of the health care workforce and their role in promoting health and providing essential services is critically important. The law is the only social mechanism that exists for the control of society that is enforceable by the country. Because nurses have to ensure that so many aspects of the law are observed in the care of patients, they are taught about the law and legal consequences related so that prescribed activities which affect legal rights of patients are observed and are not disregarded or undermined as part of hospital authority.⁵⁶ There are many diverse Acts of parliament relevant to the nursing profession. This chapter provides an overview of the relevant Acts and legislation that influence and have an impact on the nursing profession in South Africa.

2.2 The Constitution of the Republic of South Africa⁵⁷

This is the law affecting the composition and the exercise of sovereign power in the country. Chapter 2 of the Constitution describes the principles that are fundamental to the ethics of nursing - The Bill of Rights. The ethical principles of beneficence, non-maleficence, autonomy and justice are reflected in this Bill of Rights. This contains the detailed provisions concerning civil, political, economic and social rights. Ethical principles of beneficence aligns to the right to life (s11), access to health care (s27 (1)) and access to information (s23 (1)). Non – maleficence is reflected in the Constitution as the “right to an environment that is not harmful” (s24 (a)), “not to be treated in a cruel, inhumane or degrading manner” (s12 (1)) and “not to be subjected to medical or scientific experiments without consent” (s12 (2) (c)). A person’s right to bodily and psychological integrity (s12 (2)), dignity (s10), privacy (s14) and life (s11) reflects autonomy. Justice and fairness echoes “the right to equal treatment and non-discrimination (s9) and the right to lawful, reasonable and procedurally fair

⁵⁶ Searle, C. Human, S. Mogotlane, SM. *Professional Practice: A Southern African Nursing Perspective* 5th ed Cape Town Juta, (2009) 189.

⁵⁷ The Constitution refers to the Constitution of the Republic of South Africa, unless otherwise stated.

administrative treatment”.⁵⁸ It follows that these rights and ethical principles must also be observed and respected for the purposes of health care in a medical setting. The Constitution and the rights entrenched therein serve as the backdrop for the ethical and legal practice for nurses, patients and the SANC.⁵⁹

2.3 The National Health Act, 2003 (Act 61 of 2003)

Prior to the implementation of the National Health Act, the National Patients’ Rights Charter was formulated by the Department of Health and launched in 1999 to serve as a guideline to people seeking health services, as well as to health institutions concerning the rights and duties of people in the health sector. The guidelines in the National Patients’ Rights Charter are similar to those mentioned in the National Health Act and the Health Professions Council of South Africa’s (HPCSA) guidelines and also have as part of its mission, the realisation and protection of the patients’ rights to access to health care as well as to privacy and a healthy and safe environment.⁶⁰ It therefore follows that the National Health Act combines the country’s health system in a common goal to promote and improve health care delivery within the aforementioned guidelines. The Act promulgates the obligations imposed by the Constitution and other relevant health legislation including nursing care, rights of the health users and the responsibilities of the health care provider.

2.4 The Nursing Act, 2005 (Act 33 of 2005)

Nurses have a duty to study and understand the elements of the law relating to the practice, training and other issues of the nursing profession. It is here that the nurse recognises the professional council duties and will find understanding and detail of the regulations or rules that guide and regulate the profession.⁶¹

The Nursing Act is the binding force to provide recognition and cohesion to the nursing profession. In South Africa, the Nursing Act is a legal document endorsed by the parliament to ensure that its jurisdiction is the interest of the public. The fundamental purpose of the Act is to ensure regulation by statute, and a sound and just level of nursing service to all citizens. The Nursing Act provides for the existence

⁵⁸ JM Mathibe-Neke “ The role of the South African Nursing Council in promoting ethical practice in the nursing profession: a normative analysis” (2015) University of Witwatersrand 23-24.

⁵⁹ Chapter 2 of the Constitution of Republic of South Africa.

⁶⁰ Mellish, JM. Oosthuizen, A. Paton, F. (see note 23:169).

⁶¹ Searle, C. Human, C. Mogotlane, SM. (see note 22:155).

of the SANC which is responsible for the regulatory processes in nursing in South Africa.⁶²

2.4.1 *The South African Nursing Council (SANC)*

South Africa retains a significant milestone being amongst the forerunners in the world to achieve state registration for nurses and the establishment of the SANC in 1944. The SANC is the statutory body established and legally recognised by parliament, and has its basis on the laws of the country. It exists as a legal entity in its own right with powers and the authority to independently control the activities and other issues related to the profession.⁶³ The core purpose of the SANC relates to public protection through maintaining professional standards and conduct, and improving knowledge and skills of the nurse practitioners. This assents with the state's main responsibility to the public of safe and quality health care.⁶⁴ There is a close collaboration between government and the SANC as the Nursing Act assigns powers to the SANC. Although the SANC has the independence to regulate the profession, it is accountable to government in terms of its activities and the profession. Amongst a host of functions, an important function of the SANC is the regulation and control of professional conduct. The Nursing Act provides for disciplinary control of the profession by the SANC. This strives to ensure the ethical practice of nursing and is primarily intended to protect the public. It intends for the profession to be safe in the hands of the nurse practitioner and that the trust between the public and the profession is maintained.⁶⁵

In cases of misconduct, the SANC is given quasi – judicial powers to enquire into charges of misconduct and to impose sanctions, or penalties where misconduct is evident. The procedure for misconduct and the penalties are prescribed by law as the outcome may have severe social and economic consequences.⁶⁶ The advocacy role of the SANC should be aimed at enhancing professionalism in the nursing profession which entails a commitment to society that demonstrates a nurse

⁶² Searle, C. Human, C. Mogotlane, SM. (see note 22:155).

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Armstrong, S. Bhengu, B. Kotze, W. Nkonzo-Mthembu, L. Ricks, E. Stellenberg, E. Van Rooyen, D. Vasuthevan, S. *A new approach to Professional Practice* Cape Town, Juta (2013)74.

⁶⁶ Searle, C. Human, C. Mogotlane, SM. (see note 22:156).

practitioner's scientific knowledge, accountability and responsibility.⁶⁷ McCleod – Sordjan (2014) postulates that although the SANC's vision is clear in articulating the standards of professional practice, there is a need for development in areas where legal accountability and liability need emphasis. Precise guidelines on legal aspects will enhance nursing knowledge base in the interest of all stakeholders.⁶⁸

2.5 Regulation Relating to Scope of Practice (Regulation 2589)

The scope of practice of a nurse entails “the acts and procedures which may be performed by the scientifically based physical, chemical, psychological, social, educational and technological means applicable to health care practice”.⁶⁹ An important section in any regulatory function is to determine the parameters of the scope in which a practitioner may function. In the Nursing Act, the scope of practice is outlined in section 30 and details are provided in the regulations and rules according to section 58 and 59. The scope of practice provides the legal framework for practice. Any regulation in terms of section 60(1) is deemed to have been issued, made, granted or performed under the corresponding provision of the Nursing Act. Therefore Regulation 2598 provides the legal scope of practice for professional nurses and all practitioners are legally obliged to comply with these prescriptions.⁷⁰ It is vitally important that a practising nurse know their scope of practice as well as the scope of other categories in the profession. The regulations on the scope of practice for nurses define the scope of practice of registered persons, the conditions under which registered persons may carry out their professional obligations, the control which will be exercised by the SANC over the practice of registered persons and the inspections which will be carried out regarding nursing education institutions.⁷¹

Although the scope of practice is composed as a flexible framework in order to make provision for different areas of practice and allow new developments in health and nursing care, a limitation to the Regulation 2598 is that it does not specify the skills and methods which the nurse should use when caring for a patient. Researchers have argued in favour of this limitation as there cannot be a list of tasks because it

⁶⁷ R McLeod-Sordjan “Evaluating moral reasoning in nursing education” (2014) 21(4) *An International Journal for Health Care Professionals* 474-480.

⁶⁸ *Ibid.*

⁶⁹ The South African Nursing Council. Government Notice No. R2598 of 1985 as amended.

⁷⁰ N Geyer “Scope of Practice” (2009) 20(1) *Professional Nursing Today* 4-5.

