**WRITTEN SUBMISSIONS REGARDING**

**THE STATE LIABILITY AMENDMENT BILL, B16 - 2018**

**For the attention of:**

The Chairperson

Parliamentary Portfolio Committee on Justice and Correctional Development

CAPE TOWN

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**FIRST**

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**SUBMISSION TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES IN RESPONSE TO THE STATE LIABILITY AMENDMENT BILL**

**[B16 – 2018]**

SUBMISSION BY:

DSC ATTORNEYS – CAPE TOWN

19 0CTOBER 2018

1. **INTRODUCTION**
   1. The Portfolio Committee on Justice and Correctional Services invited interested parties to submit written submissions on the State Liability Amendment Bill. The purpose of the Bill is to amend the State Liability Act, 1957, so as to: *“provide for structured settlements for the satisfaction of claims against the State as a result of wrongful medical treatment of persons by servants of the State”*.

DSC Attorneys (“DSC”) is an incorporated law firm practising at offices situated at Touchstone House, 7 Bree Street, Cape Town. The firm specializes in personal injury claims, including claims based on medical malpractice. The department dealing with medical malpractice claims usually has in excess of 200 such active claims at any given time.

* 1. Given the high cost of litigation in medical malpractice matters and bearing in mind the difficulty in proving malpractice in such cases, DSC employs a rigorous screening process in respect of all new enquiries relating to such matters.
  2. A rough estimate is that less than 20% of aggrieved patients who contact DSC with an enquiry relating to medical malpractice will eventually have a formal file opened with a view to commence litigation against the State or a private medical practitioner / hospital. This is a frightening reflection on the state of healthcare in South Africa – the claims that eventually come to the knowledge of the State / Private entities are but the proverbial hippo’s ears of aggrieved patients in society.
  3. Given the considerable number of medical malpractice cases that DSC has been involved with during the last 14 years, as well as the equally considerable number of ongoing active matters currently being attended to, it is respectfully submitted that it can provide the Portfolio Committee with some well-considered and informed insights as to the prejudicial effect the proposed amendment to the State Liability Act would have on patients who have been severely disabled due to proven negligence on the part of employees of the State.
  4. The significant constitutional challenges which this Bill inevitably faces are addressed by other submissions placed before this Committee. We agree with those submissions and endorse them. Whereas the latter submissions correctly focus more acutely on legalistic principles, our purpose is to furnish the legislators with additional general comments and observations.

1. **CONTEXT**
   1. The relentless propaganda surrounding acts of State-perpetrated medical malpractice has sought to place the blame for the ever increasing number of court actions at the door of “unscrupulous lawyers”. This latter term is in fact a euphemistic misnomer, one only has to peruse the press releases issued by our own Minister of Health to know that we as a fraternity have been accused of unethical, corrupt and collusive practices, such that (so the propaganda perpetrates) this has led to the financial crisis facing State-funded medical service providers.
   2. This has (with some success) distracted attention from the State’s arguably criminal neglect of patients’ care. Our concern is that the political rhetoric detracts and distracts from the reality of the wrongs perpetrated on a daily basis on the most vulnerable, the poor, who are those most reliant on State facilities.

2.3 Tragically, there are innumerable examples of the plight of these most vulnerable of citizens, once entrusted to the State’s care. Lest legislators blindly pursue a politically seductive solution of capriciously limiting access to compensation, consider these randomly selected examples of the atrocities perpetrated daily in our State healthcare facilities:

***Baby L, 20 months old[[1]](#footnote-1):***

*“****T*** *noticed that L had a discomfort with his left hand. This would manifest when he was washed…L had cried during the night…This led to* ***T****…taking him to Frontier Hospital… “*

[L was initially incorrectly and inadequately treated and sent home, returning with his mother 5 days later, at which stage his entire left arm, left breast and back had become swollen]

*“He was then detained at the hospital for five (5) days during which period an incision was made on the inside of the left upper arm for puss drainage.[[2]](#footnote-2) …*

*During the puss drainage, the minor child* *was tied to a window by the wrist…At all material times his arm was suspended. This is somewhat shocking. I cannot imagine a twenty (20) month old who would have to sleep in a seating* (sic) *position as T stated in her evidence…*

*The pain that the child may have been growing* (sic) *through is unimaginable. It would appear that the very wrist he was tied with was the very same area where the problem was…*

*It is common cause at this point that the minor child presents with a deformed arm, with the left arm in an inward inverted position. His left arm is shorter than his right arm, bearing scars on the inner side of the upper arm, forearm and the wrist…*

