COMMENTS SUBMITTED BY THE LAW SOCIETY OF SOUTH AFRICA TO THE SOUTH AFRICAN LAW REFORM COMMISSION ON DISCUSSION PAPER 154: PROJECT 141: MEDICO-LEGAL CLAIMS

The Law Society of South Africa (LSSA) constitutes the collective voice of the approximately 30 000 attorneys within the Republic. It brings together the Black Lawyers Association, the National Association of Democratic Lawyers and nine provincial attorneys' associations, in representing the attorneys' profession.

INTRODUCTION

The South African Law Reform Commission (SALRC) reports that:

"The extent of medical negligence litigation against the State has reached a level where it is adversely prejudicially impacting in a serious manner on service delivery in the public health sector and endangering the constitutional right to have access to health care services".

However, when describing the South African legal landscape in chapter 2 of Issue Paper 154, the follow observation is made:-

"Due to failures at National Government level and the very real danger of the collapse of some provincial departments of health, the ghost of litigation based on constitutional infringements, including the right of access to health care services, could become a reality if systemic problems in the public health sector and concerns about the quality of public health care services are not addressed".

In chapter 5, which summarises responses and comments to Issue Paper 33, extracts from a submission made by Ms Trudy Kaseke (one of the advisory committee members to SALC for Discussion Paper 154) are quoted at length on pages 191 to 194. Salient points made in this submission relate to the poor quality of public health services, the fact that health care authorities are in denial with regard to the failure of the health care system and the fact that health care authorities lack understanding of relevant legislation. She points out that poor health service deliveries are caused by systems failure and human failures which require intervention by health care authorities from national government and the persons in charge of health care in the provinces and local government. This, coupled with the rising patient numbers and the lack of planning on how to deal with this, has imposed a burden on health care resources, compounding poor health care service. The following statement is of particular relevance:-

"5.136 The government do not prioritise implementing existing medical negligence solutions, preferring to blame lawyers and the Contingencies Fees Act for the health care crisis. Health authorities should do some introspection, improve their own systems and improve patient safety strategies at all levels of care. Poor coordination between different health care units / divisions cause unnecessary delays, for example between trauma units and dispatches of emergency medical services".

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"5.1.38 Consequence management is a foreign term in the health care system. There is a lack of coordination between what is happening on the ground and what appears on paper. Failure to comply with health legislation contributes to the enormous increase in medical negligence litigation, yet health authorities seem to believe that scrapping the human rights that underpin legislation like the Contingency Fees Act will stop the rise in litigation. The NDOH fails to give guidance and direction on policies that are critical to ensuring quality care and promoting patient safety. Provinces are left to use their own discretion when implementing cross-cutting policies without oversight from NDOH".

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In seeking to propose a solution the SALRC states on page 349:

"9.3 It is proposed that a system be developed that starts at the hospital when a serious adverse event occurs, through prescribed compulsory procedures to attempt early resolution, ending in compensation that provides fair restitution to the aggrieved health care user without bankrupting and eventually crippling the public health system".

In chapter 6 of the Discussion Paper the SALRC records that, as a law reform body, it is limited insofar as it cannot propose changes beyond the scope of the law. It records that issues relating to quality health care services have been dealt with extensively by a range of reports, published investigation results, declarations and other publications since 2009. **The only issue that is still outstanding is full implementation of these documents.**

Clearly, any approach to the crisis currently prevailing in public health has to be a holistic one and the recommendations of the SALRC in this regard pertaining to the law are merely a component of a bigger solution.

Any court examining legislative changes to implement a solution aimed at merely curtailing the outflow of cash to settle claims will do so against the backdrop of the existing health care system and the constitutional duty of the State to provide access to proper health care and the constitutionally protected rights of the injured party to bodily integrity and access to the courts.

Thus, any solution which forces an injured victim back to the very institution that injured him or her in the first place can only be supported if and when that institution is operating efficiently, effectively and can guarantee consistent quality health care of an acceptable standard.

PROPOSED SOLUTIONS

The SALRC recognises the necessity for a holistic approach and underpinning its proposals for a solution to the South African situation is that the quality of health care be improved by implementing the solutions and corrective measures put forward in existing public protector reports, SAHRC reports, Auditor General reports, Office of Health Standards Compliance (OHSC) reports and other government-initiated reports, plans and studies.