⁷¹ Searle, C. Human, C. Mogotlane, SM. (see note 22:177).

negates the true nature of nursing which is more than tasks and procedures. However, the broad guidelines that allow for the expansion and development of the nurse's role in order to keep pace with technology and advances in the health and nursing industry have also led to nurses uncertainty in the limitations and boundaries of their scope leading to them practicing care without acquiring full competency.⁷²

Lubbe (2013) conducted a study on nurse's scope of practice and the implication for quality nursing care. The findings revealed evidence of an alarming number of risk assessments performed by nurses not licenced or enrolled to perform the task. This highlighted implications for quality nursing care and potential risk for the patient and the institution. The author surmised the emphasis of nurses performing tasks within their scope of practice for which they are licenced or enrolled. Nurses that lack the required competency are not adequately prepared to perform tasks unsupervised even in the current global nursing shortage crisis.⁷³

The findings in this study validate a review of a more defined scope of practice that provides a more detailed outline of the permissible interventions and procedures for the various categories of nurses. This will obviate nurses acting outside their prescribed domains of practice and rendering safe, competent care that meets the ethical and legal realms of the profession. Therefore, the researcher emphasises the need for nurses to be knowledgeable of their legal obligations in order to empower their decision making when commissioned to render care. A thorough understanding of their legal responsibilities will guide their actions and safeguard the patient and the nurses themselves.

2.6 Regulation setting out the Acts and Omissions (Regulation 387 and Regulation 767)

An omission is a failure to act, which generally attracts different legal consequences from positive conduct. In the criminal law, an omission will constitute an "actus reus" and give rise to liability only when the law imposes a duty to act and the defendant is in breach of that duty.⁷⁴

⁷² N Geyer (see note 51).

⁷³ I Lubbe " Nurses' Scope of Practice and the Implication for Quality Nursing Care" (2013) *Journal of Nursing Scholarship* 58-64.

⁷⁴ McQuoid-Mason, D. Dada, M. *A-Z of Nursing Law* 2 ed Cape Town, Juta (2011) 210.

Regulation 387 of 1985 and Regulation 767 of 2014 stipulates the conditions under which the SANC may institute disciplinary measures against nurse practitioners' adverse conduct. This includes assault, abuse, harassment of health care users and colleagues or any conduct bringing the profession into disrepute and disclosure of information as per chapter 2 subsections 9, 10 and 13(1).⁷⁵ It is essential that a nurse carries out an intervention that is required in order to avert any preventable complications or adverse events. Failure to carry out such an intervention is regarded as negligence for which the nurse may be charged and disciplined. Any failure to carry out acts in respect of the assessment, diagnosis, treatment, care, prescription, collaboration, referral coordination and patient advocacy as the scope of practice permits will result in contravention of the provisions of the Acts and Omissions.⁷⁶ It is mandatory for safe nursing care delivery that the nurse practitioner keeps themselves updated with current scientific and technological advancement. Therefore, the corresponding legislation must also be understood and applied for safeguarding optimal service delivery.

2.7 Duty to Care

A duty of care is an authoritative demand enforced on an individual requiring the individual to ensure a reasonable standard of care while executing actions that may cause foreseeable harm to someone.

The law does not prescribe which tasks are either appropriate or inappropriate for the particular healthcare personnel. However, it does provide a crucial regulatory framework that applies to every individual irrespective of their rank or role. The law imposes a duty of care on all health care practitioners, in circumstances where it is 'reasonably foreseeable' that they might cause harm to patients through their actions or their failure to act. Responsibility equates to the duty of care in law. The laws authorising duty to care in nursing is amongst others, the Constitution of South Africa, the Nursing Act, the National Health Act, and the common law of the country. It is noteworthy to understand contractual liability in this context as most nurses have a contractual agreement with their employer but no written agreement with the patient or health user. This implies that a tacit agreement exists between the nurse

⁷⁵ The South African Nursing Council. Government Notice No. R387 of 1985 as amended.

⁷⁶ N Geyer (see note 51).

and the patient. The nurse as an employee of the health care organisation becomes a party to the contract between the organisation and the patient and therefore is obliged to fulfil the duties and responsibilities assigned to her. The duty to care applies irrespective of the intricacy of the task as there is the risk for harm to occur no matter how simple or how complex the task may be. The question that arises concerns the standard of care expected of practitioners performing these tasks. This is the legal liability the practitioner owes to the patient. By accepting the responsibility to perform a task the practitioner must ensure the task is performed competently at least to the standard of the ordinarily competent practitioner in that type of task.⁷⁷

2.8 Other Health Care Laws Relating to the Nursing Profession⁷⁸

The following applicable legislation referred to hereunder also include Acts that affect nursing practice but are not exhaustive.

2.8.1 The Medical Schemes Act, Act 131 of 1998 makes provision for the disclosure of personal information to a managed care organisation on condition that this information is treated as confidential.

2.8.2 The Choice of Termination of Pregnancy Amendment Act, Act 38 of 2004 determines the circumstances in which and conditions under which the pregnancy of a woman may be terminated.

2.8.3 The Mental Health Care Act, Act 17 of 2002 prohibits the discrimination against mental healthcare clients. This act entitles mental healthcare clients the same level of care as non-mental healthcare users.

2.8.4 The Children's Act, Act 38 of 2005 provides provision for determining rights of children and it sets out the principles on the care and protection of children.

The aforementioned legislation directly relates to the nurse – patient relationship and influences the delivery of care. The nurse practitioner must understand the provisions set out to guide their decisions, actions and practice in order to meet the legal and ethical requirements. A lack of knowledge of the relevant legislation may

⁷⁷ R Scrivener "Accountability and Responsibility: Principle of Nursing practice B" Art and Science Nursing Standard (2011) 25-30.

⁷⁸ Mellish, JM. Oosthuizen, A. Paton, F. (see note 23:170-172).

potentially lead to negligence in terms of the provision made by the legislation and the omission to act accordingly due to unawareness of such a legal provision.

2.9 Executive Measures on Nursing Profession

2.9.1 The Draft Charter for Nurses

The Charter provides an overview of the expectations of nurse practitioners with regards to scope of practice and the acts and omissions. The purpose of the Charter of Nursing Practice is to provide guidelines to the members of the nursing profession. It aims to ensure that they practice in accordance with national legislative and policy frameworks; are responsive to the needs of the public; provide nursing care that is in the best interest of the recipients of this care.⁷⁹

Although the Draft Charter for nurses has been given much attention and importance in the nursing curriculum of nurse training programmes and it forms part of the learning objectives when dealing with the ethical and legal framework for nursing, there is little mention of it in primary sources in the South African context on the subject. The researcher's premise on this is perhaps as a result of an issue of semantics.⁸⁰ The Draft Charter was compiled in 2004 by the SANC and was not endorsed after it was sent out for public comment. The title remained Draft Charter with the subtle connotation that it was still work in progress. This perception may create ambiguity in terms of guiding a nurse on its purpose.⁸¹

The SANC has however compiled a Code of Ethics for Nursing Practitioners in South Africa which was endorsed in 2013 and is an extended arm from the core purpose of the Draft Charter. The Code of Ethics is a loud reminder of their responsibilities towards individuals, families, groups and communities, namely to protect, promote and restore health, to prevent illness, preserve life and alleviate suffering. This Code also serves as a declaration by nurse that they will always provide due care to the public and healthcare consumers to the best of the ability while supporting each other in the process.⁸² There was a need for clarity to be obtained on the relationship between the scope of practice, practice standards and competencies in order to

⁷⁹ C Brooker, A Waugh, D van Rooyen, PJ Jordan "Foundations of nursing practice: Fundamentals of holistic care" (2009) 129.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² SANC (2013). Code of Ethics for Nursing Practitioners in South Africa.

meet one of the other important goals set out in the Draft Charter. The SANC released a format that clarifies definitions of the above and will guide the development of such a document. In some current sources, the Draft Charter is referred to as the Charter of Nursing Practice.⁸³

2.9.2 The Batho Pele Principles

This is the mechanism to ensure that services are provided within the spirit of the Constitution. The Batho Pele Principles, meaning “people first” was developed to enhance service delivery in the public sector. The eleven principles were developed to serve as acceptable policy and legislative framework and are aligned to the Constitution.⁸⁴ These principles are namely: consultation, service standards, access, courtesy, information, openness and transparency, redress, value for money, service excellence, customer impact and leadership.⁸⁵

Although the “people first” concept was directed for the public servants with the aim of inspiring commitment when serving people and to explore improved strategies for service delivery, the concept has also been embraced and enforced in the private sector of the healthcare industry. This principle grants the public a right to quality service delivery and allows them to hold the institution accountable for substandard care deliverance.

2.9.3 The Patient’s Rights Charter⁸⁶

The great majority of South African citizens have experienced a denial or violation of fundamental human rights for many decades. These included rights to health care services. In view of this subjugation, The Department of Health, in consultation with various other bodies, developed a National Patient’s Rights Charter. The impetus of this is to ensure the realisation of the right of access to health care services as guaranteed in the Constitution. The Department of Health is steadfast in sustaining, supporting and guarding this right and therefore, declares this Charter as a goal standard for achieving the realisation of this right. Likewise, all health care

⁸³ *Ibid.*

⁸⁴ Mellish, JM. Oosthuizen, A. Paton, F. (see note 23:168).

⁸⁵ Department of Public Service and Administration. Republic of South Africa.

