A FEASIBILITY STUDY OF THE LEGISLATIVE INTERVENTION TO REFORM THE MEDICAL NEGLIGENCE LITIGATION AND DAMAGES IN SOUTH AFRICA

By

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Submitted in partial fulfilment of the requirements for the degree of

Master of Philosophy: Medical Law and Ethics

Completed under the supervision of

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FACULTY OF LAW

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UNIVERSITY OF PRETORIA

JANUARY 2020

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ACKNOWLEDGEMENTS

I want to thank My God, the almighty for giving me the strength to endure the challenges I encountered during this research. I am grateful for all His promises which are always Yes and Amen! Father may You Continue using me for the fulfilment of your kingdom.

Thank you to my supervisor, Professor Pieter Carstens, for a chance he gave me in this field of law and for all that he exposed me to, both as an academic and a practitioner. I appreciate you for sharing from your overflowing fountain of knowledge.

My mother is my anchor, the key to all the blessings I have experienced and those that await me in the future. Thank you very much for your pure heart Mah.

To all my siblings, zilwane zami ezinhle, I am grateful for your support. I thank God for grouping me with a bunch of dreamers like you as my siblings. Forward let us press on!

I am grateful to my precious husband, Dr. Vusumuzi Nkosi. I am always in awe of how you pray for me more than you ever pray for yourself my love. I attribute this study to your never ceasing prayers and words of encouragement. Thank you very much myeni wami.

The Nkosis and the Mzilas, I acknowledge your support with the utmost humility.

DEDICATION

I dedicate this dissertation to my two parents Mr Vimba and Mrs Thabisile Shibe who made sure to push against all odds for their children to understand the value of education.

LIST OF ABBREVIATIONS

DoH	Department of Health
HPCSA	Health Professions Council of South Africa
ICJ	International Court of Justice
MEC	Member of the Executive Committee
MPS	Medical Professional Society
NDoH	National Department of Health
RAF	Road Accident Fund
SA	South Africa
SALRC	South African Law Reform Commission
SAMA	South African Medical Association
SCA	Supreme Court of Appeal

ABSTRACT

In South Africa, there is currently no legislation regulating medical negligence litigation and damages. The common law, through its “once and for all” rule, remains the applicable law in litigation of this field of law. In terms of the common law, proven claims must be paid as a lump sum to the successful party as claimed “once and for all.”

The National Department of Health faces a challenge of medical claims increasing every year, both in the number of claims and quantum claimed. The state pays millions of Rands for its liability every year as compensation towards injured parties who have successfully proven their claims in court. The payments for compensation are made as a lump sum from the same budget made for the operation of hospitals. The State ends up running out of funds to keep the healthcare facilities operational, in a good state and offering quality service to the rest of the public.

Legislative intervention is recommended to reform this current crisis in the medical negligence field of law.

This dissertation aims to determine whether it is feasible to enact legislation as an intervention to reform the current state of law. In doing so, recent case law will be analysed and provisions of the constitution considered, as it is crucial for any applicable law, including the current applicable common law to promote the spirit, purport and object of the Constitution of the Republic of South Africa, which it does not as argued in this dissertation.

Chapter 1: INTRODUCTION

1.1 BACKGROUND

No legislation currently exists in South Africa to specifically address legal claims in the medical negligence field of law, and claims based on medical negligence are dealt with under common law. The escalation in medical negligence litigation and the increase in the amount of the damages sought and awarded has become a major cause for concern in the public and private health sectors.[1]

The Gauteng Department of Health has approached the Constitutional Court in the recent case of *MEC for Health and Social Development, Gauteng v DZ obo WZ,*[2] *(DZ v WZ)* in a bid to get the court to make an order that future medical expenses be paid as and when the costs are incurred by the claimant, as opposed to a lump sum payment, granting the Member of Executive Council (MEC) the ability to approve or disapprove payment, on production of a quotation, at the time that a healthcare service is required. Alternatively, if it is found that the South African law does not make provision for such relief, a South African law must be developed to make such provision. The MEC failed in the High Court and the Supreme Court of Appeal (SCA) as the common law did not accommodate such an argument.

Prior to then, the case was at the Supreme Court of Appeal, herein referred to as SCA, Swain JA held in paragraph 11 of the SCA Judgment that:[3]

> No evidence was led, however, by the appellant to show that a development of the common law, by the abolition of the 'once and for all' rule in cases where damages are claimed in respect of future medical expenses, would promote the constitutional right of access to health care services, relied upon by the appellant. It was also necessary to show how the appellant would make provision in its annual budget in the future for the indeterminate and intermittent claims of claimants in the position of [WZ], to ensure that their right to medical treatment would not be denied. Numerous practical difficulties which

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1 Issue Paper 33 of the South African Law Reform Commission project 141 "Medico Legal Claim" (20 May 2017) at par 4.

2 *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 1 SA 335 (CC)
This Constitutional Court case will be referred to as the DZ obo WZ case to comply with the order of the Constitutional Court not to publish the names of the Plaintiff involved.

3 *Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Zulu* (1020/2015[2016] ZASCA 185 (30 November 2016) at par 11.

> impinge upon these claimants' right of access to healthcare services are readily apparent. Where emergency treatment is required the appellant's obligation to make payment only within 30 days of the presentation of a quote, would in most cases frustrate vital treatment. Where the appellant declined to accept the quote, the claimant would be forced to institute action. The result would be a plethora of actions against the appellant with the concomitant denial of medical treatment to claimants

In conclusion, the SCA held that:[4]

> In any event, in exercising their power to develop the common law, judges have to be 'mindful of the fact that the major engine for law reform should be the legislature and not the Judiciary.' Any legislated change in the common law rule could only be effected after the necessary process of public participation and debate. The appeal was accordingly dismissed in the SCA.

On the 17th August 2017, the Constitutional Court heard the appeal. The MEC put forward the same points that saw the dismissal of her appeal in the SCA, briefly the argument was that the MEC should pay as and when the need arise for the claim that he has been found by the court to be liable to pay to the injured party, alternatively that common law dealing with medico-legal claims must be developed to curb the potential impact of damages awards in medical negligence claims against public healthcare authorities on their ability to discharge their constitutional obligation to provide access to healthcare to everyone in terms of Section 27 of the Constitution.[5]

At this stage, the outcome of this landmark case was eagerly awaited by the Department of Health (DoH), as it would bring about significant reform in how its budget was spent on medico-legal claims. The issue of rising medical negligence claims was at this stage of great concern to the DoH and had already been taken to the South African

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4 *Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Zulu* (n3 above)par 12.

5 The Constitution of the Republic of South Africa Act , 1996.

Law Reform Commission (SALRC) for further investigation and the report was opened to the public for comments between the months of May and September 2017.[6]

In the Constitutional Court, Froneman J held that:[7]

> When exercising their authority to develop the common law, courts should be mindful that in accordance with the principle of the separation of powers, the major engine for law reform should be the legislature. Relevant factors here include whether the common law rule is a judge-made rule, the extent of the development required and the legislature's ability to amend or abolish the common law.

The appeal was again dismissed by the highest court in the land on the basis that any development of the common law requires factual material upon which the assessment whether to develop the law must be made, and Froneman J ruled that factual basis in this matter was absent and held that the only possible factual foundation for an argument that the common law must be developed was the mere fact that WZ was born in a public healthcare institution and that is where the medical negligence occurred; the Court then found this to be an inadequate ground for development of the common law in the manner sought by the Gauteng MEC[8]. Having decided to dismiss the appeal, the Honorable Froneman J further held that:[9]

> The failure of the appeal does not mean that the door to further development of the common law is shut. We have seen that possibilities for further development are arguable. Factual evidence to substantiate a carefully pleaded argument for the development of the common law must be properly adduced for assessment. If it is sufficiently cogent, it might well carry the day.

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6 SALRC Issue Paper 33(n 2 above).

7 *MEC for Health and Social Development, Gauteng v DZ obo WZ* (n 2 above) at 15.

8 *MEC for Health and Social Development, Gauteng v DZ obo WZ* (n 2 above) at 25-26.

9 As above.

1.2 LITERATURE REVIEW

Research shows that different authors have made recommendations on the topic of rising medico-legal claims and amongst others, Pepper and Nöthling Slabbert[10] recommended better self-policing by the medical profession, special health courts, policing by the medical profession of persons offering expert opinion, alternative dispute resolution, the creation of a no-fault system to resolve birth outcome disputes and legislative intervention to reduce the impact of litigation. The legislative intervention was further recommended by the SALRC.[11] Van Den Heever)[12] made his own recommendations; these were divided into conventional and fundamental reforms. The conventional reforms were categorised into reforms that limit access to courts, reforms that alter certain liability rules and reforms that directly address the size of the damages awarded (capping). Howarth and Hallinan[13] recommended a complaints process, the frequency of claims, pre-litigation resolution framework, procedural changes and limiting damages awards (general and special).

The rising of medico-legal claims is currently a topic of great concern in the South African Government, particularly the National Department of Health (NDoH), and it has been discussed on different platforms and recommendations have been made as highlighted above. The focus of this proposed research is on the feasibility of the legislative intervention to develop the common law for reformation of medical negligence and damages as a recommendation. The study will seek to investigate the possibility, achievability and reasonability in law of the said recommendation through critical analysis of the current state of law and its implications in medical negligence litigation and then ward of damages thereof. Discussions without implementing any plan are not serving the NDoH any good. The Constitutional Court, upon dismissal of the appeal in the DZ v WZ case briefly discussed above, indicated, although not directly

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10 MS Pepper & M Nöthling Slabbert 'Is South Africa on the verge of a medical malpractice litigation storm?' (2011) 4 *South African Journal of Bioethics and Law* 1 at 32.

11 SALRC Issue Paper 33(n 1 above) at 47.

12 P van den Heever 'Medical malpractice: The other side:' *De Rebus* (2016) at 49 .

13 G Howarth & E Hallinan 'Challenging the cost of clinical negligence, (2016) 106 *South African Medical Journal* at 141.

that that possibilities for further development of the common law were arguable. This prompts a need for further research on the topic for legal reform on medical negligence litigation and damages, as the problem still exists.

The SCA, in Zulu case before it was appealed in the Constitutional Court, held that "any legislated change in the common law rule could only be effected after the necessary process of public participation and debate."[14] In stating that the Court made a comparison to when the legislature performed a similar role by the introduction of s 17(4)*(b)* of the Road Accident Fund Act 56 of 1996, that allows future medical expenses of road accident victims, to be catered for by an undertaking to pay these expenses by the fund. A public debate has taken place in the form of issue paper 33 of the SALRC investigation, which was open for public participation and comments in late 2017.

The investigation came to the fore when the NDoH requested the SALRC to investigate into medico-legal claims. The request was made because of the challenges faced by the health sector due to the escalation in claims for damages based on medical negligence, and the increasing financial implications thereof for the public health sector.[15] The Minister at the time, Dr Aaron Motswaledi, expressed the opinion that the legislation proposed by the NDoH would in effect abolish the common law 'once and for all rule' in respect of certain issues, without an in-depth investigation having been conducted into the matter. The Minister was of the view that it would be advisable to await the outcome of such an investigation. He then indicated that considering the complexity of the matter, it would be appreciated if the SALRC could give favourable consideration to conducting an in-depth investigation into the matter and then provide a report on its findings.[16]

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[14] See (n 4 above).

[15] SALRC Issue Paper 33 (n 1 above) at 1.

[16] As above.

The SALRC made its own recommendations, one of them being the legislative intervention that Parliament needs to enact new legislation. Considering the judgment of the Constitutional Court and the SALRC having initiated the investigation, the legislative intervention remains a possibility towards the reform of medical negligence litigation and damages in South Africa. The research remains paramount and the development of common law remains a question of why, how and when.

