COMMENTARY ON THE STATE LIABILITY AMENDMENT BILL

By Neil Kirby, Director

LEGAL BRIEF
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With reference to the recent publication of the proposed State Liability Amendment Bill [B16-2018] ("the Bill"), in my view:

> the Bill is clearly a reaction to increasingly successful claims against the State by patients for medical negligence that occurs in public health establishments. The reaction to such claims does not appear to address the medical care provided, but rather the consequences of bad or negligent care – presumably the reference in clause 2A(2)(c) to the Office of Health Standards Compliance is an attempt to address standards of care but, in my view, falls short;

> what is interesting is that the Bill refers to "wrongful medical treatment", in clause 2A, as opposed to negligent medical treatment. I am not certain if it is the intention of the Bill to incorporate the concept of negligence into the scope and ambit of "wrongful". Normally, a reference to wrongful implies that medical treatment was provided in circumstances where it was not needed;

> the impact of the Bill, if it passes into law in its current format, on patients will be both financial and choice-limiting. The Bill contemplates that patients who claim from the State for medical negligence will be restricted in terms of the type of award they will receive, i.e. the structured payment of a successful claim in the categories dictated by clause 2A(1) of the Bill and the periodic payment/s for future expenses. In the main, patients will be disadvantaged especially in respect of their choice of healthcare practitioner – bearing in mind that the right to choose a healthcare provider is set out in the National Health Act No. 61 of 2003 – and the possibility of being faced with returning to the very institution where the negligence occurred, which would be highly undesirable consequence as returning to the very institution that caused the negligence is counter-intuitive. In addition, the Bill may bring the State Liability Act No. 20 of 1957, as amended, into conflict with the right to access healthcare service – of one's choosing – in terms of the Bill of Rights in the Constitution of the Republic of South Africa, 1996. One further disadvantage is that, where periodic payments are made, a successful plaintiff may not be in a position to invest a larger sum to gain a good return on the amount invested in order to cater for future expenses related to the injury/ies suffered – notwithstanding the escalation provisions in clause 2A(3) of the Bill;

> I do not, however, foresee any particular implications of the Bill for the legal profession other than to ensure that pleadings in medical negligence claims address the criteria set out in the Bill for the relief sought. Contingency fee arrangements may be affected if the contingency is based on a lump sum

being paid to the successful plaintiff. There may be those that may consider the Bill to be a disincentive to running medical negligence claims as a structured successful claim may be less attractive as an outcome to medical negligence proceedings;

> I also do not foresee any implications for the private healthcare sector as, presumably, should a successful plaintiff seek assistance from a healthcare provider in the private sector, where the fees charged are greater than the amount awarded, the successful plaintiff will be required to pay in the shortfall in the fees charged. One aspect the Bill does not, however, cover is the scenario where a particular treatment is needed or medically indicated, but is not provided in or available from a public health establishment in South Africa. Such a state of affairs may also operate unduly and unreasonably limit a patient's right to access healthcare services in terms of the Bill of Rights;

> whilst the driving forces behind medical negligence claims are unclear, logically, one would think that there is an increase in negligent events giving rise to harm combined with patients/consumers who are now more aware of their rights due to the effects of social media and consumer-centred legislation such as the Consumer Protection Act No. 68 of 2008. I realise that there have been allegations made against the legal profession for driving up the incidents of cases, but without a basis for a claim in law, there would be nothing to litigate. Maybe one needs to look seriously at the levels of care being provided in or even the administration of public health establishments in certain disciplines and assess the outcomes for patients and then decide on an appropriate reaction or course of action generally. In my view, that is one of the lessons to be taken from pronouncements in the Life Esidemeni case;

I am not certain why a threshold of R1 million has been included in the Bill. Presumably, the financial burden on the State only pinches in respect of claims over R1 million. The threshold does mean that a claim for R999 000 or R1 million must be paid in full without a structuring arrangement. Why the distinction? Surely, if one is going to implement a structured settlement plan, the application of that plan should, in its entirety, be left to the discretion of the court hearing the matter on a case-by-case and not be applied as a law of general application, which, in my view, has perhaps the unintended effect of unreasonably limiting constitutional rights.

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