⁸⁶ *Ibid.*

practitioners should adhere to the stipulations of this Charter as it relates to them.⁸⁷ The Charter also provides for the responsibilities the patient has for his own health.

2.10 The Legal Context of Nursing

Nurse practitioners are legally accountable for the commission and omissions regarding nursing care provided as per the guidelines of Regulation 387 of 1985 (as amended).

As stated in the policy statement of ANA (2003), professionalism in the context of nursing implies that “Nursing is the pivotal health care profession, highly valued for its specialized knowledge, skill and caring in improving the health status of the public and ensuring safe, effective quality care”. Competency in the nursing profession also depends on continued expansion of knowledge. The nursing profession should as such, fulfil the society’s nursing care needs offered by providing qualified and appropriately prepared nurses who embrace and act according to a code of ethics and a legal framework aligned to its current legal context.

Nursing regulatory bodies have a responsibility to nurses and the public to develop standards that address the needs of the public that specifies educational programmes, policies, procedures, protocols, and the evaluation of nursing service delivery systems. Because statutory provision exists for the control of the nursing profession, these practitioners have a grave responsibility to protect the wellbeing of their patients. Because they are accountable for their acts and omissions, they are vulnerable in respect of malpractice litigation. There are an increase number of criminal acts committed by nurses that are documented at the SANC where nurses face disciplinary actions.⁸⁸ It is therefore SANC’s significant role through the Nursing Act to ensure that nurses’ professional practice is according to the set standard in order to protect the public.⁸⁹

⁸⁷ Health Professionals Council of South Africa “Guidelines for good practice in the Health Care Professions” (2008) National Patient’s Rights Charter.

⁸⁸ Searle, C. Human, C. Mogotlane, SM. (see note 22:202).

⁸⁹ Armstrong, S. Bhengu, B. Kotze, W. Nkonzo-Mthembu, L. Ricks, E. Stellenberg, E. Van Rooyen, D. Vasuthevan, S. *A new approach to Professional Practice* Cape Town, Juta (2013) 175.

2.11 Conclusion

This chapter discussed the legal guidelines underlying the nursing profession in South Africa. The legal framework guides the nurse in their clinical practice and having a thorough understanding of the aforementioned legislation is imperative for the nurse to practice securely. It will be worthwhile to appraise regulations and instruments that govern the profession internationally to gain an insight on the topic as nursing malpractice is a global phenomenon. The international perspective will be addressed in the next chapter.

CHAPTER 3

LAW REGULATING NURSING PROFESSION FROM A COMPARATIVE PERSPECTIVE

3.1 Introduction

The Constitution of the Republic of South Africa stipulates that international law has both a direct and indirect impact on health law and policy making in South Africa. Section 39 of the Constitution states that the court, and other legal bodies, when interpreting the Bill of Rights: must consider international law and may consider foreign law. It is therefore necessary to appraise and compare regulations governing nursing practice in other parts of the world and to gain an insight on the position of nursing malpractice. This chapter explores nursing regulation in various countries.

3.2 Nursing Regulation Internationally

Nursing is a practical and functional discipline that is implemented differently based upon the social, political, and cultural climate within which it is practiced. Authors of the study that evaluated “Nursing around the world” (2002) looked at commonalities and differences in five countries. Although differences were identified in other jurisdictions, there were common themes that were also identified. These common themes overlap with the South African nursing context as well. These include a vast array of strategies and methods for educational preparation of nurses with a shift of education into institutions of higher education; definitive standards for credentialing to maintain safe practice; nursing practiced within a general medical model; and the existence of nursing shortages with particular emphasis on the need for an aging population.⁹⁰

3.3 Nursing in Australia

The nursing profession in Australia is regulated by The Nursing and Midwifery Board of Australia (NMBA). The Board undertakes functions as set by the Health Practitioner Regulation National Law. Similar to the SANC, the NMBA regulates the practice of nursing and midwifery with its key role being the protection of the

⁹⁰ SL Jones, H Coeling “Nursing Around the World: What are the differences and Commonalities?” (2002) 5(2) *Online Journal of Issues in Nursing* [Accessed 9 November 2016].

public. The NMBA does this by developing registration standards, professional codes, guidelines and standards for practice which together establish the requirements for the professional and safe practice of nurses and midwives in Australia.⁹¹ A nurse practitioner is certified by the NMBA who has direct clinical contact and practices within their scope under the legislatively protected title 'nurse practitioner' under the National Law.

The registration standard as a nurse is comparable to the South African nurse registration standard with a few exceptions.⁹² In Australia, nurses are required to make an annual declaration that they have met the requirements for renewal of registration i.e. professional indemnity insurance, recency of practice requirements and completed the required continuous professional development. This is in contrast to the South African requirement as the SANC does not enforce professional indemnity insurance and recency of practice. It is an annual fee that is paid to remain registered with the SANC. However, continuous professional development is an imminent regulated requirement soon to be enforced for the South African nurse.⁹³

The principle of universal access to health care is a key focus in this country and is state driven, thus operating as a public hospital system run by the government. Nurses study at university level and receive a bachelor degree for entry level practice. This is in contrast to South Africa where nurses may study at an Institution of Higher education and the entry level in nursing is a certificate. The key issues for nursing in Australia are shared globally with their shortage of nurse's challenge and a solution to manage the poor health of the native people of the country.⁹⁴

According to statistics from The World Health Organization (WHO) Australia has the highest rate of medical errors in the world:

- 18,000 people may die every year in hospitals through preventable medical negligence in Australia

⁹¹ Nursing and Midwifery Board of Australia [Accessed 24 November 2016].

⁹² *Ibid*

⁹³ *Ibid*

⁹⁴ J Stein-Parbury "Nursing Around the World: Australia" (2002) 5(2) *Online Journal of Issues in Nursing* [10 December 2016].

- 50,000 people suffer from permanent injury annually as a result of medical negligence in Australia.
- 80,000 Australian patients per year are hospitalised due to medication errors.⁹⁵

Regulation of nursing in Australia indicates some differences in terms of registration of nurses. The requirements for remaining as legal practitioners appear to be stricter than in South Africa. However, with regard to nursing malpractice, the statistics are alarming. It can be surmised that although regulation may be in place, enforced and adhered to, the incidence of unfavourable nursing care delivery exists. This may not be related to how the profession is regulated but rather there may be a lack in understanding the legal responsibilities by the nurse, a disparity identified in South Africa as well.

3.4 Nursing in Japan

In Japan, the nurse practitioner goes by the titles public health nurse, midwife or nurse. The criteria to attain certified nurse professional status is to complete a curriculum at an educational institution set forth by law, pass a national examination that can be taken once a year, and obtain a license granted by the Minister of Health, Labour and Welfare.⁹⁶ In contrast to South Africa, the Japanese nursing qualification does not have any renewal system, and lasts for the lifetime of the nurse. However, dispositions including the repeal of a license may be rendered as grounds for disqualification set forth by the law or in case of acts that compromise dignity.⁹⁷ Nursing in Japan is focussed on responding to change through involvement in policy decisions and service enhancement. Standards for licensure and movement of nursing education are at university level. As more nurses obtain graduate education, nursing science is developing. Other key issues for nursing in this country include the limited autonomy in practice in relation to the physician, and a nursing shortage.⁹⁸ There has been record of medical negligence in Japan among both

⁹⁵ *Ibid.*

⁹⁶ J Primono "Nursing around the world:Japan" (2002) 5(2) *Online Journal of Issues in Nursing* [Accessed 9 November 2016].

⁹⁷ *Ibid.*

⁹⁸ J Primomo "Nursing Around the World: Japan - Preparing for the Century of the Elderly" (2000) 5(2) *Online Journal of Issues in Nursing* [Accessed 9 November 2016].

nurses and physicians. These incidents of negligence overlap with the nature of negligent incidences in South Africa. Reports of at least 15,000 medical errors in eighty two hospitals were documented over a two year period in the mid 2000's. These errors include incorrect blood transfused to patient, infusion of disinfectant intravenously by a nurse leading to patient death, incorrect operation on patient due to incorrect identification, and liquid food administered intravenously by a nurse. The nature of these incidents is not unfamiliar in the South African context. Many of the causes to the incidents above indicated lack of experience from the physicians and the nurses involved in these cases.⁹⁹

It can be deduced that there are relatively fewer malpractice suits filed in Japan compared to other countries, and therefore one can postulate that there is under reporting of negligence within the nursing profession. Opinions on the low numbers reported have indicated reasons to be that cases take too long to be heard and judges are often changed during the course of the case, as well as decisions are often based on testimony of medical experts who lack objectivity and therefore are reluctant to point the finger at their colleagues. Although the nursing regulation in Japan is lenient in comparison to South Africa, there appears to be less malpractice in Japan. This conclusion however remains arguable in light of the aforementioned doubt of poor reporting of malpractice and negligent actions in the country.¹⁰⁰

3.5 Nursing in Zimbabwe¹⁰¹

The regulatory body in Zimbabwe for nurses is the Nurses Council of Zimbabwe (NCZ). It was established through the Health Professions Act in 2000. The core values are comparable to the SANC and include commitment, respect, teamwork, integrity, and honesty. The roles of NCZ and the SANC overlap and encompass regulation, control and supervision of all matters affecting the training of persons in, and the manner of the exercise of, the professions and callings specified, defining and enforcing ethical practice and discipline among nurses, and the evaluation and

⁹⁹ Health Care Problems in Japan <http://factsanddetails.com/japan/cat23/sub151/item838.html> [Accessed 1 December 2016].

