

# Court develops common law allowing for services as compensation for future medical damages

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20 Jan 2020

In a recent landmark judgment, *MSM obo KBM v The Member of the Executive Council for Health, Gauteng Provincial Government*, the Gauteng High Court handed down a ruling in December 2019 in which it developed the common law to allow for payment of future damages by providing services instead of money in certain medical negligence cases involving State hospitals.

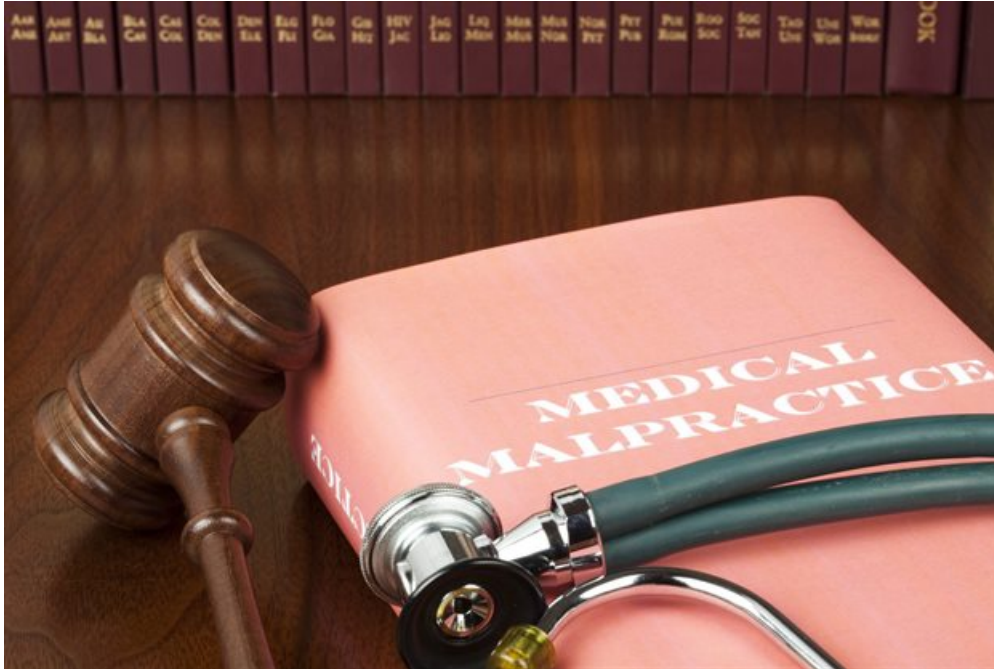


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The judgment follows a 2017 Constitutional Court decision (*Member of the Executive Counsel for Health and Social Development, Gauteng v DZ obo WZ*) where the Constitutional Court was asked to determine whether massive future medical expenses based on speculation could be paid by way of services rather than money and be paid periodically instead of as a single amount at judgment stage in accordance with the once-and-for-all rule.

The court in that case concluded that compensation in a form other than money is not incompatible with the basis of awarding delictual damages. The court also found that periodic payments (or services) which are subject to a "top-up/claw back" will sit in with general principles of compensation for loss. The court, however, also held that factual evidence has to be led to substantiate a case for the development of the common law by the court. Such evidence would have to be to the effect that the services offered to the disabled plaintiff are as good as the services they could buy for themselves from the private healthcare sector. The State had failed to lead the required evidence and the appeal failed on that basis.

## Latest case

The present case dealt with a claim by the plaintiff for future medical expenses (and other damages) arising from a neurological injury suffered by the plaintiff's cerebral palsied child during birth at a State hospital. The State led evidence to show that the services in respect of future medical expenses that were being claimed by the plaintiff are available at a public hospital, where the minor child was already a registered patient and are of a commensurate quality to the equivalent services in the private sector.

Considering the State's constitutional obligations to progressively realise proper access to healthcare and the reduction in State resources which follows from large damages awards being made, the court found that the interests of justice could be served by a change to the existing delictual rule that damages must sound in money.

**This development of the common law was carefully qualified by the court and only applies in circumstances where:**

- the claim is for future medical expenses;
- the claim is against the State;
- the State has been sued on behalf of a child who suffers from cerebral palsy arising from negligent conduct of staff in a public hospital; and
- the State has led evidence to show that the child in question will receive satisfactory equivalent care in the categories of care in respect of which future medical expenses are claimed from private facilities.

**Whilst this case is to be welcomed as a step in the right direction in dealing with the flood of medical negligence cases against the State, it also raises a number of concerns:**

- It fails to consider that the exponential rise in medical malpractice claims especially in cerebral palsy cases is a universal problem affecting both the public and the private healthcare sectors. This is evidenced by the ever-increasing insurance premiums in the specialty areas such as in gynecology and obstetrics in the private sector and the resultant scarcity of specialists in those areas.
- The judgment requires the courts to make an assessment on the facts of each case with evidence presented on a case by case basis. This is not practical; it is likely to be expensive thereby further draining State resources; and may result in an untenable situation whereby a number of cases may be awarded payment by way of services and others not. Despite the evidence led, the risk of not persuading the court or not persuading the court sufficiently to allow the provision of services as compensation instead of money remains.

One solution to the concerns raised may lie in the legislature changing the law to allow for periodic payments or the provision of services of future damages rather than a once-off lump sum payment. Any proposed reforms must ensure that the balance between the limitation of rights (in this case, limiting future losses) and the purpose for the limitation (to avoid crippling the healthcare system) is evenly struck.

## **State Liability Amendment Bill**

The State recently attempted to change the law by the introduction of the State Liability Amendment Bill [May 2018]. The bill aims to scrap lump-sum settlements for medical negligence claims against the State of more than R1 million and to replace them with structured payments.

The bill, which is still in its draft form, requires a lot of work and consultation with stakeholders. Section 2A(1)(a) to (e)

is poorly worded. It does not appear to bear clear resemblance to the awards that are made for damages. The proposed law gives no suggestion as to how the periodic payments will be determined, leaving it entirely to the courts (Section 2A (2)). It should be the amount of the medical expenses determined by the court but payable at intervals according to the requirement for such treatment.

Section 2A (4) could lead to endless future litigation whether there has been a substantial change in the condition or circumstances of the injured party and it is an open invitation for the plaintiff's lawyers to continue litigating. On the other hand, the State needs some mechanism for top-up where future medical expenses prove to be more expensive than those determined at the trial date or to claw-back from the amount of the provisional award if the future medical expenses are never incurred (for instance because of death of the claimant). In addition future medical expenses should only be payable if the expenses are actually incurred.

The proposed legislation should apply to both the public and the private healthcare sectors. The alternative for the private healthcare sector is to include a section in the Assessment of Damages Act or a stand-alone piece of legislation dealing specifically with periodic payments of future damages in personal injury cases.

## ABOUT THE AUTHOR

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