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MORAL JUSTIFIABILITY OF ADVANCE LUMP SUM PAYMENT OF DAMAGES FOR FUTURE MEDICAL EXPENSES IN MEDICO-LEGAL CASES

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A Research Report submitted to the Faculty of Health Sciences, University of the Witwatersrand, in partial fulfilment of the requirements for the degree of Master of Science in Medicine in Bioethics and Health Law.

Johannesburg, 2021.

DECLARATION

I, Warrence Mahlomola Thabane, declare that this Research Report is my own, unaided work. It is being submitted for the Degree of Master of Science in Medicine in Bioethics and Health Law at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination at any other University.



15th day of November 2021 in Johannesburg.

ABSTRACT

This report focuses on the moral justifiability of advance lump sum payments for future medical expenses in medico-legal cases. South Africa is experiencing a rapid increase in the number and amount of these claims. If such claims are allowed to continue, this remedial system poses a threat to health services access. I believe the system is neither effective, nor provides restorative justice as intended, because the bulk of the damages claimed end up covering legal costs. An ethico-legal argument is used to demonstrate that: the system is fraught with unethical conduct; it is morally unjustifiable according to Ubuntu; the common law rule that awards in medico-legal cases be made in money is archaic. My conclusion is that these factors show that the practice of advance lump sum payment of future medical expenses is not morally justifiable. A system of mediation where restorative justice and reconciliation is guaranteed is recommended.

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LIST OF ABBREVIATIONS AND SYMBOLS

ADR: Alternative Dispute Resolution

COIDA: Compensation for Occupational Injuries and Diseases Act

DPSA: Department of Public Service and Administration

HPCSA: Health Professions Council of South Africa

K: A patient at the center of the MEC v MSM case

MEC: Member of Executive Council

NDoH: National Department of Health

NHA: National Health Act

ODMWA: Occupational Diseases in Mines and Works Act

POPI: Protection of Personal Information Act

RAF: Road Accident Fund

SALPC: South African Legal Practitioners Council

SALRC: South African Legal Reform Council

SCA: Supreme Court of Appeal

CHAPTER ONE: INTRODUCTION

Defendants in medical malpractice litigation are often ordered to pay future medical expenses as a lump sum payment in advance (South African Law Reform Commission (SALRC), 2017: 38). Advance lump sum payments of future medical expenses are paid when it is believed that the claimant would need medical treatment in the future resulting from the condition which the malpractice put him or her in (ibid). This practice and the increase in claims are a source of concern for many health departments throughout the world as can be gleaned from amendments in laws effected by different European countries as reported by the SALRC (ibid, 45-6).

A case in point, the Canadian government introduced a law that allowed the courts to order that future medical expenses be paid as structured and periodic payments, rather than as a lump sum (SALRC, 2017: 38-9). The same practice was later introduced in the United States of America, United Kingdom, Australia, Spain, Finland, France, Germany, Luxembourg, Portugal, and Sweden. The damages are either paid in a mixed system of periodic payments and lump sum, or a lump sum up to a set limit and then periodic payments (ibid).

The South African government has a constitutional duty to ensure that everyone in the country has access to health services, and this access includes health services provided by the private health sector (Constitution of the Republic of South Africa, 1996 s27 (herein referred to as the Constitution)). The government is required to take reasonable legislative and other measures, within its available resources, to achieve

the progressive realisation of the right to access to health care (ibid, s27 (2)). The National Department of Health (NDoH) does not have a budget for litigation damages (SALRC, 2017: 15-6). The huge amounts claimed through litigation reduce the health budget allocated to individual hospitals, public or private. A reduced hospital budget is likely to compromise health services delivery.

The South African health sector has been experiencing high volumes of litigation recently (Malherbe, 2013: 83). The medico-legal litigations result in increased medical cover for practitioners. Consequently, medical fees are raised, and the increased premiums are passed on by practitioners to patients.

