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The Life Esidimeni Arbitration: Calculation of Damages

- Greg Whittaker, Algorithm Consultants & Actuaries

The death of at least 144 psychiatric patients after being transferred from Life Esidimeni to 27 unlicensed non-governmental organisations has been described as one of the greatest causes of human rights violations since the dawn of South Africa's democracy.

The Life Esidimeni arbitration hearings, chaired by former Deputy Chief Justice Dikgang Moseneke, concluded on Friday, 9th February 2018, after hearing testimony for in excess of 40 days from various family members, government officials and expert witnesses. I gave evidence before the hearings on 30 November 2017. One of the purposes of the arbitration hearings was to establish if families of the deceased were entitled to equitable redress and, if so, how much should be paid in compensation.

Under South African law, there are four categories under which damages can be claimed in the event of an unlawful death, namely, a claim for funeral expenses; a claim for loss of support as a result of a deceased breadwinner; a claim for general damages due to emotional shock; and,

lastly, constitutional damages. Constitutional damages may be awarded as appropriate relief in compensation for loss suffered as a consequence of unlawful infringement of a constitutional right. In this regard, a court may fashion a new remedy and make an award in the form of constitutional damages as appropriate relief to compensate for an infringement of a constitutional right.

The Life Esidimeni arbitration is the first time in South African history that constitutional damages have been sought for the violation of mental health care patients' rights.

With respect to loss of support claims, none of the psychiatric patients were breadwinners and hence under South African common law, the dependants

would have no claim under that head of damages. Loss of support claims are essentially class based – for example, the dependants of an actuary would receive far higher compensation than the dependants of a gardener, even if they died under exactly the same circumstances. This is since the common law is aimed at placing the dependants

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in the same position as they would have been but for the unlawful death. This is in contrast to Sharia law, where for example in the United Arab Emirates, if one causes the death or injury of another person accidentally or intentionally, he or she has to pay blood money or diya of up to 200,000 Dirhams. In the case of the latter, each life is essentially treated the same monetarily.

There is no guidance or previous case law in setting a monetary amount for constitutional damages in circumstances of gross human rights violations in South Africa. Section 27 sought actuarial input on this aspect and instead of the common law approach

of placing the dependants in the same position as they would have been but for the death of the breadwinner, I decided to perform a calculation from the point of view of the perpetrator as opposed to the deceased. Paying out the unlawful saving to the dependants places the perpetrator of the unlawful deaths in the same position had the deaths not occurred. The reason why I believe you need to look at the calculation from the position of the negligent party is precisely because our law does not create a vehicle to compensate a victim in this situation (because there is no loss of support claim). The fact that there is no loss of support claim is in itself perhaps discrimination against the disabled. The calculations were fashioned so as to provide an equal amount to each family, thereby treating each deceased life as equal.

As Justice Edwin Cameron says, the Constitution will not be self-enacting. Actuaries are well placed to promote constitutional values, social justice, equality, accountability and the rule of law. It is for these reasons that I have been involved in a series of pro bono matters, two of which received significant media coverage over the last year – namely the Life Esidimeni tragedy and the Michael Komape pit toilet drowning incident in Limpopo. As noted by Mark Heywood of Section 27: "Not caring is not an option in a society where the only chance at a sound business investment is ensuring that the economic and political climate is sustainable." 

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