

How will the State Liability Amendment Bill affect victims?

According to Kirstie Haslam, partner at DSC Attorneys, the proposed State Liability Amendment Bill which the government is seeking to pass, will have consequences for medical malpractice claimants, as it aims to both limit and structure the payment of damages where a patient has been a victim at a State hospital...



© feverpitched – [123RF.com](https://www.123RF.com)

Haslam believes that the move from the lump sum system to the proposed periodic system is unworkable.

“The principle difficulty with the introduction of this Bill is that it is nothing more than a stop-gap interim solution pending possible greater legislative reform,” she explains. “As matters stand, the South African Law Reform Commission is undertaking an extensive investigation into what it terms “medico-legal claims” and in that context this Bill – which has a potentially massive impact on victims of medical malpractice perpetrated in State-run institutions, which would be mostly the poor – is premature.”

Administrative burden

She adds that the passing of this Bill will inevitably impose a massive administrative burden on an already notoriously faltering public health system.

Haslam says that Government's main argument to change the bill (which has been the same since 1957) relates to the significant increase in claims against the State based on medical malpractice which is placing an increased strain on the budgets of provincial hospitals and for which the blame seems to be mainly laid at the door of "unscrupulous lawyers", an all too familiar mantra.

She continues: "The unfortunate reality is that the focus seems to be on limiting the compensation which victims of such malpractice are lawfully entitled to, whilst failing to address the obvious shortcomings which there are in terms of patient care, in our State hospitals and other institutions."

Haslam points out that the proposed periodic system will be more costly for Government. "The present system of compensation is premised on the "once and for all" rule, which means all likely damages are recovered at once," she explains. "Such damages inevitably include future potential losses; because of the fact that such losses have to be quantified at a present-day value, discounts and other relevant factors (such as the likelihood of an event actually occurring) are brought into account and a "reduced" amount is paid."

She stresses that no such discounting will happen in the event of periodic payments being made. "The full amount in respect of treatment actually rendered will be recoverable, bearing in mind that the effects of inflation will play a role and therefore the cost of goods or services will in fact increase over time."

Cap

It is proposed that there will be a R1,000,000 threshold which Haslam says is arbitrary because the R1,000,000 appears to have been selectively pinned, with no relation to the individual victim's circumstances or needs, i.e it is an across-the-board threshold. "To my knowledge there has been no explanation tendered as to the research done and motivation for this sum being stipulated," she adds.

Another problem with the mooted changes is the fact that the Bill inter alia stipulates that a victim may be ordered to undergo treatment at a public health establishment (very possibly the one where the initial malpractice was perpetrated), alternatively that where treatment at a private institution is required, the State's liability will in any event be limited to those costs which would have been incurred had the treatment been given at a public health establishment. "The nett effect therefore is the same and it is indeed highly likely that victims will face this untenable situation," says Haslam.

Haslam says a further problem is that restricting a Court's discretion regarding the imposition of periodic payments is unsupportable and that while one can comment at length on this in terms of comparative international legal systems, generally speaking, other systems typically provide that whilst a Judge must at least consider whether periodic payments are appropriate, it remains within his / her discretion to decide whether they should in fact be ordered. "This particular Bill inhibits this discretion to a greater degree in that it provides that in certain circumstances a Judge must order periodic payments."

Retrospective application

The Bill's intended retrospective application is neither justifiable nor reasonable and Haslam says probably unconstitutional.

Curiously, she says that the Bill specifically provides that where a claim relating to alleged State-perpetrated medical malpractice "has not been instituted or concluded" prior to the Bill coming into operation, it shall henceforth be dealt with in terms of the Bill.

This is hugely significant. "In other words, you as a victim may have been involved in lengthy litigation over several years, on the basis of legitimate legal advice which you have received relating to the legal position as it currently stands, only to have the rug pulled out from under you as you are at the doors of Court," she says. "This flies in the face of the general

presumption against the retrospective application of a statute and is certainly vulnerable to constitutional attack.”

Haslam stresses that any and all bodies and civil rights organisations concerned with the protection and advancement of the rights of persons with disability (or other life-changing injuries) should make their voices heard regarding this Bill which, if passed, is likely to have a profound impact on current and future victims of medical malpractice.

She says this is especially important considering the fact that the Bill seems to be on a fast track presently – the public were afforded only until 19 October 2018 to comment on it (which deadline has already therefore passed) and as early as Wednesday, 31 October 2018 parliamentary hearings have been scheduled to take place to allow those handful of persons / organisations who managed to submit comments in time, to present orally to the Portfolio Committee.

For more, visit: <https://www.bizcommunity.com>