1.3 RESEARCH APPROACH AND METHOD

Social legal approach and constitutional analysis will be conducted in undertaking this research study. The research will consider the experience of those affected by the process the current applicable law (the public), the process of decision-taking by those responsible for the administration of the law and the social factors leading to the cry for the development of the law and legal process. The type of research that will be applied for this study is qualitative in nature, using desktop approach. The findings of the study will be limited to the information gathered from text books, journal articles, case laws, and other sources. The findings of this study will not be able to produce factual evidence or material evidence to establish the link between the rising number of medical negligence claims and the lack of proper service delivery in the public health sector, which is said to lead to the infringement of the public's section 27 right to access to healthcare in terms of the Constitution. These are facts which can only be evidence-based and they would require interviews and further investigation by way of data collection.

1.4 HYPOTHESIS

The enactment of new legislation will reform the medical negligence litigation and damages in South Africa.

1.5 RESEARCH QUESTION/ QUESTION FOR DETERMINATION

Will the enactment of new legislation reform the medical negligence litigation and damages in South Africa?

1.6 AIMS/OBJECTIVES

This research seeks to evaluate the proposed intervention to reform the fast-growing and problematic medical negligence litigation and damages in South Africa.

This study will investigate whether it is constitutionally justifiable for the NDoH to keep spending millions of Rands on a few individuals who have successfully claimed for medical negligence, but at the detriment of millions of South Africans who are in the process deprived of proper service delivery in terms of medical or healthcare.

Further considerations will include whether, in the long run, the government can sustain proper functioning healthcare while millions of the budget dedicated to such is spent on medical negligence litigation.

CHAPTERS OUTLINED

Chapter 2: THE CURRENT CHALLENGES IN SOUTH AFRICA: A CALL FOR THE LAW REFORM

This chapter will be devoted to the shortcomings and complications currently faced by the South African Department of Health under the applicable law in medical negligence matters.

As it stands, the MEC for Health, particularly in Gauteng has lost a landmark case (the DZ WZ case) briefly discussed above seeking the Constitutional Court to develop the Common Law. The DoH in this case highlighted that "the ability of the appellant (DoH) to discharge the constitutional obligation of providing everyone with access to healthcare services, would be compromised by an obligation to pay damages for the minor patient's future medical expenses, by way of a lump sum payment..."[17]

The increase in payments for medico-legal claims means that money has to be diverted away from the delivery of healthcare services, which further reduces the funding of an already severely burdened system.[18] "The more damages to be paid, the less money is available for service delivery, the poorer the quality of the service rendered by the hospital, the more room for negligence and error, the more the claims, it is a vicious circle and if it not addressed, the entire public health system could implode.'[19]

The DoH budget is subject to a certain limit, every year it is obligated to pay all proven claims in litigation, which are not subjected to any limitation, and whether the money is there or not it must abide by the court order, which then becomes burdensome on the budget aimed for service delivery. The core function of all state departments is public service delivery and they receive a budget according to their core functions and not for

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17 *Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Zulu* (n 3 above)185 par 12.

18 SALRC Issue Paper 33 (n 1 above) at 15.

19 SALRC Issue Paper 33 (n1 above at 16.

the settlement of medico-legal claims. The rest of the challenges are going to be highlighted and discussed further during the course of the research.

Chapter 3: LEGAL FRAMEWORK THAT REGULATES MEDICAL NEGLIGENCE LITIGATION IN SOUTH AFRICA.

This chapter will focus on the common law which is currently applicable in medical negligence matters and whether it has any gaps and shortcomings that really prompt for the legislative intervention, as suggested by the DoH and other academics. It will be established through the analysis of the current law, and its effectiveness or lack of thereof, to determine whether the legislature's intervention in terms of developing the law will be effective or not. Previously decided case laws will be considered in this part of the research.

Chapter 4: CONSTITUTIONAL LAW PROVISIONS AND IMPLICATIONS AGAINST THE BACKDROP OF THE *MEC FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG V DZ OBO WZ* CASE 2018 (1) SA 335 (CC)

The development of common law has always been the life of the development of the law, the law is not static, it is dynamic and it grows with the needs of its society. This chapter will highlight the relevant constitutional provisions and seek to establish the stance of the constitutional provisions as far as the development of the law is concerned, particularly the issues of medical negligence and damages.

Froneman J[20] commented, after the dismissal of the appeal that "failure of the appeal does not mean that the door to further development of the common law is shut." This leaves the impression that if the DoH had adduced factual evidence in the trial, to the

[20] *MEC for Health and Social Development, Gauteng v DZ obo WZ* (n 2 above) par 58.

effect that the common law should be developed and the effect it would have on the society, the judgment of the Court may have been different. In the case of *S v Makwanyane*,[21] when dealing with deterrence Mohamed J. held that:

> We were not furnished with any reliable research dealing with the relationship between the rate of serious offences and the proportion of successful apprehensions and convictions following on the commission of serious offences. This would have been a significant enquiry. It appears to me to be an inherent probability that the more successful the police are in solving serious crimes and the more successful they are in apprehending the criminals concerned and securing their convictions, the greater will be the perception of risk for those contemplating such offences. That increase in the perception of risk, contemplated by the offender, would bear a relationship to the rate at which serious offences are committed…'

This highlights the importance of factual material in the form of extensive research to be presented to Court to argue the significance of common law development; however this will be discussed further in the study.

Chapter 5: CONCLUSION AND RECOMMENDATIONS

The researcher will consider the whole study thereof and conclude whether or not the development of the common law by way of the enactment of new legislation will be effective towards the reform of medical negligence and damages in South Africa. The problems, gaps and shortcomings will have been identified and this chapter will highlight the provisions that the proposed legislation is recommended to canvas for reformation.

[21] *S v Makwanyane and another* 1995 3 SA (CC) 391 at 163.

Chapter 2: THE CURRENT CHALLENGES IN SOUTH AFRICA: A CALL FOR THE LAW REFORM

2.1 INTRODUCTION

The private and public healthcare sector in South Africa (SA) is facing a devastating crisis regarding medical malpractice litigations that have spiraled out of control over the years. One major concern from the public healthcare is the sharp increase in the number of large amounts of money spent from the public purse to fund cases instituted against the Department of Health (DoH). The private healthcare sector is also experiencing numerous high-value claims against its healthcare service providers.

It is noble and fair for courts to order the DoH to compensate those who have been injured during any surgical procedure due to negligence. However, it should be taken into consideration whether it is worth running the DoH into bankruptcy, resulting in failure to render proper services to the nation. There is no evidence that the DoH has ever been bankrupt due to medico-legal claims; however the present state of affairs is of great concern.

When the budget is allocated to the DoH by the National Treasury, it is mainly for running costs of the public healthcare sector, which is service delivery; medico-legal claims are not part of such service delivery. It should further be considered whether it is fair and reasonable for one claimant to be awarded millions of Rands from a limited budget, while many are denied access to the healthcare facilities due to unavailability of resources, because the money might have been spent dealing with the matters of medico-legal claims. There are a number of questions that need careful consideration by the judiciary, e.g. the legislature regarding the unintended consequences of the lump-sum payment method to the claimants; i.e. is it not at the detriment of the rest of the public who will not be rendered quality services due to lack of funds? Does it serve

the public interest? Is there a specific budget for these payments and/or is the public service neglected to cover these payments?

Addressing the infringement of one person's constitutional rights cannot be justified by infringing other people's constitutional rights. Another question for consideration is who represents the interests of the public during the proceedings of each medical negligence claim while the plaintiff represents his interests? However the public's interests are affected each time an award is made in favour of the plaintiff, in that the money meant for public service delivery is used.

These are questions that can be addressed by way of gathering evidence through investigation and interviews with the DoH. The Constitutional Court was not presented with evidence before to assist the court to possibly come to a different decision in the DZ obo WZ case.

Oosthuizen and Carstens contend that[22]

> "Many factors contribute to the dire state of healthcare in SA. Problems with management and lack of accountability persist while severe human resource constraints caused by poor policy and budget decisions have led to increased workloads causing many medical interventions to be performed by inexperienced personnel without the assistance of more experienced practitioners. Infrastructures and equipment are in a desperate condition and frequent shortages of supplies and medication lead to a reduced standard of care. These factors compromise the standard of care patients receive in the public sector and potentially lead to more litigation.

[22] WT Oosthuizen & P Carstens 'Medical Malpractice: The Extent, Consequences and Causes of the Problem' (2015) *Journal of Contemporary Roman-Dutch Law 78 at 269.*

2.2 FACTORS THAT CALL FOR A REFORM IN MEDICAL NEGLIGENCE LITIGATION

2.2.1 THE HEALTHCARE CURRENT CHALLENGES LEADING TO CIVIL CLAIMS

Dhai and McQuoid[23] hold the view that intentional, unlawful or negligent conduct by practitioners resulting in injury or damage to their patients or property leads to medical malpractice claims, e.g. intentional breach of a patient's confidentiality. Prior to the discussions of a reform in the medical negligence, a root cause must be identified. The healthcare sector is in a crisis due to the rising medical negligence or malpractice claims and it all usually begins at the healthcare facilities, both private and public. Not all medical claims made end up being compensated, however for there to be a claim there must have been commission or omission at the health facilities, and this section is briefly highlighting the state of the healthcare sector that has led to the spiralling claims and causing a need for the legal reform.

The South African Medical Association (SAMA) identified the following factors contributing to litigation[24], institutional system failure, which may include infrastructural defects that would endanger the safety and security of patients in high-risk areas; the design of some hospitals may not meet the stringent modern standards, lack of either proper equipment or equipment that is faulty and producing poor results or in high-risk areas are a hazard to patients..Professionalism of the staff is paramount, as medical practitioners are required to perform above levels of skill, experience and qualification and avoid incompetence; the shortage of staff is another factor that may lead to errors of judgement in decision making for the appropriate management of patients.[25]

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[23] A Dhai 'Medico-legal Litigation: Balancing Spiralling Costs with Fair Compensation' (2015) 8 *South African Journal of Bioethics and Law* 2; Dhai A, McQuoid-Mason DJ, eds. Bioethics, Human Rights and Health Law. Principles and Practice. Cape Town: JUTA, 2011:92-96.

[24] L. Mazwai "Medico-legal litigation: Do we have the solution? Boxing under the spotlight" (2015) *The South African Medical Association* 4.

[25] As above

The Health Profession Council of South Africa (HPCSA), as the regulatory body of health professionals, defines the guidelines for professional conduct and it makes no room for such occurrences.[26]

The HPCSA revealed that 248 health professionals were found guilty of incompetence, insufficient treatment and misdiagnosis in 306 cases between 2008 and 2012, which saw the HPCSA issuing 283 fines and 137 suspensions to doctors for misconduct.[27] Figures showed that doctors were found guilty in 20 cases of misdiagnosis since 2008.[28] Cases of incompetence rose from 18 in 2010-2011, to 32 in 2011-2012. The number of cases involving insufficient care and mismanagement of patients more than doubled, with 44 cases reported in 2011-2012 compared to 20 in 2010-2011.[29] According to a survey completed between September and October 2016 by 211 clinicians, public sector hospital staff shortages and patient overloads, as well as poor record-keeping systems were identified as important reasons for medical errors.[30]

The leading provinces on complaints launched against health professionals are Gauteng, KwaZulu Natal and Free State.[31] Particularly in Gauteng, this is supported by the recent statistics of 'serious adverse events,' which has been revealed by the Health MEC, that there were 6 192 reported incidents in 2016, 9 767 in 2017 and 4 458 between the start of 2018 and June, which is already 20 417.[32] In Limpopo Province, patients who are badly treated at hospitals are failing to report negligence or

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26 L. Mazwai (n 24 above).

27 "Headlines and Deadlines" Medical Protection Casebook (January 2013). https://www.medicalprotection.org/southafrica/casebook/casebook-january-2013/headlines-and-deadlines accessed on 01 October 2018.