Central to the problem of advance payment of future medical expenses is the interpretation of the common law by the courts. The South African legal system is comprised partly of the common law and the indigenous law. The two branches of the law are constitutionally recognized as the sources of law in the country (Van Niekerk, 2001: 5-9). The common law is comprised of Roman-Dutch law, English law and decisions of the South African courts, while indigenous law is the law practiced by the black people of South Africa, derived from their customs and cultural beliefs and practices (ibid). The indigenous law is based on the values espoused by the Ubuntu moral theory (S v Makwanyane and Another (CCT3/94) [1995] ZACC 3, paras. 370-88 (herein referred to as Makwanyane)).

Ubuntu is a moral theory of right action espoused by African philosophers. Metz characterises Ubuntu as a moral theory of right action among Africans (Metz, 2007:

321-3). Ubuntu in Zulu means personhood. For one to become a full person in Ubuntu, he or she recognises the need for other people; how one relates to other people matters most (ibid).

The ‘once and for all rule’ is a South African common law rule originating from English law (Member of Executive Council, Health and Social Development, Gauteng v DZ [2017] ZACC 37 (herein referred to as DZ), para. 46; SALRC, 2017: 32). The common law rule states all claims arising from a single cause of action, both accrued and prospective, must be considered once and for all on finalisation of the matter (Neethling, Potgieter & Visser, 2015: 235-8). The rule was aimed at preventing multiple claims based on a single cause of action, harassment of defendants and conflicting decisions (DZ, para 16). However, this rule does not expressly forbid periodical payments of future medical expenses (SALRC, 2017: 44).

Another common law rule that is likely to be a challenge in the proposition to move away from lump sum payments is the rule that damages should be paid in money. This in effect bars considerations of payment in kind. Payment in kind is currently authorised for road accident victims by the Road Accident Fund Act and it is covered below (Road Accident Fund Act 56 of 1996 (herein referred to as the RAF ACT), s17(4)(a)).

The case below demonstrates the dilemma the courts and the government face when dealing with medico-legal cases. In the DZ matter, the sum of R19,970,631 was offered to a litigant as damages for future medical expenses (DZ, para 2). The case

involved a child born with cerebral palsy, following a prolonged labour and resultant asphyxia at Chris Hani Baragwanath Hospital in Gauteng Province. The Gauteng MEC conceded negligence on behalf of hospital staff in the High Court (ibid, para 1). The MEC of Gauteng asked the Supreme Court of Appeal to allow for the future medical expenses to be paid by paying medical service providers directly, but not as a lump sum, and that if the law does not allow it, the Court must amend the law to allow for it (ibid, para 2). The Gauteng MEC sought leave of appeal in the Constitutional Court (ibid, para 4).

The MECs of the Eastern Cape and Western Cape provinces applied to be friends of the court. Both the MECs wanted the Court to take decisions that would assist them in resolving pending cases in their respective provinces (ibid, para 5). The MEC for the Eastern Cape asked the Court to order that future medical expenses be paid by offering relevant services in the public healthcare system, and unavailable services should be sourced from private healthcare providers (ibid, para 6). The MEC for the Western Cape asked the Court to order that damages for future medical costs be paid into a trust administered by a case manager, who would ensure the money is used for what it is intended (ibid, para 7). The fund would be topped up if exhausted and returned to the state on the beneficiary's death. All the MECs requested development of the common law to address their requests (ibid).

The Constitutional Court rejected the MECs' requests based on 'the once and for all rule' and the rule that compensation for damages, in matters such as medico-legal cases, must comprise a monetary award the reason put forward being that no

evidence was presented for the development of the common law (DZ, para 57). The Constitutional Court argued that the amendment of the common law required it to consider deviating from monetary compensation, and deviating from the 'once and for all rule' was substantive and required amendment by the legislature, not the Court (ibid). This, the Court argued, was a requirement of the principle of separation of powers. This principle is a restriction imposed by the Constitution on the exercise of public power by the three branches of government, the executive, the legislative and the judiciary, and prevents possible abuse of state power (de Vos et al., 2017: 74).