¹⁰⁰ *Ibid.*

¹⁰¹ International Council for Nurses "the ICN Code of Ethics for Nurses" (2012) [Accessed 19 September 2016].

monitoring of the standards of qualifying examinations, courses and training for nurses.¹⁰²

A general framework for health care service delivery in Zimbabwe comprises of a ten year National Health Strategy and the Zimbabwe Patients Charter. A primary health care approach is the focus of nursing practice and encourages the citizens to be self-care oriented. Similar to Australia and Japan, there is a shift in education toward participation in higher education with five levels of university nursing education. All nursing programmes are accredited by the Zimbabwe Health Professions Council. Registration with the Zimbabwe Health Professions Council is mandatory regardless of their professional educational level. The country's main issues are the challenges for nurses to advance in their preparation and to attain cost effective, socially and culturally relevant nursing care.¹⁰³

Although there are no definitive statistics available on nursing malpractice in Zimbabwe, the occurrence of negligence has been documented. The quality of nursing care has been a concern arising from the strained numbers of the nursing workforce. An area of significant concern is in maternity and the increase in maternal related complications and mortality.¹⁰⁴ Commenting on cases of negligence at hospitals being reported in the media, officials of the council said "mistakes do happen".¹⁰⁵

3.6 Nursing in the United Kingdom (UK)

Similar to the nursing requirements in South Africa, all nurses in the United Kingdom must be registered with the Nursing and Midwifery Council (NMC). The legal requirement to practice is for the nurse to hold a current and valid registration with the Nursing and Midwifery Council. The title "registered nurse" can only be granted to those holding such registration; this protected title is laid down in the Nurses, Midwives and Health Visitors Act 1997. The NMC and SANC share the key function of establishing and improving standards of nursing and midwifery care to protect the

¹⁰² *Ibid.*

¹⁰³ KG Mapanga, MB Mapanga "A Perspective Of Nursing In Zimbabwe" (2000) 5(2) *Online Journal of Issues in Nursing* [Accessed 10 December 2016].

¹⁰⁴ ZimSitRep M "Zimbabwe need 10000 nurse to remain afloat" (2016) [Accessed 5 December 2016].

¹⁰⁵ *Ibid.*

public through registration of all nurses and midwives, setting training standards, and keeping skills and knowledge up to date.¹⁰⁶

A recent requirement enforced in 2016 in the UK is the revalidation for all NMC registered members. This standard is incongruent to the SANC requirement for nurses. The requirements are to revalidate every three years in order to ensure their registration can be renewed and necessitates that the nurse fulfill the following criteria:¹⁰⁷

- 450 practice hours, or 900 if renewing as both a nurse and midwife
- 35 hours of CPD including 20 hours of participatory learning
- Five pieces of practice-related feedback
- Five written reflective accounts
- Reflective discussion
- Health and character declaration
- Professional indemnity arrangement
- Confirmation

With regard to medical malpractice inclusive of nursing malpractice, the statistics in a 2010 report reveal that there was a steady increase in incidents and claims between 2004 and 2008 with an average ten percent increase each year. Thereafter the number of claims and cases reported remained stable. Once again, these numbers support the contention that medical malpractice exists in the UK. The main reason for most claims occurred as a result of breach of contract and duty to care, and / or poor standard of care.¹⁰⁸

3.7 International Council of Nurses (ICN)

The International Council of Nurses is an alliance comprising of more than 130 national nurses associations and represents more than 16 million nurses worldwide. Established in Geneva, Switzerland and founded in 1899, the ICN is the world's first and largest reaching international organisation for health professionals. The ICN's

¹⁰⁶ H Chin, E Mc Nichol "Practice Development Credentialing in the United Kingdom – A Unique Framework for Providing Excellence, Accountability and Quality in Nursing and Healthcare" (2000) 5(2) *Online Journal of Issues in Nursing*.

¹⁰⁷ *Ibid.*

¹⁰⁸ R Goldberg "Medical Malpractice and compensation in the UK" (2011)131-161.

core function is to ensure quality nursing care for all, rigorous health policies globally, advancement of nursing knowledge, and the presence worldwide of a respected nursing profession and a competent and satisfied nursing workforce.¹⁰⁹ Inherent to its purpose and mission, the ICN core value is ethics. This Code of Ethics for Nursing in South Africa and across the world reminds all nurses of their responsibilities towards individuals, families, groups and communities, namely to protect, promote and restore health, to prevent illness, preserve life and alleviate suffering. These responsibilities will be carried out with respect for human rights, and include cultural rights, the right to life, choice and dignity without consideration of age, colour, creed, culture, disability or illness, gender, sexual orientation, nationality, politics, race or social status.¹¹⁰

As the core principles of the code is respect for life, human dignity and the rights of other persons, its application cannot be divorced from other applicable South African laws, international policy documents such as the Universal Declaration of Human Rights, International Council of Nurses (ICN) Code of Ethics, the Patients' Rights Charter and all other nursing and healthcare policy frameworks providing direction and guidance for responsible practice in nursing.¹¹¹ There is a growing realization globally that the nurses' role has the potential to contribute significantly to resolving some of the current health care delivery problems; and a unanimous accord that appropriate educational preparation for the role is at graduate level.¹¹² These principles and policy objectives represent a basis for nursing and offer direction for nursing associations and regulatory bodies in developing and evaluating systems.¹¹³ The nursing profession in South Africa endorses the ICN code as part of the essential supporting regulatory guidelines in any nursing curriculum and it forms part of the ethical and legal framework for professional practice.

¹⁰⁹ BL Nicholls, CR Davis, DR Richardson "The future of Nursing: Leading change, advancing health: International Models of Nursing." (2011) Institute of Medicine 565-642.

¹¹⁰ International Council for Nurses "the ICN Code of Ethics for Nurses" (2012) [Accessed 19 September 2016].

¹¹¹ SANC – Code of Ethics for Nursing Practitioners in South Africa, May 2013.

¹¹² Canadian Nurses Association Fact Sheet "Role of the Nurse Practitioner around the World." (2002).

¹¹³ Armstrong, S. Bhengu, B. Kotze, W. Nkondo-Mthembu, L. Ricks, E. Stellenberg, E. Van Rooyen, D. Vasuthevan, S. *A new approach to Professional Practice* Cape Town, Juta (2013) 49-51.

3.8 Nursing Regulation and Practice in other Countries

Although nurses share a common profession, internationally their educational preparation, regulation, and practice patterns are diverse and vary in complexity and scope. There are differences in credentialing requirements that include professional licensure, use of titles, and accreditation of educational programmes.¹¹⁴

Achieving global standards for the education of nurses has been promoted by the ICN for over a century, achieving that goal remains challenging and is complicated by the discrepancies in nursing education throughout the world. The minimum criteria for entrance is university level education in many countries, but these criteria of university education for nursing remains challenging, with disparities being common in the programmes currently offered in different parts of the world. Furthermore, the issue is compounded because there are countries that still consider initial nursing education at the secondary school level to be adequate. The curriculums in nursing education programmes are diverse and varied across the world. Nurses from the Philippines complete a baccalaureate degree. Denmark, Ireland, New Zealand, and Spain also have single programmes for qualifying as a nurse. In the United States there are three educational pathways to become a registered nurse: a 2-year associate degree, a 3-year diploma programme, or a baccalaureate degree. Also in the United States the model of nurse-midwife is common, for other countries midwifery is considered a profession separate from nursing. In a nutshell, universal nursing education standards have not been achieved. Global standards continue to be a goal of the future and these will be guidelines that serve as benchmarks for the profession.¹¹⁵

Another significant difference in nursing education globally, is the regulation of the profession. Statutory nursing regulation is prevalent in most countries with the aim of ensuring a safe and competent nursing workforce. However, in contrast, there are still countries with no nursing regulation, rules, or other regulatory mechanisms that emanate from the government. In some countries there is provision for nursing regulation, either in statute or in other systems of rules, however, for various reasons no mechanisms exist that establish a legal framework for nursing as an autonomous

¹¹⁴ BL Nicholas, CR Davis, DR Richardson (see note 68).