28 "Headlines and Deadlines" Medical Protection Casebook (January 2013).

29 As above.

30 TR Carmichael 'Barriers to medical error reporting and disclosure by doctors: A bioethical evaluation' Masters thesis, University of Witwatersrand 2017 at 26-27.

31 "HPCSA campaign on patient rights regarding treatment negligence" Medical Brief (22-03-2017) https://www.medicalbrief.co.za/archives/hpcsa-campaign-patient-rights-regarding-treatment-negligence/ accessed on 01 October 2018.

32 "20 000 injured patients: Here are the most negligent hospitals in Gauteng" The South African (06-08-2018) https://www.thesouthafrican.com/the-most-negligent-hospitals-in-gauteng/ Luke Daniel accessed on 01 October 2018.

misconduct, which prompted the HPCSA to launch an awareness campaign as a joint effort with the DoH to inform people of their rights.[33]

This received the attention of lawyers in South Africa and litigation has led to the rise of claims each year. This is because the health practitioners are held accountable for unprofessional conduct by the HPCSA in terms of the Health Professions Act.[34] One or more of the following penalties are imposed upon guilty professionals by the HPCSA, a) A caution or a reprimand and a caution; b) suspension for a specified period from practising or performing acts specially pertaining to his or her profession; c) removal of his or her name from the register; d) a prescribed fine; e) a compulsory period of professional service as may be determined by the professional board; f) the payment of the costs of the proceedings or a restitution, or both.[35]

Oosthuizen[36] states that potential claimants often lodge complaints with the HPCSA with the purpose of determining their chances of success in a civil suit; the disciplinary proceedings and its outcome are used to test the waters for further prospective litigation. This entire process, as opposed to civil claims, is not meant for compensation of the patient by way of damages but rather to guard and protect the standards and the profession including public interest. In the case of *Veriava v President, SA Medical and Dental Council*,[37] the court stated that, "The council is thus truly a statutory *custos morum* of the medical profession, the guardian of the prestige, status and dignity of the profession and the public interest, in so far as members of the public are affected by the conduct of members of the profession to whom they had stood in a professional relationship."

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33 "HPCSA campaign on patient rights regarding treatment negligence" Medical Brief (n 31 above).

34 S 41 of the Health Professions Act 56 of 1974.

35 S 42(1) of the Health Professions Act.

36 W. Oosthuizen 'Reconciling patient safety and liability: Lessons from a Just Culture' unpublished PhD thesis, University of Pretoria 2017, at 377 - 378.

37 *Veriava v President, SA Medical and Dental Council* 1985 2 SA 293 (T).

Litigation is not the only route that the injured patients can take to hold unprofessional medical practitioners accountable. This state of affairs receives the attention of lawyers in South Africa and it then leads to litigation, and the more complaints are lodged and succeed with the HPCSA, the more civil claims will be lodged against the health sector, leading to the rise of claims each year as will be discussed further.

2.2.2 THE INCREASE OF MEDICAL NEGLIGENCE CLAIMS

The SALRC reported that[38] the increased quantity of medico-legal claims and pay-outs for such claims are not limited to the public sector. The private healthcare sector is also under pressure and insurance for private medical practitioners has risen sharply over the past few years. This is evident in the findings of Bateman who found that[39] medical negligence pay-outs in the private sector soared by 132% in 2009 and 2010, and the Medical Professional Society (MPS) members experienced a rise in average number of claims from 2007 to 2011, which then led to an increase in its members' subscriptions payable, and riskier disciplines such as obstetrics, spinal surgery and paediatrics were affected more. According to Health Minister Aaron Motsoaledi, more than 5,500 medical negligence claims had been made against the DoH between 2014 and mid-2017, and the numbers are expected to grow each year.[40]

Further findings by Malherbe indicated that[41] in 2013 the MPS reported that the cost of reported claims had more than doubled over the previous 2 years and claims exceeding R1 million had increased by nearly 550% compared with those of 10 years prior, while claims valued at over R5 million had increased by 900% in the preceding 5 years. In 2009/2010, the Gauteng DoH reportedly faced medical malpractice claims totalling

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38 SALRC Issue Paper 33 (n3 above) at 17.

39 C Bateman ''Medical negligence pay-outs soar by 13 %''(2011) 101 *South African Medical Journal* 216.

40 "More Than 5500 Medical Negligence Claims Against The State Since 2014" (2017-10-30) Times Live https://www.timeslive.co.za/news/south-africa/2017-10-30-more-than-5500-medical-negligence-claims-against-the-state-since-2014/ Bianca Capazorio (accessed on 07 September 2018).

41 J Malherbe 'Counting the cost: The consequences of increased medical malpractice litigation in South Africa' (2013). 103 *South African Medical Journal* 83.

R573 million.[42] Medical Chronicle reported that between 2009 and 2015 there was an escalation in the likely value of claims being brought against doctors and the claims had increased by 14% on average each year during that period. The long term average claims frequency had increased by 27% in 2015 compared to 2009; for some specialities the claims experienced threatened the sustainability of private practice.[43]

2.2.3 THE INCREASE OF MEDICAL NEGLIGENCE CLAIMS IN QUANTUM

South Africa is not only experiencing an increase of claims every year, the quantum of claims is also increasing every year. Depending on the extent of injury and the age of the patient, the damage can be millions of Rands per claim as happened in the DZ obo WZ Constitutional Court case. However, these are not the only contributing factors to the increasing value of medical negligence claims. The rise in the value of medical negligence claims could perhaps or at least in part, be ascribed to advances in medicine and technology.[44] Improved but expensive and sophisticated care has considerably extended life expectancy for extremely compromised patients. Generally, the worse the injury, and the longer the survival, the more the costs of care. Those specialties where injuries may be the most severe and survival is likely to be the longest are at greatest risk of extremely high claims; indemnity costs for this group are therefore the highest.[45]

Pienaar further mentions, amongst others, the following contributing factors in the rise of the value of claims: the decline in the level of professionalism amongst medical practitioners, lawyers contributing independently to the problem, patient-centred legislation, and pronouncements by courts that bolster patient autonomy and place

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42 Malherbe (n 3 above) 83.

43 'Clinical Negligence: Rising Costs in SA' (2017). Medical Chronicle 8.

44 L. Pienaar 'Investigating the Reasons Behind the Increase in Medical Negligence' (2016). 19 *Potchefstroom Electronic Law Journal* http://dx.doi.org/10.17159/1727 -3781/2016/v19i0a1101 accessed on 03 September 2018.

45 G Howarth 'Public Somnambulism: A general lack of awareness of the consequences of increasing medical negligence litigation' (2014). 11 *South African Medical Journal.*

patients in an ever stronger position to enforce their rights.[46] Resultant medical malpractice litigation is increasing due to the way doctors treat patients, the expectations of patients, and increased targeting of medical professionals by lawyers.[47] These contributing factors will be discussed below.

Financial24[48] estimated that the escalation of medical state hospitals payouts of up to R1.5 billion were seen at the end this financial year, 2018, and, according to this report, between March and November 2017 the state settled claims worth R1.1 billion. A simple extrapolation leads to an estimate of R1.5 billion for the full year, a fifteen-fold increase since 2010.

2.2.4 BUDGET CONSTRAINTS

In 2018 The Gauteng DoH paid out R521million in medical negligence claims between January 2017 and March 2018. This was in respect of 138 cases, and it faced a further 1,597 totaling more than R22 billion, which were still before the courts; the MEC expressed concern that this will end up costing close to half of the Department's R46.4 billion budget for the said year.[49] The budget of the DoH's for year 2018 was R46.4 billion and hundreds of millions of Rands had been paid out to medical negligence claims in one province by the end of the first term of the year. The DoH in general ended up resorting to freezing new posts for the appointment of new medical staff and stopped paying doctors for their overtime hours of work in Gauteng, which according to

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46 Pienaar (n 44 above)19.

47 D Roytowski 'Impressions of Defensive Medical Practice and Medical Litigation among South African Neurosurgeons' (2013). 11 *South African Medical Journal* 736.

48 "Medical claims against the state skyrocket" Fin24 (2018-03-04) https://m.fin24.com/Economy/medical-claims-against-the-state-skyrocket-20180302 City Press accessed on 06 September 2018

49 "Gauteng Health Facing Claims totaling R22bn for Medical Negligence" (16-04-2018) Times live https://www.timeslive.co.za/news/south-africa/2018-04-16-gauteng-health-facing-claims-totalling-r22bn-for-medical-negligence/Kgaugelo Masweneng accessed on 23 September 2018.

the MEC of Gauteng will increase the risk of more negligence claims, which will further deplete the budget. [50]

The Gauteng Health Department's Member of the Executive Committee (MEC) stated that budgets were insufficient to meet demand for services, and there was no budget allocation specifically for medical litigation.[51] In the 2018 Eastern Cape budget speech, the finance MEC stated that claims against the Provincial Health Department amounted to R17bn, which was 72% of its R23.6bn budget. The figure related to 1,800 claims dating back to 1999.[52] Currently, the DoH in Mpumalanga faces medical negligence claims of more than R7.6bn; more than 40% of the claims are of children allegedly born with cerebral palsy. This is more than half of the budget allocation for the 2018-2019 fiscal year, which stands at R13.3bn.[53]

It is also believed that no budgets for those expenses exist. Consequently, payments are being made from funds designated for medical equipment and other purposes. The irony is that because of those unexpected pay outs, old and often faulty equipment cannot be renewed or upgraded, resulting in even further claims attributable to faulty equipment.[54] Money disbursed on malpractice claims directly impact on the ability to

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50 "Gauteng Health Facing Claims totaling R22bn for Medical Negligence" Times live (16-04-2018)

51 "Staggered medical negligence bill 'unfair' and may endanger patients"(5-06-2018) Business Day https://www.businesslive.co.za/bd/national/health/2018-06-05-staggered-medical-negligence-bill-unfair-and-may-endanger-patients/ Tamar Kahn accessed on 26 September 2018

52 "R17bn Outstanding for Medical Negligence Made Up 'Generally' of Fraudulent claims - EC Health" (28-03-2018) Medical Brief https://www.medicalbrief.co.za/archives/r17bn-outstanding-medical-negligence-made-generally fraudulent-claims-ec-health/ Norton Rose Fulbright accessed on 25 September 2018.

53 "Mpumalanga Faces Huge Medical Negligence Claims" (13-06-2018) Business Day https://www.businesslive.co.za/bd/national/health/2018-06-13-mpumalanga-faces-huge-medical-negligence-claims/ accessed on 25 September 2018.

54 H. Lerm 'Medical Malpractice Litigation: Do we need a Paradigm Shift in our Approach to Handling Medical Negligence Disputes?' (2017) *Obiter* 324.

finance healthcare, which in turn leads to a further decline in the quality of care provided.[55]

Lack of budget by the Government, specifically the DoH, is one of the major reasons or factors for the call for law reform. The problem is escalating each year and urgent solutions need to be implemented. This research is meant to investigate the feasibility thereof of the proposed solution, which is legislative intervention to regulate the medical negligence litigation and damages thereof, which will be discussed further and in greater detail in one of the subsequent chapters. It is highlighted in the first chapter that different recommendations have been made because of the crippling factors in medical negligence litigation as discussed above. Doing away with the lump sum payments and implementing periodical payments has a grating potential of easing the problem as submitted by the Gauteng DoH in the DZ obo WZ case. This can be done by further development of the law.