"The government will have to find a way to address the problems in the public health sector that goes beyond yet another piece of paper and actually implements the merit of legal instruments and reports already in existence"*.*

It is submitted that until this is done, any attempt to radically change the basis of compensating the victims of medical malpractice is premature. These comments are made in that light.

Record Keeping

The proposals made with regard to record keeping (page 364 to 359) are supported in principle.

Mediation

The LSSA supports voluntary mediation. Failure to agree to mediate can be addressed by a court with an appropriate costs order and should not be a pre-requisite to the institution of proceedings.

Certificate of Merit

The LSSA does not support the proposal that a certificate of merit by an accredited and suitably qualified medical practitioner be a pre-requisite for the institution of action. Such a requirement may well lead to claims prescribing before a Plaintiff is able to obtain a certificate. The costs of obtaining such a certificate are likely to be significant, particularly in complicated matters, which may require a medical practitioner to read voluminous records in order to come to an opinion as to whether a certificate should be issued or not.

Redress

The SALRC does not support no fault compensation. The SALRC proposes that South Africa adopt an administrative compensation system based on the Welsh redress system for smaller medical negligence claims.

The limit of redress payable in terms of the Welsh system is £25 000 (approximately R55 000.00). In the Welsh system the Welsh National Health Service Body, itself, determines whether liability exists and the type of redress to be offered, which can include a contract to provide care or treatment and /or financial compensation or both. Redress is not available to claims which have been the subject of civil proceedings. If a patient wishes to complain about treatment or services a "***concern***" is logged. The Welsh NHS body is obliged to ensure that legal advice is available to the person seeking redress and if an opinion of a medical expert is required it must also obtain this. The findings of an investigation into a ***"concern"*** must be recorded in an investigation report. The health authority deals with a ***"concern"*** as an administrative function and is obliged to ensure that it has arrangements in place to review the outcome of a concern that was the subject of an investigation aimed at improving the system and preventing repeat occurrences. It appears that this is a voluntary process which cannot be followed in the event of civil litigation arising from the ***"concern"***.

The SALRC proposes that once a Plaintiff accepts an offer for redress this will be in full and final settlement of the claim and the Plaintiff cannot thereafter pursue a medical negligence claim in court.

It is not always apparent in the early stages after an adverse event what the true nature and impact of the injuries suffered are. This could result in claims being disposed of by way of limited redress settlements for adverse events which in due course are found to have resulted in life changing consequences and/or require extensive treatment or services not contemplated at the time of settlement. Who will bear the consequences of this?

The costs of setting up and operating appropriate independent bodies for such a system to operate impartially at all state medical facilities will have to be taken into account in assessing the viability of such a system. An administrative process where the very institution that caused the harm is the final arbiter on liability and quantum cannot be supported.

Before a Plaintiff can be bound by a redress award he or she should be provided with independent legal advice in writing which may include an independent medical expert opinion regarding the nature of the ***"concern"***, the potential future consequences as well as the quantum of any damages arising from such event. The costs relative to this should be borne by the DOH.

Pre-action Protocol

The LSSA supports any process whereby costs are reduced and resolution of claims is expedited. Provided that any pre-action protocol does not prevent a Plaintiff from instituting proceedings to interrupt prescription and provided, further, that any pre-action protocol does not unnecessarily delay the resolution of claims, the proposal is supported.

Litigation

The LSSA supports all proposals to limit delays and expedite proceedings. The LSSA does not support the automatic lapsing of a summons on any basis.

Adversarial system and inquisitorial system

The LSSA cannot support the introduction of ***"inquisitorial elements"*** without being appraised of the detail of the elements.

Expert Witnesses

The LSSA supports, in principle, the appointment of joint expert witnesses in routine matters and the appointment of more than one joint experts in more complicated matters. However, these experts should not be limited to those on an official list. The question of the additional costs of such a system would have to be explored.

Appointment of Assessors

The LSSA supports the appointment of assessors in appropriate cases.

COMPENSATION

Public - Private Health Care

The principle of retaining public sector funds in the public health system can only be supported if, and when, the public health system is functional.

To label victims of medical malpractice who have suffered devastating injuries as ***"lucky"*** is, with respect, insensitive. As is reducing the entire legal compensation system to a "***lottery ticket***".