*…the (Premier of the Eastern Cape Provincial Government)… contends that the treatment given to the minor child….was appropriate in the circumstances.”*

(own emphasis)

One could well argue that L’s mistreatment at the hands of the State employed medical personnel amounted to torture. Notwithstanding the uncontroverted expert evidence presented to the Premier that L’s treatment fell woefully short of the required standard of care, the Plaintiff in the matter (Baby L’s mother) was forced to run a full trial in the High Court to establish liability.[[3]](#footnote-3)

***Baby Y, neonate[[4]](#footnote-4):***

“(*NS) had fallen pregnant with Y during 2004…At no stage were any concerns raised about the foetus…*

*On 10 November 2004 she had felt pains* “in the waist area”*. She was told at the clinic that her waters had not yet broken, she should return home. The pains became worse and on the following day she went to the hospital. Her waters broke whilst* en route *thereto…the nurses who were examining her intimated that the child appeared to be normal…*

*The pains appeared to become worse and she again approached the nurses who informed her that she remained far from delivery but, to ease the pains, she should simply walk around the passages…During the night she approached the nurses approximately 3 times complaining of pain and on each occasion was given the same advice.*

*During the course of the following day, 12 November 2004, the same procedure was repeated over and over again despite the fact that she was suffering from extensive abdominal pains. At one stage a nurse placed something on her ears and on her stomach as a precursor to a vaginal examination and said to her* “Lady, still walk around!”

*She continued to approach the nurses during the remainder of that day and night to the extent that the nurses became annoyed. They continued to give her the same advice. On the 13th the pains had become severe and she requested that a caesarean section be performed. The response from the nurses was* “You seem to know a lot. You are going to deliver your child in the normal way like other people.”

*Eventually, she was so exhausted from the pain that she collapsed in front of the maternity theatre…”*

[Baby Y was subsequently born and following a prolonged stay in hospital, was discharged home in her mother’s care[[5]](#footnote-5). Only 9 years later, an official employed by the Department of Social Services recommended that NS seek legal advice, leading to the action being instituted on 2 December 2013]

In reaching it’s determination as to the Defendant’s servants’ negligence, which was denied, the Court held that *“…the care given to the plaintiff was nothing short of substandard…*[and noted that] *the defendant led no evidence whatsoever…well before trial the defendant was possessed of his own expert evidence which indicated that the hospital staff was negligent. Despite this the trial has been doggedly and unnecessarily proceeded with…I am accordingly satisfied that this is a matter where a punitive costs order ought to be made.”*

2.4 As noted previously, these are tragically by no means isolated instances and similar wrongs are being perpetrated in our State hospitals on a daily basis. It is against this backdrop that the State Liability Amendment Bill falls to be assessed. In short and as intimated in the title to these submissions, the State’s focus should unquestionably be on addressing the dire state of our healthcare system, as opposed to seeking to limit the innocent victim’s right to compensatory damages suffered at it’s hand.