2.3 THE CAUSE OF THE CURRENT STATUS

2.3.1 LAWYERS PREYING OVER THE HEALTHCARE SECTOR

Malherbe[56] identifies increased access to medical malpractice representation through the Contingency Fee Act (No. 66 of 1997) and a shift from road accident fund work to medical malpractice litigation as one off the litigation drivers. Van den Heever[57] is of the view that the amendments to the Road Accident Fund legislation may have encouraged attorneys to explore alternative types of personal injury litigation, such as medical malpractice, to indulge in more financially lucrative litigation; attorneys are purposefully targeting the public and encouraging them to seek legal assistance if they have suffered adverse consequences because of sub-standard medical care. Patients who could

[55] WT Oosthuizen & P Carstens 'Medical Malpractice: The Extent, Consequences and Causes of the Problem' (2015) 78.

[56] J Malherbe (n41 above) 83.

[57] P van den Heever (n12 above).

previously not have afforded to institute proceedings are now assisted by the provisions of the Contingency Fees Act 66 of 1997, that allows for the litigation to be conducted on a 'no win no fee' basis, thus permitting greater access to justice especially for indigent public sector patients. Certain questionable practices have developed, which have perhaps justifiably led to the perception that some lawyers are selfish, greedy and dishonest. Furthermore, the amendments to South African legislation, such as the Road Accident Fund (RAF) legislation, are also to blame as the damages claims for personal injury during a motor vehicle accident are now less profitable for lawyers, causing some to turn to other forms of personal injury litigation, such as medical malpractice.

2.3.2 PATIENT FITTING LEGISLATION

Piennar opines that many legislative provisions enacted over the last two decades place emphasis on patients' rights, thereby entitling patients to institute claims against medical practitioners and service providers to protect these rights[58]**.** This according to van den Heever makes the patients more aware of their rights. In this regard developments in legislation and case law towards patient autonomy have played a significant role.[59] The legislations referred to are, amongst others, The Constitution,[60] The Consumer Protection Act,[61] The National Health Act,[62] The Children's Act,[63] and The Mental Healthcare Act.[64] Briefly, to highlight a few provisions of these Acts, section 49 (2)(c) of the Consumer Protection Act now places a duty on the healthcare facility to draw the patient's attention to an indemnity clause where such a clause purports to exclude liability for any activity that could lead to serious injury to, or the death of a consumer.[65] A potential consequence of this expanded consumer protection may be an increase in

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58 Pienaar ' (n 44 above)19.
59 P van den Heever (n 12 above)
60 The Constitution of the Republic of South Africa Act, 1996.
61 The Consumer Protection Act 68 of 2008.
62 The National Health Act 61 of 2003.
63 The Children's Act 38 of 2005.
64 Mental Healthcare Act 17 of 2002.
65 Pienaar (n 44 above)19.

litigation and a constraint of practitioner freedom.[66] Section 28 of the Constitution read with section 9 of the Children's Act emphasises the importance of the best interest of the child. These rights are an addition to the rights that the children already have in terms of the constitution, i.e the right to dignity,[67] life,[68] integrity,[69] privacy,[70] access to healthcare[71].

2.3 THE APPLICABLE LAW AND COMMON PRACTICE IN AWARDING DAMAGES IN COURTS

The regulatory legal framework in South Africa contributes to the rise of claim values each year. However, the entire legal framework which regulates medical negligence in South Africa will be discussed in greater detail in the subsequent chapter. Briefly, the following portion about damages highlights the contributory factors to the rising medical negligence claims and the immediate need of the law reform in the country.

2.3.1 NON-PATRIMONIAL DAMAGES

The common practice in courts in terms of awarding damages is that reference is derived from previously decided cases as a precedent. Regarding general damages, the plaintiff's legal representatives quote case law where similar injuries were sustained and submissions are made to be granted a bigger award, depending on the number of years that have lapsed since that award and the current estimated value as per inflation in terms of the yearly published quantum yearbook by Robert J Koch.[72]

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66 W. Oosthuizen 'Reconciling patient safety and liability: Lessons from a Just Culture' unpublished PhD thesis, University of Pretoria 2017.

67 Section 10 of the Constitution.

68 Section 11 of the Constitution.

69 Section 12 of the Constitution.

70 Section 14 of the Constitution.

71 Section 27 of the Constitution.

72 R J Koch, the Quantum Yearbook which is published every year.

In the case of *Protea Insurance Company v Lamb*,[73] Potgieter JA held that "there was no hard and fast rule of general application requiring a trial court or a court of appeal to consider past awards." He pointed out that it would be difficult to find a case on all fours with the one being heard, but nevertheless concluded that awards in decided cases might be of some use and guidance. The court in determining the measure of damages considered all relevant factors and circumstances and derived assistance from the general pattern of previous awards. Having done that, the Judge had already stated there was no hard and fast rule to determine the fair and appropriate award, but the previous case law merely provided guidance. It is trite law that the quantum of damages to be awarded to an injured party and the nature thereof is in the discretion of the Court.

The legal representatives abuse this *dicta* in court, and the value in general damages awarded keep rising by tens of thousands each year without any proper basis, and the Courts have allowed it, to a point, as it is common practice in cases of personal injury. It was recommended by Howarth and Hallinan[74] that both general and special damages should be limited The current legal system to award general damages is not sustainable and is perpetuating a problem of rising medico-legal costs that the NDoH is currently facing.

2.3.2 PATRIMONIAL DAMAGES

Currently in SA, the common law position is that a person, or his/her dependant, is only accorded a single indivisible cause of action to recover damages for all loss or damage suffered as a result of the wrongful act causing the disablement or death in the form of the "once and for all rule."[75] This principle has been criticised and is one of the challenges with which the medical negligence litigation is faced.

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73 *Protea Insurance Company v Lamb* 1971 (1) SA 530 (A) at 535B

74 G Howarth & E Hallinan 'Challenging the cost of clinical negligence' (2016) 106 *South African Medical Journal* 141.

75 This was reiterated in the case of *Casely, NO v Minister of Defence* 1973 (1) SA 630 (A) at 642

As highlighted in the first chapter, the Gauteng DoH and the NDoH have been feeling the pinch over the years due to the large payments made to successful litigants in medical negligence claims. Recently, in the case of DZ obo WZ *(Zulu case),* the large amount of R19 970 631.00 was due to be paid to the injured minor for future hospital expenses, which was patrimonial damages. This case highlighted the biggest challenge as far as medical negligence litigation is concerned in South Africa. Briefly the appellant, Gauteng MEC proposed the reform of the form of compensation of the future medical expenses, alternatively the development of the current common law. This was posed in a form of a question to the court whether it was permissible in law to allow a compensation for delictual damages in respect of future medical expenses to be paid as and when they are required, instead of a lump sum? If this was not permissible at common law, whether the common law should not be developed by exercising the powers conferred by sections 39 and 173 of the Constitution of the Republic of SA? This case raised legal questions that had already been extensively debated on academic platforms. The Court dismissed the appeal of the MEC, although it was stated by Honorable J Froneman at paragraph 58 of the judgment that:

> The failure of the appeal does not mean that the door to further development of the common law is shut. We have seen that possibilities for further development are arguable. Factual evidence to substantiate a carefully pleaded argument for the development of the common law must be properly adduced for assessment. If it is sufficiently cogent, it might well carry the day.

The finding of the Constitutional Court in this case does not completely close the door for any possible developments of the law and reform with regard to the form of compensation in damages, and litigation in medical negligence at large. Proper channels must be followed and certain systems and procedures must be adopted from other countries who have entrenched this form of payment as their applicable laws. The focus of this chapter is to highlight the status and challenges that the South African health system is currently faced with concerning litigation and the need to have it reformed.

2.4 THE PUBLIC INTEREST AND INTEREST OF JUSTICE

Masipa J, in the matter of *Mshibi v The MEC for Health of the Gauteng Provincial Government*, case no. 12/32085[76], stated the following:

> I agree that none of the cases referred to is authority for the proposition that damages must be compensated in money only. There is also no authority, at least that I could find, for the view that an award for damages must be in the form of a lump sum. In addition this Court has the inherent power to protect and regulate its own process and to develop the common law, taking into account the interests of justice. The most important question, thereof, what would be the best interest of justice?

The Court in the case quoted above raised an important question for consideration, the interest of justice. As far as the current state affairs is concerned, it is not clear as to whether all the parties implicated in the recent rising costs of medical negligence claims are represented in court; this includes the public at large whose constitutional right to access to healthcare is being indirectly affected. The interest of justice and the public interest are two further issues that need proper scrutiny upon deciding on the legislative intervention and its feasibility thereof.

2.5 CONCLUSION

Having identified the problems that are contributing to the increase in medico-legal claims and the quantum thereof, it is necessary to investigate the possible solutions and the feasibility thereof. The point of departure to consider the most possible solutions would be to analyse the current legal framework, which regulates the medical negligence litigation that has allowed the current status to escalate. This follows in the next chapter.

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[76] *Mshibi v The MEC for Health of the Gauteng Provincial Government, case no. 12/32085*, judgment delivered on 17 December 2015.

Chapter 3: LEGAL FRAMEWORK THAT REGULATES MEDICAL NEGLIGENCE LITIGATION IN SOUTH AFRICA.

3.1 INTRODUCTION

Chapter 2 has highlighted the main challenges that are currently faced by the healthcare sector as far as litigation in medical negligence matters is concerned. The medical negligence matters are litigated in terms of the current applicable legal framework and this chapter will lay such framework down. The feasibility of the proposed legislative intervention will be based on the practicality and the applicability of the current applicable law. The assessment for a need to develop further the law will be discussed and analysed in Chapter 4.

3.2 BROAD SPECTRUM OF THE LEGAL FRAMEWORK IN SOUTH AFRICA

3.2.1 SOUTH AFRICAN LAW.[77]

Broadly, the South African law is divided into International and National and is regulated in terms of the Substantive and the Adjective law. The Substantive Law consists of Public and Private Law, while the Adjective Law consists of the Law of Criminal Procedure, Law of Civil Procedure, the Law of Evidence and finally the Legal Interpretation. The Public Law is divided into The Constitution, the Administrative Law and the Criminal Law, whereas the Private Law is divided into the Law of Patrimony, the Law of Persons, Family Law, Law of Personality and Indigenous Law. The Law of Patrimony is divided into Property Law, Law of Succession, the Law of Obligations and the Law of Intellectual Property. The Law of Obligations is then divided into the Law of

[77] D Kleyn & F Viljoen Beginner's Guide for Law Students 4ed (2010), Juta: Cape Town 210 – 227.

Contract and the Law of Delict, both from which Medical Law litigation can arise and be regulated.

3.2.2 INTERNATIONAL LAW [78]

International Law is the law of nations that consists of the rules that primarily govern the relationships between independent countries. Its rules are created and regulated by international custom or treaties, also known as conventions, by the signing of treaties by states to regulate their relations. These rules can be between two or more states. The United Nations also has the power to lay down these rules and if they are contravened, the International Court of Justice can deal with the matter ('ICJ') without compelling any state to make an appearance before it. This is only applicable to South Africa if it is in line with the Constitution.

3.2.3 NATIONAL LAW

National Law is the body of legal rules, which applies and becomes enforceable to a specific country, i.e. the South African Law. These are legal domestic rules that are only applicable territorially within a specific country and cannot be applicable if a person leaves the country, as it would become foreign law in another country.[79]

3.2.4 SUBSTANTIVE LAW VERSUS ADJECTIVE LAW[80]

In South Africa the law is divided into substantive and adjective laws, which are interdependent on each other. The Substantive Law (Material Law) concerns the legal rights, duties and obligations while the Adjective Law (Procedural Law) prescribes the procedure to follow enforcing the substantive law. Criminal Law for instance is Substantive Law, it concerns the acts which constitute crime, and the criminal

78 Kleyn and Viljoen (n77 above)
79 As above.
80 As above.

procedure prescribes the procedure and manner in which the criminal offender should be prosecuted according to the applicable laws and legislation i.e the Criminal Procedure Act[81]

3.2.5 ADJECTIVE LAW CLASSIFICATION.[82]

Adjective Law consists of the criminal procedure Law, which prescribes the manner in which those who have allegedly committed criminal offences should be prosecuted by the state and the processes followed and complied with in court. Another component is the Civil Procedure Law which governs the procedure to be followed in enforcing a person's rights against another that has allegedly violated them. This can be done by way of instituting a civil claim to recover damages against another person. Further is the Law of Evidence, which determines the legal process which must be followed and the manner in which evidence must be handled to prove facts either in civil or criminal cases, the admissibility and inadmissibility of such evidence thereof. Lastly, the legal interpretation which regulates the interpretation and the intended meaning of legislative provisions.

