THE SOUTH AFRICAN LAW REFORM COMMISSION **AND MEDICO-LEGAL CLAIMS IN HEALTHCARE**

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INTRODUCTION

The Healthcare Committee hosted their annual sessional on 4 May 2022. The wide-ranging agenda included the work of the South African Law Reform Commission (SALRC) and medico-legal claims in healthcare. It is the purpose of this article to summarize the main aspects of that presentation.

COMMON LAW

The earliest account of a medical malpractice claim in South African courts was the matter of Lee v Schönnberg. In that matter, the plaintiff alleged that the defendant discharged his professional duties in a careless and negligent manner, resulting in loss of income and additional medical expenditure in order to get cured. The court found that the medical practitioner in this instance brought to bear a reasonable amount of skill and care, with the result that the plaintiff's claim was dismissed with costs.

Almost 145 years later, courts are still grappling with the five elements that must be proven in order for a claim in delict to succeed. These are (1) the existence of a duty of care; (2) breach of that duty; (3) which causes (4) reasonably foreseeable; (5) harm. Importantly in the matter of MM obo GM v MEC for Health NW Province, the court made it clear that proof of a breach of duty of care does not axiomatically lead to prove causation of damages. There may well be cases where negligence is established, but that does not lead to liability.

There is no specific medical malpractice legislation in effect in South Africa at present. The claims are governed by the common law and previously decided cases. The law practiced in South Africa that is not written down in legislation, or the common law, is a hybrid legal system. It is based on Roman-Dutch law, but also includes rules and principles from the English law. This is recognized alongside the customary law of South Africa.

The state of medical malpractice against the nine provincial health departments is such that the contingent liability for such claims has increased from R 28.6 billion for the financial year ending 31 March 2015 to R 120.3 billion for the financial year ending 31 March 2021. The government has paid R 10.5 billion in claims from April 2012 to March 2021 – money that is essentially earmarked for public healthcare.

WORK OF THE SALRC

The SALRC is a statutory body established by section 2 of the South African Law Reform Commission Act. The objective of the SALRC is to perform research with reference to all branches of the law of South Africa and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernization or reform of the law.

Following a request by the National Department of Health and Minister of Justice and Correctional Services to investigate medico-legal claims, the SALRC released an issue paper on 17 July 2017 and a discussion paper on 11 November 2021.

The solutions proposed in the SALRC paper were discussed in the South African Actuary in March 2022.

COMMENTARY ON THE SALRC DISCUSSION PAPER

Some of the main features of ASSA's comments on the SALRC discussion paper that were submitted are discussed below:

Lack of representation from the disability sector

ASSA supports the principle of self-representation, being the practice of people being able to articulate their own issues by themselves and for themselves. It refers to people being enabled and allowed to have their own voice in issues that relate to their specific needs and circumstances.

The extent of medical negligence litigation against the state has reached a level where it is adversely and prejudicially impacting in a serious manner on service delivery in the public health sector and endangering the constitutional right to have access to health care services. It is important to bring to the attention of law reform leaders the viewpoints from the disability sector as vulnerable end users of public health care services.

THERE IS NO SPECIFIC MEDICAL MALPRACTICE LEGISLATION IN EFFECT IN SOUTH AFRICA AT PRESENT.

Competing rights

There is a face-off between the right of the individual's common law claim for damages pursuant to harm caused by the negligence of the State against the constitutional rights to health care services of the greater community. There also exists a differentiation between birth-injured children who have had access to legal representation to assumedly prove negligence on the part of their birthers, and those who are living with birth disorders due to genetics or chance, by no fault of man. On the one hand, we have awards being made for over R20 million in respect of one individual. On the other, we have parents of children living with mobility disabilities resorting to using wheelbarrows as wheelchairs are scarce.

If South Africa is to reach anything close to universal health coverage in terms of sustainable development goals, there cannot be a distinction between people living with cerebral palsy who can access healthcare services by way of a medico-legal claim award and people living with cerebral palsy who cannot access healthcare services because they face numerous barriers plus the additional barrier of not having had access to litigious resources.

It is necessary to test the constitutional question of whether or not the common law remedy of the individual may be legitimately limited in terms of the limitations clause in the Bill of Rights when considering the intricate connection and run-on effect of these enormous lump sum payments to individuals and the depletion of public health care budgets for the collective. This is no easy exercise but that does not mean that we should be trying to tweak a system that already exists but doesn't support the principles of fairness.

Feedback loops

A key component missing from the SALRC discussion paper and our general understanding of the medical negligence claim process for birth injury claims is what happens after the award has been made. There is a need to analyse the factual expenditure incurred by the guardians of the child and the actual therapies received by the beneficiaries. Questions to which we have little data include:

(a) Where are child beneficiaries accessing medical care services in the rural areas?
(b) Are qualified care-givers being employed?
(c) Which assistive devices are actually being purchased?
(d) How long after the award was made did the child begin attending therapies and treatments?
(e) Are children living with cerebral palsy (in particular wheelchair users) being accepted on public transport to access their therapies in rural and urban areas?
(f) How much of the total award is invested in the trust that is supposed to be set up for claimants?

Get the science right

As noted in the discussion paper:

Given the high prevalence of CP litigation, the detrimental impact of the enormous pay-outs on the fiscus and the knock-on effect on the delivery of health care services, the state will be well-served by getting the science right when defending a matter of this nature.

Causation is not being paid the attention it deserves in the litigation strategy of some defendants. Causation should present a lofty hurdle for litigants to overcome to find success with the merits of a birth defect matter. Preparation and presentation of a defence of causation is as important as the defence of the breach of duty of care in medical malpractice claims. It is important that experts are engaged to discuss issues around causation in birth injury claims and build on the judgment in MM obo GM v MEC for Health NW Province.

Get the basics right

Lack of record keeping is a commonly cited failing in written judgments against the various health departments. Manual record keeping systems are open to corruption and manipulation.

The proposal made by the Eastern Cape Department of Health to make use of a "scribbler" to accompany medical teams while doing rounds to take notes as an interim measure to improve medical records is supported. In addition, a process of electronic capturing and uploading of records must be implemented to ensure that records are stored properly and do not go missing.

CONCLUSION

Whether or not our compensation system uses structured settlements or lump sum payments, the compensation envisaged is targeted only at the individual. Until it can be proven that guardians utilize awarded funds and/or payments in kind to actually benefit the birth-injured child, medico-legal litigation remains an exercise in procedure and profits.

It is time to weigh up competing rights. The solution set should also be guided by the availability of non-governmental organizations to be a part of service provision and the establishment of specialist rehabilitation clinics using the funds traditionally earmarked for individual claimants only.