In another case, the Constitutional Court was called to decide on an appeal from the Supreme Court of Appeal (SCA). Judge Moshidi, of the High Court of South Africa, Gauteng Local Division, Johannesburg, had held that the defendant in a case of medical negligence pay 100% of the agreed or proven damages (Member of Executive Council for Health, Gauteng v PN [2021] ZACC 6 (herein referred to as PN), para 1). The question was whether this judgment precluded the court from discussing the manner of payment, and whether it means that payment can only be in one lump sum sounding in money (ibid, para 1).

PN's child had sustained injuries (cerebral palsy) in a public institution and the MEC of Health, Gauteng, had accepted liability (ibid, para 2). Judge Moshidi issued an order that separated the questions of liability and that of the quantum (ibid). The quantum was to be determined later (ibid, para 3). The applicant sought to amend his plea in the High Court, during the quantum hearing seeking the amendment of the common law following the DZ judgment (ibid, para 5). The respondent argued that the Moshidi

judgment meant that the quantum needed to be made in money and as a lump sum and accepting the plea would translate to trying the matter again (ibid, para 6). Judge van Linden ruled that the previous judgment did not have anything to do with the manner of payment (ibid, para 7). This decision was appealed by the respondent and overturned by the SCA (ibid). The SCA argued that payment in money was all that the judge had in mind when making the judgment (ibid). The applicant argued that when the judge separated the issues of liability to those of the quantum, he could not, while dealing with the issue of liability, have been legitimately dealing with the manner of compensation (ibid, para 12). The Constitutional Court held that the decision of the SCA implicates the high court's power to develop the common law as empowered by s173 of the Constitution, the rights of the applicant to a fair hearing / to lead evidence and the obligation of the MEC to achieve s27(2) directive (ibid, para 19). Instead of funding health care services, the bulk of the money is spent on medico-legal fees (ibid).

In yet another medico-legal case, where K, a 7-year-old minor, was born with cerebral palsy at Leratong Hospital and the MEC for Health, Gauteng, had accepted liability, Judge Raylene Keightley ruled that future medical expenses should be paid in kind rather than in a lump sum (MSM obo KBM vs The Member of the Executive Council for Health, Gauteng Provincial Government (4314/15) [2019] ZAGP JHC 504 (herein referred to as MSM), para 207.1). The case was held in the High Court of South Africa Gauteng Local Division in 2019. The judge ruled that K would receive continued medical treatment at a government institution (ibid). The judge noted the conundrum inherent in these types of cases, in that the cases adversely affect the child and his family on the one hand, and the public health service on the other (ibid, para 186). The judge further indicated that it is in the interest of justice that the common law be

amended to allow the courts to order payment of future medical expenses in kind, as opposed to the monetary payment (ibid, para 194).

The lump sum payment system is not without an advantage. This solution brings certainty and conclusiveness to a case in that it alleviates possible failure by the defendants to maintain payments over time (SALRC, 2017: 43). The down side to the current system is that it involves complex non-standard estimations (SALRC, 2017: 38). As a result, claimants may either be overpaid or underpaid (ibid). Litigations are costly and proceeds are often paid to cover the costs of the litigation process instead of future medical costs (ibid). The money paid may be depleted quicker than expected, or the claimant may die before the predicted life expectancy, and this leads to undue enrichment of the claimant's estate (ibid).

Another problem cited is that of double-dipping, for example, the claimant uses free public health care facilities instead of using private health services (SALRC, 2017: 63). The parents of a child in a case may successfully apply and draw a disability grant from the government (ibid). On successful litigation, some claimants may use the proceeds designated for future medical expenses for other living expenses (ibid: 39).

In an effort to curb abuse of the advance payment system, the NDoH has taken a number of steps. One such step is requesting the Law Reform Commission to explore ways the law can be amended to curb the increasing medico-legal litigation claims (SALRC, 2017: 1).