¹¹⁵ *Ibid.*

regulated profession and licensure is not a mandatory requirement. Some countries require nurses to pass an examination after completion of their nursing education before they can practice. Nurses in the Philippines, Australia, Thailand, Singapore, the Cameroons, Korea, and Poland take a licensing exam that provides national licensure and registration as a first level (registered) nurse. Other countries, such as Mexico, do not require a post-graduation examination. The nursing schools administer an exit or qualifying examination and upon passage, the student is granted a diploma. The diploma allows the graduate to practice as a nurse. Titles are used to inform the public of the scope of practice and the professional identity of a health care worker and differ by country. The nurse's role and responsibilities also may differ by country, although the titles may be the same.¹¹⁶

It may be argued that although the common objective of the profession is universal with the main aim of restoring and promoting health, alleviating illness and protection of the patient, there remains an inconsistency on how the profession is regulated across the world and it is this discrepancy that may potentially be the root cause for varying standards in the delivery of care.

3.9 An Examination of Nursing Malpractice Internationally

An analysis based on more than two hundred and fifty (250) cases against nurses revealed the major categories of negligence issues that prompted malpractice lawsuits (EM Croke: 2003).¹¹⁷ The categories identified are "failure to follow standards of care (perform a complete admission assessment or design a plan of care, adhere to standardized protocols, or institutional policies and procedure, follow a physician's order); failure to use equipment in a responsible manner (follow the manufactures instruction for operating same, check equipment for safety prior to use, place equipment properly during treatment, learn how equipment functions); failure to communicate (notify physician in a timely manner when condition warrants it, listen to a patient's complaint and act on it, communicate effectively with a patient, seek higher medical authorization for treatment); failure to document (a patient's progress and response to treatment, a patient's injury, pertinent nursing assessment information such as allergies, a physicians medical order, information on telephone

¹¹⁶ *Ibid.*

¹¹⁷ EM Croke "Nurse, Negligence and Malpractice." (2003) 103(9) *American Journal of Nursing* 54-64.

conversations with physicians including time, content of communication between nurse and physician and actions taken); failure to assess and monitor (complete a shift assessment, implement a plan of care, observe a patient's progress, interpret a patient's signs and symptoms); and failure to act as a patient advocate (question discharge orders when a patient's condition warrants it, question incomplete or illegible medical orders, provide a safe environment)."¹¹⁸

Some of the factors contributing to nursing negligence have been documented as an inappropriate delegation whereby nursing tasks are delegated to unlicensed assistive personnel. Early discharge, nurse shortage, advances in technology, increased autonomy and responsibility of hospital, better informed customers and expanded legal definitions of liability are comparable contributors as in the South African context.¹¹⁹

Studies conducted on international and national grounds reveal that nursing staff knew little of the law pertinent to their work and workplace. A study in Barbados concurs this where the majority of respondents did not know the contents of the law specific to their codes of practice and the workplace.¹²⁰ The author identified in this study, that nursing professionals were unaware of how to deal with ethical and legal issues that they faced as they had insufficient knowledge of the law pertaining to them. A strong recommendation was to devise a means to sensitise them through practical education in ethics and ethical and legal approaches.¹²¹

Sharmil (2011) examined the awareness of nurse's knowledge on legal aspects of health care. Qualitative data was collected. The study findings provided information about the present knowledge of nurses on legal aspects of health care where 43.3% of the nurses in the study had inadequate knowledge and 56.7% had moderate knowledge. In order to provide quality care and legal protection, the interventions suggested was the updating of legal knowledge through continued education.¹²²

¹¹⁸ EM Croke (see note 95).

¹¹⁹ *Ibid.*

¹²⁰ S Hariharan, R Jonnalagadda, E Walrond, H Moseley "Knowledge, attitudes and practice of healthcare ethics and law among doctors and nurses in Barbados" (2006) 7(7) *MNC Medical Ethics*.

¹²¹ *Ibid.*

¹²² H Sharmil "Awareness of Community Health Nurses on legal aspects of health care" (2011) *International Journal of Public Health* 199-218.

To determine the nurse's knowledge in ethics, Osingada, et al have concluded from a quantitative study that nurses exhibited very little knowledge in ethics and recommended structured continuing programmes in developing their knowledge on ethics in practice.¹²³ Nurse's knowledge was also examined by Oyetunde and Ofi in hospitals in Nigeria, 41.6% demonstrated a knowledge deficit about the laws of the land and its application and 77.6% demonstrated a deficit in knowledge regarding laws governing their practice. According to Ashton and as cited by Oyetunde and Ofi, "if more nurses are knowledgeable about the laws of the land and that which governs their practice, there will be little or no problems in nursing practice since laws guide human conduct."¹²⁴

In a study conducted by Mali and Mali (2014) in India, the nurse's knowledge was assessed regarding medico legal aspects. The results revealed that nurses had inadequate knowledge regarding medico legal responsibilities.¹²⁵ To corroborate this finding, Indian nurses participated in a separate but similar study whereby knowledge of legal awareness was assessed and found to be hugely lacking.¹²⁶ Similar to the above findings, Kaur, et al recommend the need for an information booklet that will help independent learning in nurses of knowledge regarding legal responsibilities.¹²⁷ This recommendation stems from the findings of a study conducted to assess the knowledge regarding legal responsibilities in nursing. Although the results revealed a moderate to good knowledge base of legal responsibilities, the authors confirm the deficit of aspects such as the law and legal terms and its application thereof.¹²⁸

¹²³ CP Osingada, G Nalwadda, T Ngabirano, J Wakida, N Sewankambo and D Nakanjako "Nurse's knowledge in ethics and their perceptions regarding continuing ethics education" (2011) 8 *BMC Research Notes* 319.

¹²⁴ MO Oyetunde, BA Ofi "Nurse's knowledge of legal aspects of nursing practice in Iban, Nigeria" (2012) 3(9) *Journal of Nursing Education and Practice* 80.

¹²⁵ R Mali, NR Mali " Effect of self Instructional module on knowledge regarding medico legal responsibilities among nurses" (2014) 3(3) *International Journal of Science and Research* 617-624.

¹²⁶ H Kumar, Gokhale, K Jain, DR Mathur "Legal awareness and responsibilities of nursing staff in administration of patient care in a Trust hospital" (2013) 7(12) *Journal of Clinical and Disgnostic Research* 1-11.

¹²⁷ H Kaur, JK Sodhi, K Sharma "A Study to assess the knowledge regarding legal responsibilities in nursing" (2014), 2(1) *International Journal of Health Sciences* 50-53.

¹²⁸ *Ibid.*

3.10 Conclusion

An overview of selected international regulations with a focus on nursing practice has been evaluated. It is clear that similar challenges exist throughout the world in nursing practice, however, the main priority and common thread remains the safety of the patient and the enhancement of regulations governing practice to protect this vital human right. No matter where one lives in the world, one's wellbeing depends on how health issues are managed. It is apparent that South Africa is not alone in its challenges within the nursing profession. Although nursing regulation varies in different parts of the world, and may be perceived as either rigorous or lenient, negligence still exists. It can be deduced that professional regulation does not necessarily safeguard nursing practice unless the nurse fully understands those legal responsibilities and boundaries. The following chapter will examine nursing malpractice as it exists in South Africa. It must be borne in mind that regardless of the strict regulation of the profession, the statistics and nature of negligence are alarming.

CHAPTER 4

MALPRACTICE IN THE NURSING PROFESSION

4.1 Introduction

This chapter examines the extent and significance of malpractice in the nursing profession. Case law and nursing malpractice incidents nationally and internationally will be assessed in an attempt to ascertain the reasons for unsafe practice. The SANC statistics of nurses that have faced disciplinary action for unprofessional conduct will also be examined to reflect on nursing practice in South Africa.

4.2 Nursing Negligence and Malpractice in South Africa as reflected in Case Law

The following are illustrations of nursing negligence and malpractice reflected in South African case law.

In case law *Goliath v MEC of Health in Province of Eastern Cape*,¹²⁹ the Supreme Court of Appeal upheld the appeal with costs for damages to the plaintiff where a swab was left in the plaintiff's abdomen post-surgery resulting in sepsis. In this case, both the doctor and the nurse were trialled, however, effectively, the failure to ensure the duty of care in this instance lies with nursing sister who is in charge of her theatre and is responsible for a swab count. It is on her nod that the doctor will "close" a patient once she confirms her swab count. A similar outcome arose in the *Van Wyk v Lewis* case, where the surgeon had left a swab in the plaintiff's abdominal cavity following surgery. Although the court found that the defendant Lewis, was not negligent, the court held "that it was the general practice that the attending nursing sister carried the responsibility to ensure that all swabs were accounted for."¹³⁰

The above incidents illustrate nursing negligence and failure to execute responsibilities as required by a nurse practitioner under these circumstances. A nurse practitioner working in such an environment must know that it is her responsibility for the swab count and the implications of her adverse actions will result in legal liability.