3.2.6 SUBSTANTIVE LAW CLASSIFICATION: PUBLIC AND PRIVATE LAW[83]

Substantive Law is divided into Public and Private Law. The Public Law regulates the legal relations of between public authorities, public authorities and private individuals, which is a vertical relationship. Private Law determines rights and duties that persons may have and further regulates the relationship between private persons. It finds place in, amongst others, Contracts Law, Family Law, claims for damages and the Law of Estates. The state can also be a party in Private Law matters and the relationship in this instance is horizontal (equal). The state may also be a party in Private Law if it does

81 Criminal Procedure Act 51 of 1977.
82 As above.
83 As above.

not act with any state authority in this instance, but rather as an equal party in the proceedings as any other person.

Private Law has its own Substantive and Adjective Law, briefly the Substantive Private Law is divided into the Law of Patrimony, which regulates the relationship between persons with respect to their means, the Law of Persons determines a person's status and standing in law, Family Law governs the legal rules applicable to family relationships, i.e. it includes, amongst others, marriage, children's custody and dissolution of marriage. The Law of Personality regulates the rights associated with a person and Indigenous Law regulates customary laws and customs that are applicable to specific indigenous communities in South Africa. The state acts without its authority if involved as a party.

The Private Law, through the Patrimony Law, governs the laws that are most applicable in this research. The Law of Patrimony is sub-divided into Property Law, which regulates people's rights over certain objects or things, the Law of Succession deals with people's estates after their death, the Law of Obligations regulates personal rights and obligations, while Intellectual Property Law regulates and protects intellectual property rights that people have on their intellectual properties, i.e patents.

3.3 THE LAW OF OBLIGATIONS

For the purposes of this study, the focus will be on the Law of Obligations, from which the concept of this study is derived. Visser and Potgieter[84] define the Law of Obligations as that branch of Private Law which regulates the creation, content and termination of an obligation. An obligation is a legal relationship between two parties in terms of which the one (creditor) is entitled to performance and the other (debtor) is obliged to render such performance. Sources of obligation among others are contract and delict. Contract is a certain agreement entered into between the parties, where the other party has an

[84] JM Potgieter, L Steynberg & TB Floyd The Law of Damages 3ed JUTA (2012) at 1.

obligation to fulfil the said agreement. In delict, the parties do not agree to anything.[85] A delictual claim arises if elements of delict are all present and proven against a party and the wrongdoer has an obligation to compensate the prejudiced party by way of damages and the prejudiced party has a corresponding right to claim compensation. The elements of delict are act or conduct, wrongfulness, fault (intention or negligence), causation and harm. Medical negligence, which is the subject matter of this research, often arises as a delictual claim and this affords a need for analysis of the elements for the understanding of the applicable law.

3.4 THE LAW OF DELICT

Briefly, David McQuoid-Mason[86] analyses how the claimants must go about proving a delictual claim by meeting all the required elements of delict in order to be compensated as follows: For a successful delictual action, the plaintiff must prove that there was a voluntary act or omission by the defendant, the conduct was unlawful or wrongful (infringed a lawful right, e.g. the right to life or bodily integrity), the defendant had legal capacity (e.g. was not a young child or insane), the defendant was at fault in the form of intention or negligence, the act or omission caused the loss to the plaintiff and the plaintiff suffered loss or damages. Delict constitutes the five mentioned elements, and each of them is explained below.

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85 Visser & Potgieter (2012) at 8.

86 D McQuoid-Mason "Establishing liability for harm caused to patients in a resource-deficient environment" (2010) *South African Medical Journal* 573.

3.4.1 ACT OR CONDUCT

Conduct is a requirement or element of delict and is defined as a voluntary human act or omission. An act is a positive conduct (commission) and an omission is doing nothing. JC van der Walt and JR Midgley [87] explain the difference as follows:

> "In general, the leg nature of the conduct is determined by the particular context in which it occurs. An 'omission' or failure to take certain measures in the course of some activity is therefore not necessarily a form of conduct, but may well indicate that the action was negligently performed. Inaction as a part or a stage of some positive activity can therefore constitute or indicate negligence on the part of the actor; negligence is by definition failure to take reasonable precautions. Many 'omissions' are therefore merely indication of legally deficient positive conduct. To drive a car through a stop street into another car constitutes a course of positive conduct, namely the driving of a car. The failure to stop ('omission') indicates negligent or positive deficient conduct – *culpa in faciendo*. The mere fact that linguistic alternatives enable us to describe the positive occurrence in a negative way (for example 'the driver failed or omitted to stop at a stop street') is legally irrelevant in the determination of the conduct."

JC van der Walt and JR Midgley are of the view that a human action constitutes conduct if it is performed voluntarily, susceptible to the will of the person involved[88], a juristic person, i.e. company or any statutory body may act through its organs (humans) and be held liable for such actions[89]. J Neethling and JM Potgieter [90] further state that an act performed with an order or permission of a director, officer or servant of a juristic person (institution or company) during the exercise of his duties or powers while advancing the interests of the juristic person, is deemed to have been performed by the juristic person, this is termed as vicarious liability in law.

87 JC van der Walt & JR Midgley Principles of Delict 4 ed (2016).

88 JC van der Walt & JR Midgley Principles of Delict (2016).

89 J Neethling & JM Potgieter Neethling-Visser-Potgieter Law of Delict 7 ed (2015) at 26.

90 J Neethling & JM Potgieter Neethling-Visser-Potgieter Law of Delict 7 ed (2015) at 27.

3.4.2 WRONGFULNESS

David McQuoid-Mason contends that that liability for medical malpractice depends on whether there was intentional or negligent wrongful conduct by the parties concerned, or whether they were vicariously liable for the wrongful acts or omissions of others;[91] it is trite law and for liability to follow, conduct must be wrongful. Van der Walt and Midgley hold that wrongfulness lies in the infringement of a legally protected interest in a legally comprehensive way, wrongfulness should be determined in consideration of the relevant facts and circumstances really present, and all the circumstances that really ensued[92].

The Constitutional Court, in the case of *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC)[93], stated that the enquiry to wrongfulness was an after-the-fact, objective assessment. The Court in *Aucamp and Others v University of Stellenbosch*[94] held that in considering whether or not the conduct in question was wrongful, the court was required to make a value judgment. In doing so it must weigh up the interests of the parties and of the community at large against the background of the relevant facts and circumstances. In addition it must strive, impartially and objectively, to apply the values of justice, fairness and reasonableness, while taking into account considerations of good faith (*bona fides*) and good morals (*boni mores*), otherwise known as public policy reflecting the legal convictions of the community.

In medical negligence, matters wrongfulness is determined in consideration of the different facts of each case in full cognisance of the legal convictions of the community criterion, as the law requires.

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91 D McQuoid-Mason "Establishing liability for harm caused to patients in a resource-deficient environment" (2010). (2010) 100 *South African Medical Journal* 573.

92 J Neethling & JM Potgieter Neethling-Visser-Potgieter Law of Delict (2015) at 33.

93 *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) 139.

94 *Aucamp And Others v University of Stellenbosch 2002* (4) SA 544 *(C).*

3.4.3 FAULT (INTENTION OR NEGLIGENCE)

The third element to be proven for the establishment of delictual liability is fault which comes in two forms, namely intention and negligence. These two forms of fault refer to the legal blameworthiness or the reprehensive state of mind of someone who has acted wrongfully.[95] This current study investigates the law that currently regulates the medical negligence; therefore intention as a form of fault is not the subject of discussion for the purposes of this research. Negligence, in general, is when a reasonable person would have foreseen the likelihood of harm and taken steps to prevent it.[96] Van der Walt and Midgley describe negligence as follows, "Conduct is negligent if the actor does not observe that degree of care which the law of delict requires. This involves a value judgment which is made by balancing various competing interests. The standard of care which the law demands is ordinarily that which a reasonable person ...in the position of the defendant would exercise in the same situation." Neethling, Potgiter and Visser[97] state that "In the case of negligence, a peron is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving sufficient attention to his actions, he failed to adhere to establish whether a person has acted carelessly and thus negligently failed to adhere to the standard of care required of him." The test for determining negligence is that formulated by Holmes JA, in *Kruger v Coetzee*.[98]

'For the purposes of liability, culpa arises if–

(a) a diligens paterfamilias in the position of the defendant–

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss;

(ii) would take reasonable steps to guard against such occurrence;

(b) the defendant failed to take such steps.'

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95 J Neethling & JM Potgieter Neethling-Visser-Potgieter Law of Delict (2015) at 129.

96 D McQuoid-Mason (n91 above).

97 J Neethling & JM Potgieter Neethling-Visser-Potgieter(n95 above).

98 *Kruger v Coetzee* 1966 (2) SA 428 (A) at 431.

The Court stated further that the reasonable steps to be taken by a reasonable person depend on the circumstances, there is no hard and fast basis laid down in law.[99]

David McQuoid-Mason makes the following examples to constitute medical negligence under specific circumstances, "Where hospital managers know that patients will be harmed if they do not take steps, which reasonable managers could take to prevent such harm, and fail to do so, they will be liable for foreseeable harm caused to patients. Therefore, healthcare managers could be held liable for negligently failing to repair or replace medical equipment or obtain the required medical items (including drugs) when resources were available, or when they negligently diverted resources from healthcare services and patients suffered harm as a result.

3.4.4 HARM (LOSS OR DAMAGE)

Visser and Potgieter[100] attach the following synonyms to damage, namely loss, harm, injury, detriment and prejudice. Moseneke DCJ, in the constitutional case of *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as amicu curiae)*,[101] stated that 'Damage is not defined in any legislation and its meaning is collected from the common law.' Visser and Potgiter define damage as 'The diminution as a damage-causing event, of the utility or quality of a patrimonial or a personality interest in satisfying the legally recognised needs of the person involved.'[102] Damage is also defined as prejudicial impact upon a patrimonial or personality interest regarded worthy of protection by the law.[103] The Court further held that an award of damage is made to place, to the fullest possible extent, the injured party in the same position she or he

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99 *Kruger v Coetzee* at 431, J Neethling & JM Potgieter Neethling-Visser-Potgieter Law of Delict (2015) at 129.

100 Law of Damages 2012 at 52.

101 *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as amicus curiae)* 2006 4 SA 230 CC at 23.

102 J Neethling & JM Potgieter Neethling-Visser-Potgieter Law of Delict (2015) , Potgieter, Stynberg & Floyd Law of Damages 2003.

103 J Neethling & JM Potgieter Neethling-Visser-Potgieter Law of Delict (2015).

would have been in, but for the wrongful conduct,[104] and this may arise due to delict or a breach of contract.

In the case of *Administrator, Natal v Edouard*, Thirion J held that in our law a breach of contract does not give rise to a claim for non-patrimonial ('intangible') damages.[105] A party can only claim patrimonial damages if a claim arises from a contract. Non-patrimonial damage cannot be claimed on the basis of breach of contract. However, this study is focused on medical negligence, which arises from delict as a basis of liability. Van Heerden JA in the Appeal Court held that our Courts have, in later years, consistently indicated that only patrimonial loss may be recovered both in contract and in delict.[106] In delictual claims, if liability is proven, a party can claim both patrimonial and non-patrimonial.