Further remedies that can be explored are already in place in other government institutions. In South Africa, there are three pieces of legislation which represent a departure from the lump sum only payment system for personal injury damages. They are the Compensation for Occupational Injuries and Diseases Act 78 of 1973 (herein referred to as COIDA), the Occupational Diseases in Mines and Works Act 130 of 1993 (herein referred to as ODMWA), and the Road Accident Fund Act 56 of 1996). According to its long title, COIDA provides for compensation in respect of certain diseases contracted by persons employed by the mines and works and related matters. The long title of the ODMWA states that the Act provides compensation for disablement caused by occupational injuries and diseases sustained or contracted from employment or death from such injuries, or diseases and related matters for people who work in the mines and works. The long title of the RAF indicates that the RAF provides for compensation for loss or damage wrongfully caused by the driving of motor vehicles. Structured payments, which include both lump sum and periodic payments, are allowed by these acts for their beneficiaries (RAF, s17; COIDA, s84(10); ODMWA, s79). Section 17 of the RAF states further that payments for future medical expenses may be paid by way of supplying services, such as health services, and accommodation in a hospital, as and when they are incurred and payment in instalments (ibid).

The lump sum payment of damages for future medical expenses undermines government and private sector efforts to improve access to quality health services for the people of South Africa (SALRC, 2017: 16). Therefore, the aim of this study is to

demonstrate through normative ethical and legal reasoning that advance lump sum payment of future medical expenses in medico-legal cases is not morally justified.

The research question I am going to respond to is the following: Is the advance lump sum payment of damages for future medical expenses in medico-legal cases morally justifiable? I am going to defend the thesis that the advance lump sum payment of damages for future medical expenses in medico-legal cases is not morally justifiable, in that it disadvantages many people, and it borders on unjustified enrichment of the claimant in that his/her estate gets enhanced by money claimed before it is due to be paid to them.

In the next chapter I am going to present the challenges arising from the system of payment of future medical expenses in medico-legal cases and discuss the possible ethical problems that can be encouraged by these payments. I will argue that the payments can encourage morally reprehensible behaviour by some of the participants. Thereafter, in chapter three, I will focus on the Ubuntu moral theory and discuss how the theory would treat the practice of the payment of future medical expenses in medico-legal cases. The Ubuntu moral theory will be used to argue that the advance lump sum payment of future medical expenses in medico-legal cases is not morally justified because it can encourage unethical behaviour by many of the participants.

Chapter four follows and argues that the common law rule that compensation in medico-legal cases has to be paid in money is archaic and needs to be revised. This chapter will be followed by my conclusion. The final chapter will summarise my

premises and conclude that the practice of the advance lump sum payment of damages for future medical expenses in medico-legal cases is not morally justifiable, and I will recommend specific changes to be made to this law.

CHAPTER TWO: UNETHICAL BEHAVIOUR ARISING FROM THE SYSTEM

2.1 Introduction

Advance lump sum payment for future medical expenses in medico-legal cases presents a number of challenges. The advance lump sum claiming system's intentions are those of compensatory justice for claimants, however I am going to argue that the value chain of the claiming process is littered with unethical challenges. Compensatory justice is justice from compensation for injuries sustained, inconvenience, or any cost incurred as a result of medical malpractice in the case (Dhai, 2018: 7). The value chain has invariably morphed into a funding source, rather than compensatory justice for the victims, and it includes the following role players, the lawyers, health care workers, claimants and other experts. At the top of the chain are the agents, who act on behalf of the lawyers. An otherwise just system designed for victims of medical malpractice has, in some instances, effectively been hijacked for monetary gains, resulting in more money for some lawyers than for the victims. My argument is that central and a catalyst to this unethical behaviour is undoubtedly the advance lump sum payment for future medical expenses. The argument is some lawyers are prepared to circumvent their own code of conduct because of this enticing element of lump sum payments.