¹²⁹ Cecilia Goliath v Member of the Executive Council for Health 2014 (085) ZASCA 182.

¹³⁰ S v Van Wyk v Lewis 2002 (840/01, 849/01) (ZANHC).

The nurse's negligent act is again highlighted in *Michael v Linksfeld*¹³¹ where a young man suffered a cardiac arrest resulting in cerebral anoxia which left him in a vegetative state whilst under general anaesthetic during a surgical procedure. Negligence was alleged during the resuscitation procedure due to failure of the nursing sister to operate the resuscitation equipment correctly, a responsibility she should have been familiar with as the allocated person responsible for checking its functioning.

As a nurse practitioner, competency in operating emergency equipment is a vital and basic requirement for safe practice. Failure to operate or possess knowledge thereof is like going to war without an army. It is unjustifiable that a registered nurse practitioner is ignorant of operating emergency equipment in their immediate work environment. However, the researcher questions if the legal implications of this omission was known to the nurse. A different outcome may have ensued had the nurse practitioner known what the legal consequences could have resulted.

In case law *Ntsele v MEC for Health, Gauteng Provincial Department*¹³² the medical staff had failed to exercise skill and diligence in the medical profession to the pregnant mother (plaintiff) and as a result, the plaintiff's child suffered hypoxia and perinatal asphyxia resulting in cerebral palsy. The court found in favour of the plaintiff as emergency care was not diagnosed and instituted. As nurses initiate their professional obligations, their legal responsibilities also begin.

*Hoffman v MEC of Eastern Cape*¹³³ also highlights the nurse's lack of reasonable care administered to a pregnant mother and her unborn child. The evidence indicates that the nurses failed to identify medical problems of distress with the baby and the mother timeously thus resulting in a delay in their actions and death of the child. The court found that the required level of skill and care was not evident by the attending nurses. A similar unfavourable outcome is seen in the matter of *NP v MEC for Health, Eastern Cape*.¹³⁴ As a result of poor nursing assessment, a child was

¹³¹ Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another 2001 (1) (361/98) [2001] ZASCA 12; [2002] 1 All SA 384 (A).

¹³² *Ntsele v MEC for Health, Gauteng Provincial Government* 2009 (52394) ZAGPJHC 208; [2013] 2 All SA 356 (GSJ).

¹³³ *Hoffman v MEC, Department of Health, Eastern Cape* 2007 (1037).

¹³⁴ *NP v MEC for Health, Eastern Cape* 2012 (1196).

born with a physical deformity that proved to be avoidable had a reasonable standard of care been executed.

The above cases illustrate the failure of a reasonable standard of care instituted by the nursing staff. Although, it is arguable that negligent actions result from lack of legal knowledge, it can be deduced that a nurse that knows and understands her legal obligations well and the implications of her actions and omissions in the legal context may exercise a higher level of critical thinking when delivering care.

In the current challenged and resource deficient healthcare environment, one of the common incidents that demonstrate nursing negligence and lack of executing a reasonable standard of care is the development of pressure sores / ulcers in long term, ill and compromised patients. A case in point is the *Mediclinic Limited v Vermeulen*,¹³⁵ whereby the plaintiff, George Vermeulen was admitted for a naturally occurring disease he acquired whilst on holiday. He was hospitalised and treated. During the course of his stay in hospital he developed pressure sores to his sacral area and heels of his foot. As a result of the sacral pressure sore, he suffered bilateral sciatic nerve injuries resulting in paralysis of his legs and confinement to a wheelchair. He brought charges against the nurses for failure to take sufficient preventative measures to avoid the onset of the pressure sores. Although the defence (nurses) reinforced that the plaintiffs condition was critically ill, he had a predisposition for developing a pressure sore, and turning the patient to relieve pressure posed a threat to his life, the court found that they was no reason for preventative measures not to be instituted and found in favour of the plaintiff. Although the above case resulted in dismissal of the charges on appeal, it was not without scrutiny of the nurses' every action and evidence of care in the documents. This again corroborates the need for nurses to know and understand their legal responsibilities and how it can be challenged and analysed to attain justice.

Application and implementation of negligence laws and malpractice theories are used to determine direct or indirect liability for injuries when a nurse is trailed. As seen in the cases above, the hospital, the physician and the nurse can be held liable, depending on the facts of the situation. Nurse liability laws are generally based on

¹³⁵ *Mediclinic v Vermeulen* 2013 (504).

negligence principles. Under a negligence theory, a nurse can only be held liable for injuries if: they owed a duty of care to the patient, they breached this duty of care, and the breach resulted in measurable damage to the patient.¹³⁶

4.3 A South African Perspective on Nurse's knowledge of Legal Aspects

In a national study, Hyde (2006) conducted a survey to determine the knowledge of critical care nurses regarding legal liability issues in the critical care environment. The results revealed a low knowledge base and the author proposed continuing education to bridge the knowledge gap on medico legal issues.¹³⁷ A study with contradictory results revealed that there was greater knowledge of the law than knowledge of ethics.¹³⁸ However, the author emphasises the significance of the level of legal awareness required among nursing staff in order to enable focussed, safe and quality care.

In a South African study conducted by Dorse (2008), nurses from selected private hospitals were evaluated on their knowledge regarding legal aspects in their practice. Although the findings from the study indicate that the majority of the nurses are knowledgeable about their legal responsibilities and the legislation governing their practice, the results also reveal that there are a significant number of nurses that lack important knowledge on some aspects. These aspects include: nurses function out of their scope of practice, they do not function within the legal guidelines of the profession, and do not understand their scope of practice. Nurses do not always adhere to the patient's rights. They function in an unsafe working environment, the company does not function within all legislative regulations, and nurses do not feel skilled and competent to perform their duties. Nurses do not address patient safety in all aspects of care, they do not inform families of potential risks, and lower categories of staff do not function under direct supervision.¹³⁹

The awareness of knowledge on legal aspects in patient care to prevent nursing malpractice is reemphasised in an American cross sectional study where 510 nurses

¹³⁶ K LaMance "Nursing Liability Laws" (2014) [Accessed 24 August 2016].

¹³⁷ EMC Hyde "The knowledge of critical care nurse regarding legal liability issues" (2011) University of Pretoria 104-112.

¹³⁸ S Shrestha, P Jose "Knowledge and practice of nursing ethics and laws" (2014) 2(3) *Journal of Universal College of Medical Sciences* 30-34.

¹³⁹ AJ Dorse "Legal and Ethical aspects of nursing practice in selected private hospitals in the Western Cape Metropolitan area" (2008) University of Stellenbosch 38.

formed the population of the study. The results revealed agrees with previous similar studies on the topic and highlights again the poor knowledge base that nurses have on legal aspects regarding their practice and the health care environment they work in.¹⁴⁰ Another descriptive study was conducted among mental health nurses. The results are valuable as a dynamic relationship between the concept of mental illness, the treatment of the mentally ill and the law exists. The mental health nurse must know the basic legal and ethical aspects of psychiatry for competent patient care. The findings revealed that there was a moderate level of knowledge on legal and ethical aspects among majority of the nurses (90%) and a high level in the remainder (10%). Although there is a high percentage of moderate level of knowledge, the nurses agree that they lack the skill in application thereof and only 50% felt themselves capable to apply knowledge in their daily practice.¹⁴¹

A noteworthy study that examines the other side of the coin sheds an interesting perspective from the nurse. This study was conducted to examine the perceptions of nurses that were involved in unintentional nursing errors and was referred to as the second victim.¹⁴² The findings revealed that there was an intense emotional response that affected their personal and professional lives. The overall major theme that emerged from this study was that the nurses described themselves as having “a little scar.”¹⁴³ The participant’s response of describing the errors as scars reminded the nurse of the imperfections in their role and their failure of reaching the desired goal of preventing harm to the patient. The nurses identified themselves as being accountable for the welfare of their patients and being responsible for individual nursing actions.¹⁴⁴ As a result of the failure to maintain a certain order, policy, procedure, guideline, or code of ethics to do no harm, the erring nurse became emotional scarred. The researcher identifies value in imparting these lived experiences of these nurses as lessons to the profession in adopting positive

¹⁴⁰ S Malarvizhi, R Samson “Knowledge and attitude of nurses on legal aspects in patient care” (2015) 3(1) *International Journal of Advanced Research* 1-8.

¹⁴¹ R Kumar, S Mehta, R Kalra “Knowledge of staff nurses regarding legal and ethical responsibilities in the field of psychiatric nursing” (2011) 7(1) *Nursing and Midwifery Research Journal* 1-11.