1. **CONFLICT OF INTEREST**
   1. One of the main problems that would arise where the tortfeasor also becomes the purse after conclusion of a successful claim is the inevitable conflict of interest that would arise.
   2. During the course of litigation the State as Defendant and the injured party would have been ‘opponents’ participating in the adversarial system of litigation in South African Courts. The State would have employed various tactics and strategies to avoid paying any compensation at all and, then, once liability was established eventually, would have employed further tactics and strategies to limit the amount of compensation to be paid.
   3. At the conclusion of the claim the self-same State/Defendant would now be placed in the position of having to ensure that compensation gets paid timeously, in regular instalments, to ensure that the injured party receives optimal medical treatment. In an instant the State will have transformed from opponent to benefactor.
   4. To illustrate the above difficulties we sketch the following hypothetical situations that could arise:
      1. The minor child X suffers serious brain injury due to the negligence of the State and compensation is awarded. Periodic payments are ordered by the Court. Towards the end of her life X becomes seriously ill and her parents come to know of revolutionary new treatment options that are very expensive but at least offers her a small chance of recovery. The State administrator dealing with authorizations and payments would now be in a very compromised position. On the one hand one would wish to do all possible within reasonable limits to accommodate the wishes of the parents to have their child undergo treatment, even if it is quite expensive. On the other hand, the administrator would have the interests of the State in mind, even if just subliminally so. Crude and immoral as it may seem, if treatment is refused the State would save money firstly by avoiding having to pay for the potentially speculative treatment but would also benefit from the reduced life expectancy of X that would follow due to treatment not being given. It is not a question of building safeguards to avoid a wrong decision being made in such a situation – the point is this potential conflict of interest should not arise in the first place.
      2. Another situation which could arise, based on the same background as 3.4.1 above, is where further treatment is not indicated at all. The parents of X would by the very nature of preceding events and litigation hold a very dim view of the probity and motives of the State. Even though an administrator may well be justified then in refusing to pay for continued treatment this decision is bound to cause significant conflict and emotional trauma for the parents of X. Following threats, conflict and emotional communication between the parents and the administrator, a situation will once again arise where the administrator is faced with a conflict of interest. This time the administrator may well be inclined to authorize unjustified payments so as to avoid any contention that the State caused serious injury or even death due to a (justified) refusal to authorize payment.
2. **CLEAN BREAK FOR THE INJURED PARTY**
   1. In our experience claimants / parents of claimants are very relieved to hear that they will have the opportunity to obtain treatment from medical practitioners and hospitals other than the State Hospital where the traumatic events took place in the first place.
   2. There is inevitably a complete breakdown in trust between the patient and the State following treatment that in some cases could be described as gross negligence (the above examples illustrate this amply). The benefit of the current compensation model where a lump-sum is paid, especially when it comes to the psychological impact on the injured, is that the injured can make a so-called clean break.
   3. Conversely, the disadvantage of the periodical payment model is that the injured will now be forced to have continued and permanent interaction with the tortfeasor. Depending on how the proposed system is planned to be implemented, the injured may well have to attend to the self-same hospital where the traumatic events took place on a monthly basis. The injured would have an unwanted continued reliance on the defendant rather than the independence that a lump sum award brings.
3. **ADMINISTRATIVE BURDEN**
   1. It is trite that one of the main causes of medical malpractice in the State setup is the lack of adequately trained staff. Therefore, it would seem very unreasonable and counter-intuitive to create a new system of compensation which would require a significant force of new administrators to be employed.
   2. To date not all of the Provincial Health Departments have given any input to the Portfolio Committee in regard inter alia to their capacity to administer the proposed new system. Based on past experience we very much doubt that such a system could be catered for to such an extent that the health and well-being of injured patients is not compromised at some stage.
   3. The upshot of a less than adequate administrative system would be a significant escalation in review applications in terms of the Promotion of Administrative Justice Act. This would in turn place pressure on the Health Department budget as legal costs mount.
   4. There will inevitably have to be various checks and balances to ensure that fraud and corruption does not occur. One would therefore expect that the injured party will also have to endure a significant administrative burden and will be required to go through a lot of bureaucratic red-tape to ensure that payments are made promptly and appropriately.
   5. With the current lump sum model, the trustee is subject to the conditions set out in the trust deed and retains a level of discretion. Investments can then be managed to cater for some unforeseen eventualities.
4. **FINANCIAL BURDEN**
   1. One of the benefits for the State where it comes to lump sum compensation for future medical treatment is that it usually only has to pay a discounted amount, which amount would then also have been reduced to cater for future eventualities. The onus is then on the injured (with the assistance of appropriate professionals) to invest the money in such a way that all future needs are met.
   2. One would require expert input in this regard from an actuary but in our view a periodic payment system may well increase the financial burden for the State in cases where the injured does not pass away earlier than expected. The crucial point here is that the State will in all likelihood not benefit at all in having funds invested pending their periodic payment at a later stage.
   3. To illustrate the above:
      1. Patient X requires rehabilitation treatment that will cost R10 000.00 per month and X is expected to live for another 10 years.
      2. Based on the lump sum compensation model (at a discount rate of 2.5% and deducting 15% for future contingencies) the Plaintiff will receive a once-off payment of **R903 801.60**. This amount will have to be invested judiciously to ensure that all future payments can be met.
      3. Very roughly, if periodic payments are made instead and assuming that the cost of treatment will escalate at 5% per annum, the State will at the end of the 10-year period have paid an amount of **R1 520 118.97** in periodic payments.
5. **GENERAL ISSUES REGARDING THE WORDING OF THE PROPOSED AMENDMENTS**
   1. The newly proposed Section 2A (1) does not allow the presiding Judge any discretion regarding the order that compensation be paid by way of a structured payment scheme. Having had regard to foreign legal systems the usual terminology used in legislation is that a Judge ‘must’ consider and ‘may’ order compensation by way of a structured payment scheme.
   2. The considerations referred to above regarding a clean break from the Defendant apply equally to a case where the injured would have to receive continued medical care at the self-same State hospital where the initial negligent treatment was administered. In some circumstances the injured may even have to be treated by the same medical personnel who caused the severe disability in the first place.
   3. To expect an injured person who is receiving treatment at a private institution to be compensated according to the potential costs that would be incurred if such care was provided in a public health establishment, shows a complete disregard for the plight of the injured. If one could use the example of a child born with cerebral palsy due to negligence of State employees: instead of having a perfectly normal child who would not require extensive medical treatment the parents of the injured child now face the reality that their child’s health is severely compromised. How could one in good conscience then say to such parents that the child requires urgent surgery that costs R100 000.00 but the State (who is 100% responsible for this surgery being required in the first place) will only pay R50 000.00 because this is what it would have cost if surgery was performed at a public institution?
   4. The proposed amendment will further give the State the opportunity to apply to court for the terms of the periodic payment regime to be varied. The vast majority of injured persons would be indigent or of very low-income groups and would in most cases not be able to afford legal representation to resist such a variation. It appears that there will then be a significant risk of prejudice towards the injured given the disparity in financial resources between the State and the injured person. Similarly, if the injured party requires an urgent variation of the periodic payment regime this could conceivably only occur if an application is brought to Court. Given the cost of litigation and the inevitable delays in litigation there is a serious risk of additional harm and suffering to the injured patient.
   5. Lastly, it would be not only prejudicial but devastating to potential and current claimants if the proposed amendment to the State Liability Act had retrospective effect, as is proposed in terms of the new section 4. Litigants and plaintiff attorneys engage in ethical and legal contingency fee agreements under the premise that a proportionate, fair and reasonable portion of the lump sum payment is used to pay for legal costs and disbursements. This arrangement ensures access to justice for claimants who would otherwise not have been able to claim compensation. If periodic payments are ordered by way of retrospective application, these arrangements may well be jeopardised and claimants with valid claims will be prejudiced. The Rule of Law requires certainty regarding the current law applicable and it is only in very exceptional circumstances that legislation should apply retrospectively. We submit that retrospective application of this proposed new system of compensation (should this indeed be the route determined by the Portfolio Committee following consideration of all submissions received) will not be fair and reasonable.
6. **CONCLUDING REMARKS**
   1. As the Committee would be aware and as referred to in other submissions, the South African Law Reform Commission has been tasked with undertaking an extensive investigation into medico-legal claims. As noted in the majority judgment of ***MEC for Health and Social Development, Gauteng v DZ obo WZ[[6]](#footnote-6)****,* moving away from “ancient” and entrenched legal principle such as the “once and for all rule” – whilst not necessarily unwarranted or unwelcome - would represent a significant shift in our law.

