
# SUBMISSION BY THE SOUTH AFRICAN ORTHOPAEDIC ASSOCIATION (SAOA) ON THE PROPOSED STATE LIABILITY AMENDMENT BILL

(Government Gazette No. 41658 of 25 May 2018)

Sent via email to vramaano@parliament.gov.za

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## 1. Introduction

The South African Orthopaedic Association (SAOA) hereby submits its comments, for consideration, on the proposed State Liability Amendment Bill as published in Government Gazette No. 41658 of 25 May 2018 by the Justice Portfolio Committee.

The Act referred to herein is the State Liability Act, 20 of 1957 (the Principal Act), and the amendments, as published for comment are being referred to as the "Bill" and its provisions as "clauses".

## 2. About the SAOA

The SAOA represents the majority of orthopaedic surgeons in South Africa and has 857 members, which includes orthopaedic surgeons in the public and private sectors and trainees in orthopaedic surgery. It is estimated that 170 Orthopaedic Surgeons work in the public sector.

Orthopaedic surgery is one of the areas of higher risk of malpractice litigation. The SAOA, and its members therefore have a keen interest in the field of malpractice law. It is more than willing to further engage with the Portfolio Committee on this very important matter and will provide any further

information required.

The SAOA also wishes to stress that the massive increases in litigation against medical practitioners and healthcare facilities are also affecting the private sector, and that it supports lasting solutions such as those that have been mooted by the SA Law Reform Commission in its Issue Paper 33 of May 2017.

Although the attempts to address this matter, albeit only for the public sector are welcomed, this challenge will continue as South Africa moves into a system of NHI, where both the public and private sectors will be service providers contracted to the NHI Fund. Unless the NHI Fund is protected through the necessary law reforms, it could be crippled through lawsuits, not unlike the challenges faced by the Road Accident Fund, the Compensation Fund and other statutory mechanisms.

## 3. Comments on proposed amendments

### 3.1 A dual system of protection against malpractice?

The SAOA is concerned that the introduction of measures to address the impact that malpractice lawsuits have on the public sector, could result in a system where under patients serviced by the public sector have different, or arguably lesser rights than patients in the private sector. Such a system could be constitutionally challenged, as Section 9(1) of the Constitution of the Republic of South Africa, 1996, grants everyone the right to equality before the law and everyone has the right to equal protection and benefit of the law.

### 3.2 Insertion of a new section 2A in the Principal Act by clause 1 of the Amendment Bill

The SAOA is concerned that the amendments refer to "wrongful medical treatment" as opposed to negligent medical treatment, which gives rise to delictual liability.

In South African, the law of delict deals with and explains the criteria (known as delictual law principles) in order for a person to successfully claim compensation from another due to harm that has been suffered. One of these principles refers to *wrongful* conduct of the other party. Wrongfulness means the unlawful conduct for such an act. It may therefore be regarded as *wrongful / unlawful* if a person cuts another with a knife. However, in health care, a surgery (in which a person cuts another) will not be considered to be *wrongful / unlawful* should the person being cut (the patient) have provided (informed) consent to be injured or harmed in that way - *volenti non fit iniuria*.

The wording of "wrongful medical treatment" in the amendment Bill may thus create confusion and is not a medically or legally the correct term which should be used.

*The SAOA **suggests** that the wording be changed from "wrongful medical treatment" to "delictual liability". Furthermore, that the amendment bill stipulates negligent medical treatment be recognized only once all delictual law principles are proven.*

### 3.3 Periodic payments for future care, medical treatment and loss of earnings

The Bill contains a clause where future care, future medical treatment and the loss of earnings are affected. According to this, the proposed sub-section 2(a) of (which section?), the courts may award this future cost by way of periodic payment (not less than once a year), during the lifetime of the injured party concerned, and "on such terms as the court consider necessary".

The SAOA regards "periodic payments, which may not be less often than once a year" and "only during the lifetime" to be easily comprehended, however it does not understand how (and what) the courts may determine to be the terms necessary. As part of these terms the question if further if a period payment will be consistent / fixed throughout the lifetime or may one of these terms, as "court consider necessary", allow for this to change from year-to-year / payment-to-payment, linked to CPI only as per sub clause 3 – refer to below discussion. It must be noted that the costs of rendering healthcare outstrips ordinary CPI, of which only a very small part comprises healthcare goods and services.

*The SAOA **supports** the amendment to have periodic payments and not a once-off payment, which may not be less often than once a year and only during the lifetime of the injured party. This may reduce the once-off settlement burden on the State and ensure the sustained maintenance of a wronged person. The SAOA does **request** that the Bill prescribes what the court may and may not consider to be terms of the compensation cost.*

### 3.4 Future cost awarded for treatment at a public health establishment and treatment at a private health establishment

The SAOA has several concerns regarding the insertions of a new section 2A, and sub-sections 2(b), 2(c) and 2 (d).

The first of which is that in terms of sub clause 2(b) the court may "in lieu of the amount" (if this is probably a substantial amount in terms on nominal value), "or at a reduced amount", order the State to provide future medical care / treatment at a public health establishment. The Public Healthcare System in South Africa is already under severe strain to deliver proper and good quality healthcare. It may also be problematic where a person wronged and, and by a specific facility, have to go back to that facility to receive care related to the harm initially caused in that facility.