Damages are distinguishable between two types, namely patrimonial and non-patrimonial, as discussed in Chapter 2. Briefly, patrimonial damages are calculable in money and are also referred to as special damages in practice.[107] Visser and Potgieter[108] define patrimonial damages as the diminution in the utility of a patrimonial interest in satisfying the legally recognised needs of the person entitled to such interest,[109] while they define non-patrimonial damage, also referred to as general damages, as the diminution in quality of the highly personal interests of an individual in satisfying his or her legally recognised needs which does not affect that person's patrimony.[110]

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104 *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as amicus curiae)* n101 above.

105 *Administrator, Natal v Edouard* 1990 (3) SA 581 A at 6.

106 *Administrator, Natal v Edouard* at 41.

107 *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as amicus curiae)* n101 above.

108 Visser & Potgieter 2012.

109 i.e loss of earnings, loss of support, medical expenses which are both pure economic losses.

110 i.e shock, pain and suffering, disfigurement, loss of amenities of life which affect the plaintiff's health.

In the South African Law, it is trite that there is a 'once and for all' rule applicable in the award of damages. This rule is derived from English Law and has been applied in South African Law for so long that it can no longer be denounced based on its historical foundation.[111] According to Boberg,[112] "Once and for all" rule entails that a wrongful act gives rise to a cause of action for all the damages, including past and future damage that it causes. This then means that the plaintiff cannot claim compensation piecemeal for his various losses as they occur, instead he must sue "once and for all" for the whole of his damage, seeking redress not only for the harm he has already suffered, which is actual or accrued loss, but also for the harm he expects to suffer in the future (prospective loss). The "once and for all rule" will be explored further in the next chapter.

3.4.5 CAUSATION

In law for there to be delict, there has to be a *causal nexus* between conduct and damage.[113] Causation is one of the elements of delict, Visser and Potgieter[114] states that there can be no delictual liability if it is not proved that the conduct of the wrongdoer or defendant caused the damage to the person suffering the harm. In the case of *Muller v Mutual and Federal Insurance Co. Ltd*,[115] the Court differentiated between two of the elements of causation: factual causation and legal causation. It was stated that "The problem of causation in delict involves two distinct enquiries. The first is whether the defendant's wrongful act was a cause of the plaintiff's loss ("factual causation"); the second is whether the wrongful act is linked sufficiently closely to the loss for legal liability to ensue ("legal causation" or remoteness)."

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111 Law of Damages 2012 at 153. See also Van Der Walt *Die Sommeskadeleer en die "Once and for All"-reël* (LLD thesis 1977 UNISA).

112 Boberg PQR *The Law of Delict I*: Acquilian Liability (1984): at 476

113 Law of Damages 2012 at 183; *First National Bank of South Africa Ltd v Duvenhag*e 2006 5 SA 319 SCA at320.

114 Visser & Potgieter 2012 at 184. See also Boeberg Delict at 380 where it was explained as follows: "[T]he defendant is not liable *unless* the conduct *in fact* caused the plaintiff's harm".

115 *Muller v Mutual and Federal Insurance Co*. Ltd 1994 (2) SA 425 (C) at 449F-449G.

In the case of *Minister of Police v Skosana*,[116] the Court stated that "Causation in the law of delict gives rise to two distinct problems. The first is a factual one and relates to the question of whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim. If it did not, then no legal liability can arise and *caedit quaestio.* If it did, then the second problem becomes relevant, viz. whether the negligent act or omission was linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm was too remote. This is basically a juridical problem in which considerations of legal policy may play a part".

It must be remembered that the other aspect of proving medical negligence is to establish at law that the breach of the appropriate duty of care to the patient actually caused an injury. In other words, that the damage alleged by the patient has been caused by the breach of duty of care. Proving this aspect of the claim is called "establishing causation." If the injury, loss or damage would have happened regardless of the breach of the duty of care, then no compensation can be claimed. It is necessary for the patient to show that it was more probable than not that the breach of the duty of care caused the injury and the loss and damage that flowed from the injury.[117]

The test for factual causation although not in all circumstances is, the *causa (conditio) sine qua non,* where the plaintiff must show that the harm would not have arisen but for the actions or omissions of the defendant. Conversely, the Courts have to decide the question of legal causation on the basis of a number of factors that relate essentially to public policy, which is informed by the values and principles of the Constitution.[118]

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116 *Minister of Police v. Skosana* 1977 (1) SA 31 (A) at 34E-35D.

117 "Establishing "causation" is a major aspect of medical negligence claims" Law Talk Blog (16-04-2016) https://www.andersons.com.au/lawtalk/2016/april/causation-in-medical-negligence/ accessed on 13 April 2019.

118 LC Coetee and PA Carstens 'Medical Malpractice and Compensation in South Africa' (2011) 1263 *Chicago Kent Law Review* 1288.

3.5 CONCLUSION

Medical negligence litigation and damages in South Africa is broadly governed by the legal framework outlined above. Every element of delict plays a major role in litigation for the court to reach a decision on the balance of probabilities. If all elements are successfully proven by the plaintiff in court, that is when the court is faced with the duty of determining the quantum based on proven damages suffered by the plaintiff as a successful litigant. The parties have to prove mostly by way of expert of evidence the amount due to plaintiff and all proven damages are paid “once and for all.”

This has presented challenges in medical negligence litigation, as laid out in Chapter 2, and this issue has been canvassed by the Constitutional Court in the case of *DZ obo WZ.* The next chapter will analyse this case thoroughly in consideration of feasibility of legislative intervention to reform the law in this regard.

Chapter 4: CONSTITUTIONAL LAW PROVISIONS AND IMPLICATIONS AGAINST THE BACKDROP OF THE MEC FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG v DZ OBO WZ CASE 2018 (1) SA 335 (CC)

4.1 INTRODUCTION

Having discussed and laid out the applicable legal framework in the medical negligence matters in South Africa in the previous chapter, this chapter seeks to determine the feasibility of the development of the law in order to cure the identified issues that surround the medical negligence litigation in the country. This research proposes for the development of the law to be done by way of developing a legislation seeing that the courts have not developed the common law which currently regulates this field of law in litigation. The Constitutional Court in the case of DZ obo WZ, which has been discussed extensively above, was not presented with factual evidence to influence its decision to order for the common law to be developed. What could be other ways? This chapter looks into that.

4.2 THE SIGNIFICANCE OF FACTUAL EVIDENCE AS A BASIS FOR THE DEVELOPMENT OF LAW

The issues and challenges amongst others in the healthcare sector, especially in the government sector, have been discussed in Chapter 2 and it has also been highlighted how some of those affect other ordinary citizens from getting satisfactory healthcare in the public hospital facilities. It cannot be constitutionally justifiable for people to not get medical or healthcare in the hospitals due to depletion of funds. It has been highlighted how the budget is made and how the money is likely to get spent, mostly on medical negligence claims and neglecting the public's healthcare needs in the process. Having said that, there is still no tangible factual evidence showing and breaking down how

much ends up being spent on medical negligence claims as opposed to healthcare needs in the public facilities in a particular year. This is contrary to the comments of Froneman J in the finding of the DZ obo WZ case above, where he stated that "Factual evidence to substantiate a carefully pleaded argument for the development of the common law must be properly adduced for assessment."[119]

In context, the Court in the above case would have worked better if there was a very extensive research where interviews were held and data was collected, which could have included conducting case studies and any form of research in which evidence could have been gathered to assist the courts to see the link between poor healthcare facilities and the paid out exorbitant medical negligence claims. That would have been a significant enquiry. The Court would have been in a better position to draw a justifiable inference, possibly decide for the common law to be developed and order for the legislative intervention.[120]

Section 39(2) of the Constitution states that:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Ackerman and Goldstone JJ, in the case of *Carmichele v Minister of Safety and Security and Another*,(*Carmichele* case)[121] stated that "It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation."

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119 See footnote 8 above.

120 See footnote 21 above.

121 *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) at par 56.

The Judges in the *Carmichele case* [122] went on and formulated a two stage enquiry that the Court needs to undertake when a need to develop the common law arises as follows:

> The first stage is to consider whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives. This enquiry requires a reconsideration of the common law in the light of section 39(2). If this enquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives.

In the case of *Thebus and Another*,[123] Moseneke J laid out instances where a need for the development of common law could arise and stated that:

> It seems to me that the need to develop the common law under section 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the "objective normative value system" found in the Constitution.

Development of the law is not discretionary upon the courts, it is up to the litigants through their legal representatives who seek such development to bring a solid argument before court, which will be supported by factual evidence where required and leave the Court with a legal obligation to bring about that development to the law. Rogers J stated in the case of *AD and Another v MEC for Health and Social*

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122 *Carmichele* (n121)par 40.

123 *Thebus and Another v S* 2003 (6) SA 505 (CC) at par 28.

Development, Western Cape Provincial Government[124] that

"It has also been observed that a constitutional principle that tends to be overlooked when generalised resort is made to constitutional values is the principle of legality: Making rules of law discretionary or subject to value judgments may be destructive of the rule of law' (*Bredenkamp & Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 39)"

Rogers J[125] summarised his assessment of the case and evidence and stated:

> In summary, the departure from the common law, which the defendant contends for in this particular case (ie a solution following the form of its proposed trust deed), has not been shown to be a development which will promote or enhance any rights or duties in the Bill of Rights. A more radical departure, in which the obligation to pay a lump sum is replaced by an obligation to make periodic payments, might promote or enhance certain rights and duties in the Bill of Rights, but is a development that should be left to the legislature.

In the case of DZ obo WZ, the Constitutional Court was faced with the second instance out of the two that were mentioned by Moseneke J, and based on that instance, MEC's legal representatives were arguing for the development of common law. The problem faced in that case was the rule of common law, which currently regulates the medical negligence litigation, is not per se inconsistent with the constitution but falls short of its spirit, purport and objects. The Court needed evidence submitted by the MEC's legal team to assist the Court to be able to make a determination whether the common law that regulates the medical negligence litigation falls short of the spirit, purport and objects of the Bill of Rights, that being section 39(2) of the Constitution. This will demonstrated by way of examples below.

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124 *AD and Another v MEC for Health and Social Development, Western Cape Provincial Government* 2017 (5) SA 134 at par 65.

125 (See n 126 above) 74.

In the case of *Pharmaceutical Manufacturers*,[126] Chaskalson P commented as follows:

> The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims thus, the command that law be developed and interpreted by the courts to promote the spirit, purport and objects of the Bill of Rights. This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system, the Constitution is the supreme law with which all other law must comply.

In the case of *DZ obo WZ*, the Court lacked facts of how it could link the development of the law to the promotion of the spirit, and objects of the Bill of Rights. That could have been done by submitting findings of research done by the MEC. For example, how certain people could not be helped by certain health facilities due to the lack of funds to provide either medication or equipment needed to assist the people and how that led to their death and as a result, deprived of their right to life. Alternatively presented on how other people resultantly could not be afforded emergency medical treatment. However, that could not have been done without showing the lack of funds due to using most of them towards medical negligence claims, as opposed to providing what lacks in the hospitals.

This example then speaks to the right to life and access to healthcare, which would have factually been proven to have been deprived and prompted the Court to develop the law in compliance with section 39(2) of the Constitution. In the *S v Makwanyane*, O' Regan J echoed these historical words:[127]

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126 *Pharmaceutical Manufacturers Association of South Africa In Re: Ex Parte Application of the President of the* RSA 2000 3 BCLR 241 (CC) at par 49.

127 *Makwanyane* (n21 above) par 326-327.

> But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society…The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence; it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.