2.2 Unethical Behaviour of Lawyers

The seeking of 'business' by lawyers using their agents is a behaviour in violation of the code of conduct expected of lawyers (South African Legal Practice Council (SALPC), 2019 s18.9; Langner, 2014: 1). The code of conduct by the South African Legal Practice Council states the following:

4.3 Attorneys shall ensure that all written and oral approaches (including letterheads) to clients, or potential clients, and all publicity, including the offering of services by publicity, made or published by or on behalf of an attorney:

4.3.1 Are made in a manner which does not bring the attorney's profession into disrepute (SALPC, 2019 s7(2)(1)).

The position of the SALPC on this issue is expressed as follows:

6.1 An attorney or a firm shall not, directly or indirectly, enter into any express or tacit agreement, arrangement or scheme of operation or any partnership (express, tacit or implied), the result or potential result whereof is to secure for him or her or it the benefit of professional work, solicited by a person who is not an attorney, for reward, whether in money or in kind… (SALPC, 2019 s12(1)).

The proceeds of the case, that is, the money claimed, is also the money used to settle the legal bill (Contingency Fees Act 66 of 1997 (herein referred to as the Contingency Act), s2; Mathimba and Others v Nonxuba and Others (2946/2017) [2018] ZAECGGHC 85 (herein referred to as Mathimba), para 91). Often the claimant is indigent and cannot afford to pay the expenses of the court process (SALRC, 2017: 14; Mathimba, para 89). As mentioned earlier, lawyers undertake to represent their client with the hope of being paid after settlement, and if they fail to settle financially, they lose out (Contingency Act, s2(1) & (2)). According to the Mathimba case, legal costs in contingency matters should not be as expensive to the claimant as alleged by Walters (Mathimba, para 1-64). Some of the claimant's lawyers appear to be winners unduly at the defendant's (health institution and/or health worker) and the plaintiff's (claimant) expense. Overreaching a client is an unethical behaviour barred by the SALPC (SALPC, 2019 s18.7). "An attorney shall: not overreach a client or overcharge

the debtor of a client, or charge a fee which is unreasonably high, having regard to the circumstances of the matter" (ibid).

In the case of Mathimba, the RAF and the MEC of Health (Eastern Cape) are challenging Nonxuba, his legal firm and his advocate's calculation of the fees to be paid to their client, Mathimba (Mathimba, para 3). The defendants each have claimed more than their normal fees (the lawyer and the advocate) (ibid). They each entered into a Contingency Fee Agreement with the client: there were two Contingency Fee Agreements, one between attorney and client, and another between the advocate and the client, for one claim against the MEC (ibid, para 119). On being challenged, the attorney was prepared to repay the client more than R3 million to avoid the court process (ibid: 3). The client rejected the offer (ibid, para 18). The client was charged so-called success fees by both the attorney and the advocate, and the client was to pay disbursements or the out-of-pocket expenses of the lawyer (ibid, para 111-17). In terms of these agreements, the client was due to pay about 50% of the money paid by the MEC as fees to the lawyers excluding disbursements. The court ruled that the contingency fee agreements were invalid, that there should have been one agreement qualifying both legal practitioners, a fee not exceeding 25% of the award from the MEC (ibid: 62). There were many cases cited in this case which were brought before court since the Contingency Fees Act came into effect in 1997. Here is what other courts, cited in Mathimba, had to say about the Contingency Fees Act: para 102:

> One of the concerns was to prevent a situation where most if not all of the proceeds of the award are absorbed in legal costs with the result that the

> litigant, the very person who was meant to benefit from the litigation, is left with little or nothing at the end (Mathimba, para 102).

and

> …the overall purpose of these provisions, which it is to protect the client against exploitation by the lawyers who act for him, her or it on a contingency basis. We have already noted that the purpose of this legislation is to enhance access to justice. It is not intended as it has become in the USA as a means of ensuring colossal wealth to lawyers who very often in effect run cases for their own rather than the litigants' benefit (ibid, para 106).