By further burdening the Public Healthcare System to accommodate the future treatment and care of patients awarded as compensation for injuries suffered may not have the required result. Subject to this the patient, who already suffered damage or loss due to negligent medical treatment in the Public Healthcare System if therefore referred back to the System where this incurred. The result of which does not solve the fundamental issue facing the South African Public Healthcare System which is no longer is fit for purpose.

*The SAOA is of the **opinion** that referring state patients back to state treatment may not be the appropriate course of action and not ultimately reduce the financial burden of the State.*

Sub clause 2(c) try to remedy the issue of a Public Facility with poor quality services, in that the "establishment concerned" "must be compliant with the norms and standards as determined" by the Office of Health Standards Compliance ("OHSC"). The most recent reports from the OHSC, as presented in Parliament shows that public hospitals[1] received average outcome score of 59%, 34 Community Health Centres (CHC)[2] inspected scored an average of 50% and the 768 clinics inspected scored an average of 47%. These scores refer to the national average percentage outcome score per facility type, of which services are referred to as common basic standards.

[1] 1 central hospital, 2 provincial tertiary hospitals, 12 regional hospitals and 35 District hospitals.

*The SAOA is of the view that unless a facility performs satisfactorily during its last inspection by the OHSC, such facility be excluded from rendering further care pursuant to an order made under the State Liability Act.*

Sub clause 2(d) refer to cases where "future medical treatment has to be delivered in a private health establishment". According to sub clause the liability of the State shall be limited in terms of costs. The sub clause refers to limiting the private care costs to "the potential costs that would be incurred if such care was provided in a public health establishment".

The availability of services in state in the Public Healthcare Sector raises an issue. In this regard consideration must be had for the decision in the matter in *Law Society of South Africa and Others v Minister for Transport and Another (CCT 38/10) [2010] ZACC 25*, where the Constitutional Court ruled as follows:

*"The public sector is not able to provide adequate services in a material respect. It must follow that the means selected are not rationally related to the objectives sought to be achieved. That objective is to provide reasonable healthcare to seriously injured victims of motor accidents."*

The Constitutional Court confirmed that the UPFS tariff was wholly inadequate and unsuited for paying medical treatment compensation of these (quadriplegic and paraplegic) road accident victims in the private health care sector. It was further confirmed that, even if Regulation 5(1) were found to be rational, the tariff is in any event under-inclusive in relation to the healthcare needs for these victims. This was deemed unreasonable and in breach of the Constitution (section 27(1)(a) read together with section 27(2)) Regulation 5(1) was struck down and the Minister would be obliged to make a fresh determination.

*The SAOA is **concerned** that this means if the patient has to be treated in the private health sector, the state only has to pay for the cost of care at public sector costs (presumably the UPFS rates), which will not make good on the costs of rendering care in the private sector. A situation similar to that of the Compensation Fund may unfold, where private sector providers, due to the poor levels of reimbursement, might choose not to assist such patients.*

Lastly, the SAOA would like to particularly state, despite the suggested amendment in sub clause 3 that allow for period payments to increase yearly "in accordance to the average of the consumer price index (CPI), it is their experience that the price of orthopaedic devices, equipment and other, most of which are imported, may increase above CPI. This has indeed been a trend and has been noted and document by the Health Market Inquiry in its draft Final report.

### 3.5 Definitions

The SAOA recommends, in the light of the closer co-operation between the public and private sectors, that any private sector provider, working on a voluntary or paid basis, i.e. as an employee and/or contractor, be deemed to be a "servant" of the public sector within the context of section a of the Principal Act.

The SAOA therefore **proposes** that section 4A be amended to include a definition of "servant":

*"'Servant of the state' for the purposes of health services provided by the state means an employee of the state, a contractor fulfilling the duties of an employee rendering health services on behalf of the state and/or any person otherwise fulfilling health services on behalf of the state, and under the direction, instruction, supervision and/or control of the state"*

### 3.6 Pending matters

The amendment proposed to sub-section 2 under section 4 of the Act means that this Act also applies retrospectively to all matters that are pending.

*Clause 4(2) …"and which have not been instituted or concluded prior to the commencement of section 2A, must be instituted, continued and concluded in accordance with the provisions of section 2A".*

*The SAOA does have a **concern** relating to pending matter in that legal proceedings not yet concluded may be extended, delayed and incur higher costs, should the counsel for the plaintiff / applicant now request future treatment or other rights now afforded under the amended Act.*

## 4. Conclusion

The SAOA is appreciative of the effort to reduce the burden on the state in general and specifically an already over-burdened health sector, who lose as much as R43 billion per annum on malpractice claims.[3] This is close to the amount of R35.9 billion allocated in total to all the central (academic) hospitals for the 2017/8 financial year. This eats into already constrained budgets. Drastic intervention is indeed needed, and not only for the public- but also for the private sector.

The SAOA welcomes some of the changes in terms of the Amendment Bill, however still believe in the need to look at other ways of capping or limiting compensation in terms of medical liability claims as some of their member's professional insurance premiums are unaffordable.

The recent development in the South African Healthcare environment see all sectors getting ready in terms of National Health Insurance. More and more private healthcare providers (and facilities) are already contracted to provide healthcare to public sector patients. This will affect questions of liability, in particular where the levels of care, and limitations thereto, are set by the public sector, but adhered to by the private sector providers.

The SAOA's President Dr Leon Rajah, can be contacted through the office of the SAOA CEO, as detailed below.

Yours sincerely

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[3] https://www.iol.co.za/capetimes/news/state-in-r43bn-medical-claims-8360883.