¹⁴² Swift SH ““It’s a Little Scar”: A Phenomenological Study of Nurses’ Responses Following Direct Involvement in a Nursing Error” (2013) 1-163.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

practice changes and an increase in awareness to prevent similar errors in the future.¹⁴⁵

An added strain in the South African health care context is the promulgation of the Consumer Protection Act whereby patients are also viewed as consumers from a legal perspective. Calling a recipient of health care a consumer as opposed to a patient has distinct connotations and may result in differential behaviour. This Act applies to consumers and patients alike. It enforces strict liability for harm caused by goods and services. Everyone in the supply chain, including the doctor, can be held jointly and severally liable. This may lead to enormous challenges in health care delivery.¹⁴⁶

4.4 The Nurse's Accountability and Responsibility

Safety and quality of patient care can be determined by the environment in which care is provided. As the largest healthcare workforce, nurses apply their knowledge, skills and experience to care for the various and changing needs of the patient. When care falls short of standards due to resource allocation, lack of appropriate policies and standards, the nurse bears this responsibility. Nurses need to understand the parameters of safe and effective practice in a complex context where legislation may grey ethical and legal norms. Clear and consistent verbal and written communications with patients and other members of the health care team is needed. The nurse is responsible for maintaining and updating nursing skills and competencies, having proper documentation, and understanding one's role as a member of the health care team so that the nurse does not exceed his or her scope of practice and functions within the legal boundaries. Legal responsibility in nursing practice is of fundamental importance and consumers are becoming increasingly aware of their legal rights in health care. It is therefore submitted that it is imperative that nurses know and understand their legal rights and obligations in the domain of their practice.

¹⁴⁵ *Ibid.*

¹⁴⁶ K Rowe, K Moodley "Patients as consumers of health care in South Africa: the ethical and legal implications" (2013) Centre for Medical Ethics and Law, Stellenbosch University 14-15.

4.5 The Nurses Legal Liability

The licence authorises legal practice and is the evidence that the nurse has demonstrated the ability to render quality and holistic care to the client. Licenced nurses are considered responsible and accountable for the quality of performance of their duties.¹⁴⁷ The nurse is bound to a standard of conduct that is expected of reasonably prudent nurses.¹⁴⁸ Few health care professionals know or fully understand the Acts and regulations governing their profession, having had minimum exposure to them during undergraduate training. It is especially true concerning the legislation involved in medico legal malpractice incidents involving the healthcare professional.

Although most healthcare professionals are aware of the rights of patients, the challenge lies in the understanding and application of the specific Acts and regulations concerning these rights as they are not always internalised. Specific rights concerning the patient relationship with the healthcare professional team, and, regulatory boards, such as the Health Professions Council of South Africa (HPCSA), the SANC exist to protect these rights, and to assist where they might be violated. The existing structures in the justice system (e.g. the *Criminal Procedure Act 51 of 1977*) that protect human rights are also applicable in the doctor-patient relationship. These laws and structures also protect patients against incompetent healthcare professionals.¹⁴⁹ In South Africa, patients' rights are protected by various laws and regulations, such as the Health Professions Act, the Health Professions Amendment Act and the National Health Act, as well as the Constitution.¹⁵⁰ These acts stipulate ethical and competent management of patients by their healthcare providers.¹⁵¹ The practice of nursing is a right granted by legislation to protect those who need nursing care. The regulations and guidelines provide safe parameters within which to work as well as protect patients from unprofessional and unsafe nursing practice.

¹⁴⁷ S Jansen van Vuuren "Acts and Procedures concerning procedure related deaths in South Africa." (2013) 5(1) *AJPHCFM*.

¹⁴⁸ A Lacer "Nurses and Lawsuits: A Medico legal Perspective" (2010).

¹⁴⁹ S Jansen van Vuuren "Acts and Procedures concerning procedure related deaths in South Africa." (2013) 5(1) *AJPHCFM*.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

4.6 Unprofessional Conduct documented by the SANC

The SANC confirms that unprofessional conduct is conduct that is improper in carrying out one's duties in a specific profession. Misconduct cases are close to criminal negligence cases like abandoning of patients while on duty, being under the influence of alcohol or other substances while on duty, failure to obtain the assistance of a medical officer when the condition of the patient warranted such, or plain fraud, theft, and assault.¹⁵² The SANC statistics from 2008 to 2013 show numerous cases on professional misconduct amongst various categories of nurses. More than 150 cases have been heard, with the areas of misconduct being maternity related, poor nursing care, medication related, fraud, theft, forgery and / or not following proper procedure when conducting research.¹⁵³ These statistics affirm that nurses are faced with constraints and challenges that lead to substandard care delivered. However, an awareness of the legal implications is insufficient but rather a more thorough understanding of the law and the legal aspects impacting their practice is fostered. This will conscientise the nurses and guide their actions within safe and legal boundaries. Two hundred and thirty five (235) cases were addressed by the Professional Conduct Committee (PCC) during the period 2010 – 2013.¹⁵⁴

4.7 Conclusion

On the basis of the aforementioned evidence of nursing malpractice, and with exclusion to other factors, it is clear that a gap exists amongst nurses with regard to awareness and understanding of the law and legal implications of their actions or their failure to act. Most nurses in practice lack an understanding in their legal responsibilities and this is due to a multitude of factors. However, attempts must be made to bridge the gap by urgently developing an authoritative means that can contribute to increasing public safety and protecting the nurse practitioner. The findings postulate a lack of legal knowledge amongst nurses as a contributing factor to nursing malpractice. These findings corroborate that there is inadequate knowledge on legal aspects among majority of nurses. The legislation regulating the nursing profession can only function if nurses know and apply the current laws

¹⁵² SANC: Submission by the SANC at the public hearings on inquiry into the private healthcare market by the competition commission.

¹⁵³ SANC: Professional misconduct statistics (2008-2013).

¹⁵⁴ *Ibid.*

governing their practice. They must acquire the necessary knowledge regarding legal and ethical issues and the effects of misuse of law and negligence of the nursing practice.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Nursing practice demands specialized knowledge, skill, and independent decision making which varies by situation, by patient, by disease, therapeutic approach or level of rehabilitation. The profession is dynamic and nurses work in an environment that is changing and diverse for consumers resulting in the existence of an inherent risk in the provision of nursing care. With this possibility borne in mind, the utilisation of unprepared or incompetent nurses compounds the risk. Therefore, the state, through its authoritative powers, is required to protect its citizens from harm in the form of reasonable laws that regulate the nursing profession.

5.2 Summary of Main Findings of the Study

To reiterate, nurses are one of the largest groups of professionals working in the health care system and they play a vital role in the recovery and welfare of patients. As an integral member of the health care team, nurses treat more patients daily than any other health care professional. While most nurses act within the required standards and provide excellent care, some fail to appropriately treat patients, leading to misdiagnosis, injury and in some cases wrongful death.¹⁵⁵ The analysis of the literature reviewed suggests a large number of issues that need to be addressed against the rapidly changing context of nursing. The increasing role of a nurse as a patient care taker and advocate, on one hand and her requirement of having in depth knowledge of the legality of her actions on the other hand, have raised the bar for nursing. The changes in the health status of a patient can be gradual or sudden and nurses are usually the first to see the changes and to take action. A nurse's accuracy in assessing, monitoring and reporting of changes in health status timeously to a physician can often make the difference between life and death. Noting the level of legal awareness among nursing staff, the researcher surmises that the knowledge of legal responsibilities is integral to the expanding clinical role, and a logical application of the planned, systematic, and focused care, should be the goal of

¹⁵⁵ Luvera Law firm "Failure to follow standards, properly treat patients top nursing negligence claims" (2014) Medical Malpractice September 29.

nursing. The study undertaken has corroborated that nurses need to know the laws that govern their profession, and that it will be increasingly difficult to avoid filing lawsuits against them.¹⁵⁶

From the aforementioned review, it is evident that the knowledge on laws and various legal provisions applicable to nursing, across various categories of nurses under review, was inadequate. Overall findings indicated that nurses lack knowledge and understanding on specific areas of legal aspects, such as legal terms, basic rights, legal control, taking telephonic orders from physicians, legal obligations and patients' rights. The nurses lacked awareness about patient's rights and legal obligations towards them. The results from the studies analyzed were conducted in different parts of the world, and the findings were consistent that huge deficits in their knowledge exist among nurses both on legal as well as ethical aspects. This lack of sufficient knowledge impacts directly on the quality of nursing care delivery and patient safety. The knowledge deficit leaves the nurse in a position where her plan of care, actions and decisions are incongruent with the ethical and legal boundaries of her practice. Thus, patient care is compromised and unsafe practice results either by a negligent act or an omission to act.