The right to life is not the only one that could have been demonstrated to have been infringed in the example above but, also the right of access to healthcare accompanied by the right not to be refused emergency medical treatment. The Constitution recognises other rights which must be enforced by the courts. Section 27 of the Constitution provides as follows:

1 Everyone has the right to have access to:

(a) healthcare services, including reproductive healthcare;

(b) sufficient food and water;

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

Examples could have been made in court about the pregnant women who are admitted into hospitals with an urgent need for cesarean surgeries, but there is no equipment due to lack of funds due to payment of exorbitant medical negligence claims, which then leads to their rights to emergency medical care being deprived.

4.3 THE DZ OBO WZ JUDGMENT UNDER THE LENSE OF THE SOUTH AFRICAN CONSTITUTIONAL PROVISIONS

4.3.1 SECTION 2 OF THE CONSTITUTION.

On the emphasis of the provisions of section 27 and 39 discussed above, The Supremacy Clause in section 2 of the Constitution states that “This Constitution is the Supreme Law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” The law regulating the medical negligence claims, particularly the common law principle of “once and for all’ rule, is not accommodative of all South Africans at all times. This principle deals with one individual at the expense of others at the same time. This argument has been analysed in Chapters 2 and 3. The Supremacy Clause declares any law which is inconsistent with the Constitution to be invalid. The common law in this field of law is not necessarily inconsistent with the Constitution; however it falls short of the spirit, purport and object of the Bill of Rights. This indicates a serious call for at least the enactment of legislation to cure the identified gap.

4.3.2 SECTION 7 OF THE CONSTITUTION.

Subsections 1 and 2 of section 7 state that:

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

Contrary to the provisions of this section, the common law principle of "once and for all" rule does not promote, protect and fulfil the right in the Bill of Rights, which is enshrined for all people and not just for those who have successfully proven liability against the state.

4.3.3 SECTION 9 OF THE CONSTITUTION

Section 9 of the Bill of Rights guarantees that everyone is equal before the law and has the right to equal protection and benefit of the law. Common law, standing undeveloped, does not give equal protection. The sick remain vulnerable, while the few individuals are prioritised by virtue of being entitled to compensation.

4.3.4 SECTION 10 OF THE CONSTITUTION

Everyone has inherent dignity and the right to have their dignity respected and protected. O' Regan J states clearly in the *Makwanyane*[128] case above that:

"[T]he right to life is more than existence, it is a right to be treated as a human being with dignity; without dignity, human life is substantially diminished. Without life, there cannot be dignity."

Infringing one's right to dignity is as good as depriving them of their right to life. Turning away thousands of people from a healthcare institution due to lack of means to help them over one individual who has gained millions from compensation is unconstitutional and unjustifiable. Peoples' right to dignity and right to life are infringed more than they are protected each time funds are depleted due to medical negligence claims.

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[128] *Makwanyane* case (n 126) above

4.3.5 SECTION 11 OF THE CONSTITUTION

Everyone has the right to life, not only individuals who are entitled to compensation.

4.3.6 SECTION 173 OF THE CONSTITUTION

The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. The Courts have not found it in the interest of justice to exercise this Constitutional power due to lack of evidence to act as such; however is worth noting that South African Constitutional Court enjoys this discretion.

4.4 COMMUNITARIANISM VERSUS INDIVIDUALISM IN THE LIGHT OF THE BILL OF RIGHTS

It cannot be argued that the rights of the minority must surpass the rights of the majority. The lump sum payments made to the specific individuals for medico-legal claims under the common law principle of the “once and for all” indirectly infringe upon the rights of others; paying medico-legal claims from the same operating budget of hospitals. Jafta J, in the DZ obo WZ[129] case, highlighted the issue of individualism imposed by the common law “once and for all" rule as follows:

> Although the “once and for all” rule, with its bias towards individualism and the free market, cannot be said to be in conflict with our constitutional value system, it can also not be said that the periodic payment or rent system is out of sync with the high value the Constitution ascribes to socio-economic rights. There is no obvious choice at this highest level of justification.

[129] *DZ obo WZ* CC judgment par 54.

What remains a fact, after all the argument, is that in the case of DZ obo WZ the court found against development of the common despite the need to do so, but Froneman J[130] expressed his optimistic view on the state of the matter when he stated that, "The failure of the appeal does not mean that the door to further development of the common law is shut." The status quo remains flawed, as detailed in Chapter 2; what could be the last resort to reform medical negligence litigation and damages in South Africa?

4.5 LEGISLATIVE INTERVENTION AS THE POSSIBLE LAST RESORT TO REFORM THE COMMON LAW AFTER THE CONSTITUTIONAL COURT JUDGMENT AGAINST COMMON LAW DEVELOPMENT IN THE DZ OBO BZ CASE

In the paper published for public comment on the Department of Health website in 2017,[131] under the Ministry or Dr Aaron Motsoaledi, the legal fraternity at large voiced their concerns and a lot of recommendations were raised, as highlighted in Chapter 1, but mainly for the purposes of this paper the focus is on legislative intervention considering that the judicial common law development did not succeed. The law which regulates the medical negligence litigation has come under scrutiny over the past few years and raised a debate on the possible development of the common law. The reasons amongst others have been shown in Chapters 2 and 3. The Courts are not against the development; however they have left it in the hands of the legislature, as according to Ackerman and Goldstone JJ, "It is the major engine for law reform and not the judiciary."[132] Prior to the *Carmichele* case, Judge Kentridge, in the Constitutional Court case of *Du Plessis and Others v De Klerk and Another*,[133] had already borrowed a

130 See n 9 above.
131 See n 1 above.
132 *Carmichele* (n 120 above) par 21.
133 Du *Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at par 61.

dictum from Iacobucci J of the Canadian Court, in the case of *R v Salituro*,[134] where the Court stated that:

> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law. In a constitutional democracy such as ours, it is the Legislature and not the courts which has the major responsibility for law reform. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

It is perhaps worth investigating at this point how other countries have managed to tackle the issue. South Africa is not the only country dealing with the increase in medical negligence cases in the world.[135] Studies show that in China, medical malpractice litigation has become much more common than previously reported, and between 2010 and 2015, similar increases in the annual numbers of cases of medical malpractice litigation have been observed in Japan, Mexico and the USA.[136] The SALRC,[137] having cited *Denher and Others*,[138] state that "Apart from Canada, Courts in countries such as the United States of America, United Kingdom, Australia, New Zealand, Finland, France, Germany, Luxembourg, Portugal, Spain and Sweden are empowered to order defendants to pay damages for certain future losses in periodic payments or in a lump sum."

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134 *R v Salituro* (1992) 8 CRR (2d) 173.

135 SALRC paper 33 (n 1 above) at 40.

136 Z Wang 'Records of Medical Malpractice Litigation: A Potential Indicator of Health-care Quality in China' (2017) *Bulletin of the World Health Organization* https://www.who.int/bulletin/volumes/95/6/16-179143/en/ accessed on 25 October 2019.

137 SALRC paper 33 (n 1 above) at 30.

138 *JJ Dehner et al* Structured Settlements and Periodic Payment Judgments (2005) 1-37 to 1-40.

4.5.1 COURSE OF ACTION ADOPTED BY OTHER COUNTRIES

4.5.1.1 CANADA

Canada is reported to have been the first country to use structured settlements and periodic payments for personal injury claims.[139] This followed after a specific company was sued after children by different mothers, who were using Thalidomide during pregnancy, were born with bodily defects which included not developing limbs and developing as unborn babies.[140] The drug company could not afford to pay the lump sum payments in full, therefore it opted for payment of claims through structured settlements, undertaking to make periodic payments to the victims over the course of their [141]lifetimes. In 1989, in the case of *Watkins v Olafson*,[142] the Supreme Court of Canada refused an application to change the lump-sum rule on the basis that such a significant change should be left to the legislature. Later in 1990, the Ontario Courts of Justice Act was enacted in the State of Ontario, Canada, which made it compulsory in terms of section 116 to order that damages for future care costs be satisfied by way of periodic payments in the event of a medical malpractice action where the award exceeded a certain amount.[143]

4.5.1.2 UNITED KINGDOM

In United Kingdom, specifically England and Scotland, the common law adopted the lump sum rule until in terms of Section 2(1) of the Damages Act 1996,[144] the English courts were given the power to make orders for periodic payment if both parties

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139 SALRC paper 33 (n 1 above) at 40

140 As above.

141 As above.

142 *Watkins v Olafson 1989 CanLII 36 (SCC),* [1989] 2 SCR 750.

143 SALRC paper 33 (n 1 above) at 40, cited Denher and others (n135 above).

144 Section 2(1) states that: A court awarding damages in an action for personal injury may, with the consent of the parties, make an order under which the damages are wholly or partly to take the form of periodical payments.

agreed.[145] As opposed to what was argued and proposed by the DoH in the DZ v WZ case, the English Courts did not order the periodic payments to be made as and when required, this was to avoid disputes which may then overburden the courts with recurring disputes of payment in the same matter, which was also a point of concern in the DZ v WZ case. The English legislature instead intervened by way of Sections 100 to 101 of the Courts Act 2003,[146] which substituted the relevant provisions of the Damages Act. This Act entitles the courts, following a full enquiry into damages, to make an order for periodic payments, which are annually adjusted in accordance with the retail prices index unless the court orders some other index to apply and the Court is required to be satisfied that the periodic payments are reasonably secure.[147]

4.5.1.3 AUSTRALIA

The common law lump sum principle was applicable in Australia. The High Court of Australia in the 1981 case of Todorovic v Walter [148] stated that:

> Certain fundamental principles are so well established that it is unnecessary to cite authorities in support of them. In the first place, a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries. Secondly, damages for one cause of action must be recovered once and forever, and (in the absence of any statutory exception) must be awarded as a lump sum; the court cannot order a defendant to make periodic payments to the plaintiff. Thirdly, the court has no concern with the manner in which the plaintiff uses the sum awarded to him; the plaintiff is free to do what he

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145 *AD and Another v MEC for Health and Social Development, Western Cape Provincial Government* (n 124 above) at par 67.

146 Courts Act which substituted some of the provisions of the Damages Act of 1996.

147 *AD and Another v MEC for Health and Social Development, Western Cape Provincial Government* at par (n 124 above) 67-68.

148 *Todorovic v Walter* [1981] HCA 72 at par 6.

likes with it. Fourthly, the burden lies on the plaintiff to prove the injury or loss for which he seeks damages.

In 2002 that position changed when the Civil Liability Act of 2002 was enacted and provided for structured settlements when dealing with awards of personal injury damages. In terms of the Act, structured settlement refers to an agreement that provides for all or part of the damages agreed or awarded to be paid in the form of periodic payments funded by an annuity or other agreed means.[149]

It is noted that it took the legislature to intervene and develop the law that would regulate the payments done periodically. It is something that the Courts did not decide on, just like in the South African Courts, as it was a struggle to do.

4.5.1.4 IRELAND

On the 18th February 2010, in Ireland, the President of the High Court established a Working Group on Medical Negligence and Periodic Payments to address him on the following terms:[150]

1. Examining the present system within the courts for the management of claims for damages arising out of alleged medical negligence and to identify any shortcomings within that system.
2. Making recommendations to the President as may be necessary in order to improve the system and eliminate shortcomings.
3. Considering whether certain categories of damages for catastrophic injuries can or should be awarded by way of Periodic Payments Orders and to make such recommendations to the President as may be necessary.

[149] SALRC paper 33 (n 1 above) at 42; Australian Civil Liability Act of 2002.

[150] Report of the Working Group on Medical Negligence and Periodic Payments (Module 1) at 3.

4. Providing the President with such draft Legislation, Regulations, and Rules of Court as may be necessary to give effect to the Working Group's recommendations.

Eight months later, on the 29th October 2010, The Working Group presented their recommendation, which briefly was:[151]

Legislation should be enacted to empower the courts, as an alternative to lump sum awards of damages, to make consensual and non-consensual periodic payment orders to compensate injured victims in cases of catastrophic injury where long term permanent care will be required, for the costs of (a) future treatment (b) future care and (c) the future provision of medical and assistive aids and appliances.