* 1. In our respectful submission:
* The introduction of the State Liability Amendment Bill at this stage, and prior to the Law Reform Commission completing it’s investigation, is premature.
* The proposed manner of structuring the “periodic payments” is unworkable.
* The R1 000 000 threshold is arbitrary.
* Providing for an injured claimant to be directed back to the very facility where the wrong was perpetrated to begin with, offends the Constitution.
* Restricting a Court’s discretion regarding the imposition of periodic payments is unsupportable.
* The Bill’s intended retrospective application is neither justifiable nor reasonable and most probably unconstitutional.

We would welcome the opportunity to make an oral presentation to the Portfolio Committee with reference to these submissions.

**DSC ATTORNEYS**

**19 0CT0BER 2018**

1. Unreported judgment in re LK v The Premier of the Eastern Cape Provincial Government, Eastern Cape High Court, Bisho Case No.: 862/08 [↑](#footnote-ref-1)
2. In fact L was suffering from osteitis, a paediatric condition which is an infection of the bone. A correct diagnosis can only be made surgically and the correct treatment is aggressive antibiotics. [↑](#footnote-ref-2)
3. Per the judgment handed down on 31 May 2011 it was unequivocally held that the relevant servants’ conduct constituted negligence and held the Premier liable for the proven damages. [↑](#footnote-ref-3)
4. Unreported judgment in re N S obo Y v MEC for the Department of Health, Eastern Cape, Eastern Cape Local Division of the High Court, Case No.: 2930/13 [↑](#footnote-ref-4)
5. In retrospect, Y had suffered from Hypoxic Ischemic Encephalopathy, a specific condition in the newborn caused by a lack of oxygen and poor blood circulation. [↑](#footnote-ref-5)
6. 2018 (1) SA 335 (CC) [↑](#footnote-ref-6)