A question is how many of the recipients of awards have accepted money without even noticing that they have been overreached by their lawyers over the years? Mathimba had to use another lawyer to claim his money, which was an additional expense in order to get his share back. In essence, just looking at the MEC case alone, he was paid R2,211,657.14 of his award of R6,977,105.84 plus party to party fees of R1,344,053.54 (ibid: 2). The amount paid constitutes just above 26% of the money paid by the MEC. The lawyers shared over 73% of the award, which amounted to R6,109,502.44. Their legal fees according to the court should have been 25% of the award, which amounts to R1,744,276.46 plus disbursements of R825,001.24, totalling R2,567,277.70 (ibid). The calculations are mine based on the facts of the case.

The above example attempts to show that the lump sum payment of damages for future medical expenses system can nourish unethical behaviour rather than serve its purpose of restorative justice.

2.3 Unethical Behaviour of Some Health Workers

Some health workers have been reported as being part of a group of people defrauding the government in frivolous medico-legal claims (Motsoaledi, 2015: 3). In so doing, they violate their oath of practice by failing to preserve confidentiality when sharing their patient's information with the syndicates (Health Professions Council of South Africa (HPCSA), 2016a para 4.1; South African Nursing Council (SANC): 5). The failure to observe patient confidentiality can occur by both health professionals and non-health professional employees of hospitals and private practices. Non-health professional employees are often made to sign an oath of secrecy pertaining to patient information, or health institutions should have confidentiality policies which bind every employee to treat information in the work place confidentially (Protection of Personal Information Act 4 of 2013 (herein referred to as POPI Act), s3 & s4). Rule 13 of the Ethical Rules of the HPCSA dictates when a health professional can disclose patient information, and the disclosure of information to lawyers referred to here does not comply with any of the prescripts of this rule (HPCSA, 2016a, para 3.2). The theft of patient information ensures that money flows from lawyers to the health professionals, who cannot ethically receive perverse incentives (Prevention and Combating of Corrupt Activities Act, 2004 s3(a) & (b); HPCSA, 2016c para 3.9.1)

Perverse incentives are defined by the HPCSA as:

> 2.9 Money or any form of compensation, payment, reward or benefit which is not officially due, or which is given on the understanding, whether express, implied or tacit, that the recipient will engage or refrain from engaging in certain behaviour in a manner which is either:
>
> 2.9.1 Illegal; and/or

2.9.2 Contrary to ethical or professional rules; and/or

2.9.3 Which, in the opinion of the HPCSA, may adversely affect the interests of a patient or a group of patients,

In order to procure some direct or indirect advantage, benefit, reward or payment for the person offering or giving the said money, compensation, payment, reward or benefit, and “perverse incentive” has the same meaning (HPCSA, 2016c para 2.9).

2.4 The Position In Which Lump Sum Payment Leave Claimants

My argument is that the advance lump sum payment system presupposes that the claimant is able and capable of keeping the funds until such time they are needed for medical attention. Most of the claimants come from poor socio-economic backgrounds, and the lump sum payment system places an enormous burden of financial management on them. As a result, the system becomes counter-productive in the following ways: they still can get disability grants, and they can continue to use free public health services (SALRC, 2017: 8 & 63).

2.5 Missing Patient Records

Treatment of patients involves an administrative process of keeping records about the actual treatment and future needs for the patient. These files can either be lost or stolen. On litigation, the government has to produce these files as proof of the actual treatments carried out. Medical records do get stolen for “malefide reasons by