Following such recommendations by the working group, the Civil Liability (Amendment) Act 2017 was passed in November 2017.[152] Rebecca Ryan[153] in an analysis of the Act states that:

> The act addresses issues raised by the Working Group on Medical Negligence and Periodic Payments, particularly the deficiencies underlined in the lump sum system. Importantly, and after significant delays, the act provided for the Irish courts to award periodic payment orders (PPOs) in cases where a plaintiff has suffered catastrophic injuries. However, the relevant parts of the act required commencement by ministerial order before this new power could be invoked by the courts. After a further delay of nearly a year, this order was ultimately signed by

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151 Irish Working Group Report at 7.

152 Rebecca Ryan "Periodic Payment Orders in Catastrophic Injury Cases" (2019-04-23) https://www.matheson.com/news- and-insights/article/periodic-payment-orders-in-catastrophic-injury-cases accessed 26 October 2019.

153 "Periodic Payment Orders in Catastrophic Injury Cases" (2019-04-23)

the Minister for Justice and equality in October 2018, marking the formal introduction of the long-awaited PPOs in Ireland.

The Irish Government followed through after the concerns and recommendations were raised by the Working Group as requested and already a first periodic payment order was approved in February 2019.[154] The common solution, in all the countries mentioned, is legislative intervention, the payments for plaintiffs are not ordered by way of common law but the provisions of a developed legislation are followed and applied. However this does not mean that their systems are without any disadvantages, they are just better systems than the South African system of the lump sum rule, which is more disadvantaged.

4.5.2. ADVANTAGES AND DISADVANTAGES OF A LUMP SUM RULE

4.5.2.1. ADVANTAGES OF THE LUMP SUM PAYMENTS

The lump sum payment resolves the matter conclusively and brings certainty in the resolution of the claim.[155] The 'once and for all' rule, which regulates the judicial process in South Africa, prohibits multiple lawsuits based on a single cause of action. Corbett J, in the case of *Elvins v Shield Insurance*,[156] defined the "once and for all" as follows:

> "Expressed in relation to delictual claims, the rule is to the effect that in general a plaintiff must claim in one action all damages, already sustained and prospective, flowing from one cause of action." Jafta J, in the DZ obo

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154 "Girl, 13, Becomes First Ever to Receive Annual Lifelong Payments as a Case Settled" Irish Examiner (2019-02-19)https://www.irishexaminer.com/breakingnews/ireland/girl-13-becomes-first-ever-to-receive-annual-lifelong-payments-as-case-settled-906186.html accessed on 26 October 2019.

155 Irish Working Group Report at 15.

156 *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835 C-D

WZ[157] case, stated that what the "once and for all" rule in our context means is that all damages arising from one cause of action be claimed in one action, and presumably determined in that same action, in order to avoid multiple actions.

4.5.2.2 DISADVANTAGES OF THE LUMP SUM PAYMENTS

The prediction of life expectancy can never be accurate. Resultantly, there is recourse for a plaintiff who exhausts his funds by exceeding his projected life expectancy. It is therefore certain and inescapable for the wrong amount to be paid as lump sum for future care under assumed circumstances. Equally so, a defendant has no recourse if a large lump sum is paid to a plaintiff who succumbs to his injuries earlier than expected.[158] Lord Steyn, in the English case *Wells v Wells*,[159] identified some of the shortcomings in the common law lump sum rule and stated:

> [t]here is a major structural flaw in the present system. It is the inflexibility of the lump sum system, which requires an assessment of damages once and for all of future pecuniary losses. In the case of the great majority of relatively minor injuries the plaintiff will have recovered before his damages are assessed and the lump sum system works satisfactorily. But the lump sum system causes acute problems in cases of serious injuries with consequences enduring after the assessment of damages. In such cases the judge must often resort to guesswork about the future. Inevitably, judges will strain to ensure that a seriously injured plaintiff is properly cared for whatever the future may have in store for him. It is a wasteful system since the courts are sometimes compelled to award large sums that turn out not to be needed.

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157 DZ obo WZ (n 2 above) par 77.

158 Irish Working Group Report at 11.

159 *Wells v Wells* [1998] 3 All ER 481 (HL) at 384.

4.5.3 ADVANTAGES AND DISADVANTAGES OF PERIODIC PAYMENTS

4.5.3.1 ADVANTAGES OF PERIODIC PAYMENTS

Some of the advantages highlighted in the English system following the enactment of the Damages Act 1996, followed by the amendment in terms of the Courts Act 2003, are as follows:[160]

Regular payments rather than one lump sum make it easier for the injured person to budget and manage funds and care costs. There is no worry that the money will run out. A lump sum award is based on the estimated life expectancy of the injured person; often this can be a point of contention between the parties. The Defendant is likely to argue a lower life expectancy, in order to pay a lower lump sum. Periodical payments will continue for the injured person's lifetime even if the injured person lives longer than expected. If an injured person's condition deteriorates or they develop an additional condition (such as epilepsy) as a result of the initial injury, then they can apply to the court to vary the PPO and increase the payments.

4.5.3.2 DISADVANTAGES OF PERIODIC PAYMENTS

The Pearson Commission was also concerned about the additional cost of administering claims which would ensue, and by what it considered was the injustice of imposing a continuing liability on a defendant over many years, which would likely rise with inflation and would reduce the prospect of early settlement of the claim as opposed to lump sum payments.[161]

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160 S. Grose Periodical Payments in Serious Injury Claims (2019-02-11) https://knowledge.mooreblatch.com/blog/periodical-payments-in-serious-injury-claims) accessed on 26 October 2019.

161 Irish Working Group Report at 22; Royal Commission on Civil Liability and Compensation for Personal Injury ("the Pearson Commission").

4.6 CONCLUSION

The Constitutional Court in the landmark case of DZ obo WZ refused the DoH an order to make periodical payments for prospective payments or future medical expenses as and when required after being supplied by a quotation by the plaintiff. The Court further refused to develop the common law to make such a provision mainly due to the lack of extensive research and evidence by the DoH. The Court could not overstep its mandate and make the law as it is a tribunal, there to interpret the law. It has been shown that the current applicable common law is not in line with section 39(2) of the Constitution. The Courts are not opposed to the development of the law and this matter, which should not be left unresolved, and there are prospects of the reformation of the law in this regard. The strategies adopted by other countries have been discussed concerning legislative intervention and the next chapter explores the feasibility of similar strategies. The State Liability Amendment Bill was published in May 2018. What is it feasibility? The next chapter seeks to answer that question and make recommendations in conclusion.

Chapter 5: CONCLUSION AND RECOMMENDATIONS

5.1 FEASIBILITY AND PROSPECTS OF LEGISLATIVE INTERVENTION TO REFORM THE LAW IN SOUTH AFRICA

Ireland, just like South Africa, was faced with Lump Sum Payment deficiencies and it took (seven) 7 years, between 2010 and 2017, to pass legislation to make provision for periodic payments which had been recommended by their Working Group report upon request by the President of the High Court.[162] It took almost another year period to obtain a ministerial order signed by the Minister for Justice, and equality as was provided in the Act.[163] It was only in February 2019 that the Court managed to grant a periodical payment order in terms of legislation. The problem of lump sum deficiencies was identified, the Courts could not act outside of their powers and recommendations were sought from the Working Group, which provided a well researched report. The law makers of Ireland followed their procedure, which took less than a decade to see the legislation being enacted and implemented. The other three countries discussed allowed their legislatures to intervene by enacting Acts to regulate the process in courts.

In comparison to South Africa, the deficiencies have been identified by scholars, the Courts, the public, the legal and medical fraternity at large. The Minister of Health together with the Minister of Justice and Constitutional Development both approached the South African Law Reform Commission to do research and investigate the medico-legal claims, which had become problematic, as highlighted in Chapter 2. In 2017, the public made recommendations to reform the law; it has been two years since the SALRC made this investigation and published the recommendations. The process of drafting the bill has commenced, if it given the urgent attention that it seeks the State would be liberated from the medico-legal claims common law deficiencies in less than a decade from now.

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[162] See (150 and 151) above.

[163] As above.

5.2 THE STATE LIABILITY AMENDMENT BILL, 2018 AS A RECOMMENDATION

There is progress already made to address the issue of ever increasing medico-legal claims. One of the recommendations by the SALRC was the amendment of the already existing State Liability Act[164] 20 of 1957. The State Liability Amendment Bill was published on 25 May 2018[165] and it proposes that the State Liability Act 20 of 1957 is amended to "provide for structured settlements for the satisfaction of claims against the State as a result of wrongful medical treatment of persons by servants of the State." This proposal seeks to reduce the lump sum payments and better the financial burden on the State to pay for the spiraling medico-legal claims and the State is left with the means to provide healthcare to State health institutions.

The Bill strives to insert Section 2A to the State Liability Act, which will provide that compensation exceeding 1 million against the State to be paid to the injured party in terms of structured settlements and periodic payments,[166] and payments for future care, future medical treatment and future loss of earnings be paid at intervals of once a year until the death of the injured party. The Court may, in lieu of the amount or at a reduced amount, order the State to provide such treatment to the injured party at a public health establishment, which is in compliance with the norms and standards of the Office of Health Standards Compliance. If the future medical treatment has to take place in a private healthcare institution, the State would be liable to pay up to what it would have paid had the treatment taken place in a public institution.

164 SALRC paper 33 (n 1 above) at 42; State Liability Act 20 of 1957.

165 Government Gazette No. 41658 of 25 May 2018

166 See the Object of the State Liability Amendment Bill.

5.3 CRITICAL ANALYSIS OF THE THE STATE LIABILITY AMENDMENT BILL, 2018

The State Liability Amendment Bill 2018, as it stands is not without flaws although it remains strongly recommended, after all it is still at the developing stage. The following are some of the flaws in the Bill so far:

- The Bill does not cater for injured parties who would opt to get their future medical treatment at private healthcare institutions. The State would pay the costs as if they are at a public healthcare institution, leaving the balance, if there is any, for the injured party to pay. This provision imposes a condition on the compensation of the injured party who would have successfully proven liability against the State.

- The Bill is still silent about the litigation budget and the proven claims compensation would still be paid from the budget meant for operation of hospitals. This does not bring much of a relief to the hospital budget, which has suffered over the years paying for litigation costs at the expense of the smooth operation of the day to day functioning of the hospitals and service to the public.

- The countries considered in comparison, and from which this Bill is adopted, are of a better socio-economic status than South Africa, which is still a developing country. The implementation of the Bill may be more challenging for South Africa due to those circumstances.

The Bill, with its flaws, remains the best step towards the right direction, which is to promote the spirit, purport and object of the Bill of Rights, if it closes the gap that the common law has with Section 39(2) with the Constitution, it is therefore a great step towards reformation of the law. Most Acts get to be amended where flaws are identified

and this will be one of those cases for a greater cause which is to relieve the state of a financial burden which deprives its citizens of their fundamental rights.

5.3 FEASIBILITY PROSPECTS OF THE RECOMMENDED LEGISLATIVE INTERVENTION

Legislative intervention as a possible reformation of the medical negligence litigation in South Africa has been suggested by the legal fraternity. The Bill process has begun, it is not flawless but has great potential for bringing more solutions than problems to the medical negligence litigation and payment of damages as it is adopted from the trialed and tested systems of first World Countries. It is concluded that with time and improvement, the Bill can be implemented as one of the long awaited solutions to the problem and it will develop into legislation solid enough to be enacted and reform medical negligence and litigation in South Africa. The risks that come with enactment of the legislation will deliver a greater return than where the country is in terms of this specific field of law. This is a process which could take years while the Government is preyed upon by lawyers who make huge claims to be awarded all at once, based on inaccurate estimations.

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