5.3 Recommendations

In light of the findings of this study, the researcher maintains that there is a crucial need for nurses to keep abreast of current information relevant to legal liability and the relevant legal aspects as it will apply in their day to day care. It has been established that sufficient information is disseminated during the training of nurses for the various categories. However, what is evident is that nurses find the application of this knowledge challenging at the bedside. Nursing is a service oriented profession and it must advance and keep pace with the advancing technology, newer problems, and growing demands of consumers. There is a need for continued and intensified efforts to ensure that nurses are obligated in providing quality health care services. The following strategies are therefore mentioned in response to the gaps identified and the problems experienced by the nursing professional.

¹⁵⁶ Kumar et al (see note 105).

- **The inclusion of a module on medical law and practice in the nursing curriculum.**

Nurses have an obligation to act within their scope of practice, competence and legal boundaries. Their foremost responsibility is to safeguard the patient and family against harm, abuse, neglect and deprivation. It is therefore submitted that knowledge on medico legal responsibilities will better prepare student nurses and encourage accountability for their actions. As discussed in chapter two of this discourse, the legal framework for nurses is vast and overlaps with other significant legislation that impact their practice. Thus, it is submitted that a module of this nature will also empower the nurse to appraise the laws governing their practice and impose an appreciation of ethical and legal issues. The researcher proposes that this will equip the nurse with applicable knowledge and understanding of aspects relevant to their daily practice. Especially for the Registered Nurse practitioner who has a wider scope of practice compared to other categories, this should be considered as a mandatory module as its significance will be valuable in practice as it is the Registered Nurse whose function encompasses decision making, supervision, delegation and management of patient care. Aspects of medical law may include subject matter such as medical law and practice, forensic nursing, human rights, and HIV and the law. The aim of equipping nurse practitioners with knowledge on legal aspects relevant in the current and dynamic healthcare environment may be achieved if the relevant knowledge is disseminated in the appropriate context.

- **To facilitate and support interdisciplinary education.**

In order to translate a succinct approach for education and training on medical law and its relevant matters to enhance safe nursing practice, it is necessary that opportunities be created for in service training, lectures, seminars, continuous professional development modules and workshops by medico legal experts and medical expert witnesses. To corroborate the recommendations of the studies by Osingada et al, Mali and Sharmil as examined in chapter three which revealed a marked deficiency in legal knowledge amongst the nurses, this exposure will enable nurses to update and keep abreast of legislation in the current health care context. The transference of experience, knowledge and information will prove to be

educational for the nurse practitioner as the realities of the nature of the incidents and cases will enable a cathartic encounter for the nurse.

- **To conduct empirical research on a larger scale in this area and on the topic**

In the research undertaken, the studies examined have proposed recommendations for more extensive research to be conducted on the examination of nurse's legal knowledge on a larger scale and with a larger population. It is assented that more extensive studies in the South African context will assist to identify and quantify the status of nurse's knowledge on legal aspects. Nurses can become more aware of the medico legal responsibility and be accountable for their own activities if appropriate gaps are identified and education is conducted. An evidence based research study will reveal the validity of the level of the knowledge base of the nurse practitioner and assist in promulgating the appropriate education and training to bridge the gap. Further research on analysing nursing malpractice and its aetiology in South Africa will also prove to be valuable in determining reasons for the increase in nursing malpractice.

- **A need for reflection after a medico legal incident has occurred in the institution.**

A common response after an unfavourable incident is to hide and avoid the details of the matter in fear of negative publicity or defamation to those involved. Reflection of the events and debriefing will provide a safe evaluation of one's practice. It allows one to revisit the event without the stress of the moment and replicate actions thus enabling identification of strengths, weaknesses and potential opportunities for improvement should a similar incident recur. The reflection must be debriefed using the ethical and legal framework to reinforce the nurse's actions and decisions in context. Real incidents with medico legal implications may be used for reflection exercises within larger groups as well to introspect on ones own practice.

- **To attend disciplinary hearings and formal court proceedings relevant to the nursing profession.**

It is recommended that the true and full impact of the power and ability of the law in action may effect a shift in emphasis from a superficial to a deep respect for the law. This will allow for the witness of case law to learn from mistakes, actions or inactions of other nurses. Exposure to this will empower the nurse and give insight on the seriousness of protecting ones professional licence and means of survival. A real experience of this nature will evoke the significance of the role of legal aspects in nursing practice and the fact that it cannot be divorced from delivery of care.

- **To enable availability of resources such as legal nurse consultants or legal advisors at institution or regional level for healthcare workers to advise on matters on the job.**

When decision making is challenging and ethical issues arise, expert knowledge and advice may be the life line for both the patient and the nurse. Often, the nurse is faced with situations where the struggle between ethical and legal obligations exists. There may be uncertainty and indecisiveness due to a lack of knowledge of the legal aspects pertaining to their actions. In the preceding chapters, the central theme is that of the nurses' lack of relevant legal knowledge applicable to their work domain. Although decision making and problem solving regarding legal matters may improve with experience and rank as noted in some findings of studies in chapter three, there may be some legal issues that remain unclear. An available resource with legal knowledge will be of valuable assistance and may potentially obviate a medico legal incident.

- **To establish a medico legal forum for nurses.**

A forum of this nature comprising of nurses as well as legal experts can be established and meet on a quarterly basis to conduct a mortality review of all patients within a specified period to identify and preclude possible legal and ethical issues. An analysis of patient cases in such a forum may also emphasise the nurse's shortcomings in delivery of care and potentially encourage a more conscientised nurse and safer practice. A comprehensive, purposive and systematic review of these cases can aid in identifying the causes of the nursing malpractice, morbidity or

mortality associated with these cases. One will need to define and analyse the nursing care related injuries and insults and explore and develop preventative measures and strategies for safer practice. “When human error is systematically studied, valuable lessons can be learned and safety is improved.”¹⁵⁷

5.4 Conclusion

The healthcare institution is one of the most dynamic and complex organisations in society. It encompasses a multitude of functions; however, the nursing care administered still constitutes the single largest component of the health care industry.¹⁵⁸ The nursing function is the mainstay of the organisation in fulfilling its objectives in relation to patient care. The primary purpose of the nursing function is to provide safe, individualised, comprehensive and effective care to patients through the execution of the nursing process. They play an indispensable role in providing society with widespread and all inclusive healthcare. Their knowledge that is garnered through education and clinical practice forms the basis of safe and effective nursing care. The nurse practitioner is the only member of the health care team responsible for the hospitalised patient over a 24 hour day. His / her interventions are guided by policies and procedures established by the country, the profession, and the healthcare institution in accordance with accepted standards of care.¹⁵⁹ Therefore, nurses have a legal obligation to practice in a legally safe manner. A general principle is that each nurse is legally and professionally responsible for his or her actions or omissions. Also, nurses need to understand the parameters of what constitutes safe and effective practice. The Nursing Act is a living document that evolves and is updated or amended as changes in scope of practice occur.

The above discourse has revealed that there is an obvious lack of the relevant legal knowledge required for safe and competent professional practice. It is in light of these findings that the recommendations made above be implemented to address this gap. It is intended that the above strategies will conjure a thorough understanding of the laws governing the nursing practice. Legal issues in nursing must be well learned and embraced as legal knowledge can improve the healthcare

¹⁵⁷ JP Beckmann “Nursing Negligence, Analyzing Malpractice in the Hospital Setting” (1996) 1-2.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

outcomes and promote an understanding of nursing responsibility as a means to improve patient safety. The laws of the nursing profession can only function properly if nurses know the current laws governing their practice. Ignorance of the law is never an excuse!¹⁶⁰ “No man is above the law and no man is below it; nor do we ask any man’s permission when we require him to obey it.”¹⁶¹

¹⁶⁰ MO Oyetunde, BA Ofi “Nurse’s knowledge of legal aspects of nursing practice in Iban, Nigeria” (2012) 3(9) *Journal of Nursing Education and Practice* 80.

¹⁶¹ T Roosevelt (1904).

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19 October 2016

Mrs Medesha Mathuray (213571391)
School of Law
Howard College Campus

Dear Mrs Mathuray,

Protocol reference number: HSS/0703/016M

New project title: A critical evaluation of nurse's legal knowledge and its impact in preventing nursing malpractice in South Africa

Approval Notification – Amendment Application

This letter serves to notify you that your application and request for an amendment received on 10 October 2016 has now been approved as follows:

- Change in Title

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for period of 3 years from the date of original issue. Thereafter Recertification must be applied for on an annual basis.

Best wishes for the successful completion of your research protocol.

Yours faithfully

Dr Shamila Naidoo (Deputy Chair)

/ms

Cc Supervisor: Dr A Singh
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak / Ms Robynne Louw

Humanities & Social Sciences Research Ethics Committee

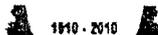
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