Many victims of medical malpractice find it extremely stressful to have to return to the hospital or other institution where they or their child were injured. To force them to do so will add to their injury.

Having regard to the current state of public health, the LSSA does not support this.

Structured Settlements

The LSSA supports the proposal for structured settlements in relation to future costs only. This head of damages comprises the bulk of many significant awards, particularly in respect of claims for birth defects and other serious permanent injuries.

A similar system operates with claims against the Road Accident Fund where an undertaking is given to pay future costs as and when they are incurred. If, at the time when the treatment, services of equipment is

needed the state can provide same of comparable quality to that available in the private sector, then the costs can be determined accordingly. However, it should be incumbent on the state to prove that it can provide what is needed within an acceptable time frame and of an acceptable standard. If not, then the costs must be determined in the open market.

Future Loss of Income

The LSSA does not support the calculation of loss of income claims based on average national income or average income for the area where the claimant lives. The capping of maximum lumpsum awards for future loss of income, similar to that applied in Road Accident Fund claims, could be supported.

Capping Certain Categories of Damages

The LSSA does not support the capping of general damages.

Periodic Payments

The LSSA is of the view that periodic payment should only relate to future medical and related expenses as and when the need arises as per the system currently operating in respect of Road Accident Fund claimants.

Administration of Periodic Payments

As the LSSA supports periodic payments only for future medical and related expenses, it will not be necessary to create and administrative system.

The LSSA does not support periodic payment for anything other than future medical and related expenses. The liability of the State in respect of these expenses should be the current costs as at the date when the services or treatment is rendered or equipment provided.

Argument Against Lump Sum Payments

The dangers of an award being squandered can be dealt with either by the appointment of a curator bonis or the creation of a trust.

Argument Against Trusts

Trusts can operate very effectively to protect awards for general damages and loss of earnings/earning capacity. Currently, the biggest component of significant awards usually pertains to future medical treatment, expenses and equipment which, it is suggested, be dealt with by way of undertakings to pay as and when needed.

Delivery of Quality Health Services

The Commission here has succinctly stated the reality in challenges faced by the State:

"If the courts are not convinced that the State can deliver services of an acceptable standard, the proposals made in this paper will be challenged and the situation will be worse than before".

Birth Defects and Serious Permanent Injuries

Comments under this heading are noted. The LSSA proposes that future medical treatment, services and equipment required be dealt with by way of an undertaking, thus avoiding significant lump sum awards under this heading of damages.

Contingency Fees

The Commission has proposed an amendment of the Contingency Fees Act to provide for a sliding scale for determining contingency fees in relation to the size of a compensation award.

However, this is precisely how the Contingency Fees Act currently works. Contingency fees are limited to normal fees charged for attendances actually performed in execution of the mandate, with a maximum surcharge of 100% (the total of the two being the success fee) which is capped at 25% of the award, inclusive of VAT.

Therefore, even if a significant award is made an attorney (and advocate) acting on contingency can only charge for all work necessarily done at a reasonable attorney-and-client rate with a surcharge of 100% for assuming the risk in the litigation, capped at 25% of the capital amount of the award. In medical malpractice claims this risk is often significant. Attorney-and-client bills are subject to vetting by a taxing master.

The LSSA is of the opinion that there is no need to amend the Contingency Fees Act.

Good Samaritan Laws

The LSSA is of the opinion that there is no need to introduce a Good Samaritan Law.

Amendment of ILPACOS Act 40 of 2002

The LSSA is of the view that the six-month notice period imposed in terms of the Institution of Legal Proceedings against Certain Organs of State (ILPACOS) Act should be abandoned.

The fact that the State Attorney has encountered problems in obtaining the cooperation and / or instructions from the Department of Health should not, in any way, result in an additional burden or cost to a claimant.

Ordinary Negligence vs Gross Negligence

The LSSA cannot support any proposal which would deny a claimant compensation for damages suffered because of “ordinary” negligence of a public health employee or institution.

CONCLUSION

The report deals with matters of policy for consideration by government as well as broad legal principles applicable to medical malpractice claims. Accordingly, these comments are also of a general nature. Further detailed comment will be made in the event of there being specific legislation proposed to give effect to any policy decisions made relative to the enforcement of claims against the State arising from treatment received at public health care institutions.