interested parties," and failure to produce them in court weakens a case (Thomas, 2009: 3-4). In cases where the government is unable to produce patient records, they invariably lose those cases. A case in point is the MM v Netcare Hospitals (Pty) Ltd and Others. In this case a twelve-year-old girl's (patient's) right leg was amputated at Steve Biko Hospital (MM v Netcare Hospitals (Pty) Ltd and Others, (7255/2012) [2017] ZAGPPC 474 (herein referred to as Netcare), para 1). The above-knee amputation followed mismanagement between a private medical practitioner, Dr. J Jacobs, in Bronkhorspruit, and Mamelodi Hospital (ibid). Charges were preferred against both the MEC, Gauteng Provincial Department of Health and Social Development, and Dr J. Jacobs (ibid, para 4). Dr J. Jacobs referred the patient, with full notes and a treatment plan, to Mamelodi Hospital for admission after the leg had developed a sepsis (ibid, para 20). Mamelodi Hospital could not produce the patient's record during the trial (ibid, paras 22 & 24). The MEC lost the case as a result and was ordered to compensate the claimant (ibid, para 137). If the disappearance of the patient record has been stolen on behalf of the lawyer, it would be a case of unfair advantage, because the hospital would not have the records to defend themselves in court. Theft is an unacceptable behaviour, a dishonesty considered to be unethical behaviour and a crime by the South African National Health Act (National Health Act 61 of 2003, s17(h)).

The challenge here is that a case that would otherwise be pleaded in favour of the state may be lost, leading to a huge outflow of funds from the state due to misplaced or stolen records. Below I focus on the effects of the advance lump sum payments of damages for future medical expenses system on health professionals and how it affects health services delivery.

2.6 Effects on Health Professionals

While requesting an extra investigation of the disease can provide positive patient support, it may be unnecessary and can be costly and above all is not permitted if it is considered over-servicing a patient according to Ethical Rule 7 of the HPCSA (HPCSA, 2016c para 3.1). Some health professionals have been reported as practicing defensive medicine in an attempt to avoid medico-legal cases (Roytowski, Fieggen and Taylor, 2014: 1-2). This practice is a form of over-servicing of patients which entails ordering unnecessary investigations of the disease, more tests which may expose patients to unnecessary risks, over-referring patients to other specialists, performing unnecessary procedures and limiting their professional practice to accepting only easy, low-risk cases (ibid). The practice of defensive medicine can be costly to the patient when patients have to pay for more examinations and further referrals that are not necessary, and it can lead to an increased cost of treatment, known as 'medical inflation' (Roytowski et al., 2014: 1-2). Negative defensive medicine happens when specialists ensure that some patients who have a potential for adverse effects following treatment are not treated by them, but referred to other specialists (ibid).

More than 60% of neurosurgeons in a study reported that they would not have chosen their careers had they known that the practice would attract medico-legal cases (Roytowski et al., 2014: 3). A high percentage of obstetrics and gynaecology practitioners reported medico-legal litigation as a stressful event, and that they did not see themselves practicing the profession in the next five years (Taylor et al., 2018: 1).

Health professionals who are stressed are likely to make mistakes, which can lead to litigation (ibid). Medico legal cases in this instance have the potential to discourage future specialisation in some important fields of medicine, thereby depriving or limiting the provision of such health services to patients (Motsoaledi, 2015: 2; Taylor et al., 2018: 1). Insurance cover for categories of health professionals, such as obstetricians and neurosurgeons, gets increased due to the increase in litigation and increases in the amount claimed per case (Howarth and Hallinan, 2016: 1). These cases also can result in medical inflation, since this increase in insurance cover is passed on to patients and funders.

2.7 Undue Enrichment

The lump sum payment has been seen to unduly enhance the estate of the recipient (SALRC, 2017: 49). Unjustified enrichment has been defined as “where one person receives a benefit or value from another at the expense of the latter without any legal cause for such receipt or retention of the value or benefit from the former” (Fakude, 2015: 1). It follows that unjustified enrichment must present with the following elements before liability can be found: “enrichment of the defendant, impoverishment of the plaintiff, a connection between such enrichment and impoverishment, no legal justification for such enrichment and impoverishment, and absence of any other remedy in law” (ibid). My argument is that the claimant’s undue enrichment is at the expense of public health services. The public is impoverished as far as health services are concerned. The connection between the enrichment of the claimant and the impoverishment of the public is that public funds are paid to the claimant as a lump sum for use in the future, while these funds could be used to procure health resources/ services for the public before the future event happens. While the claimant is entitled

to restorative justice in terms of payment of a lump sum for past and current loss and for pain and suffering, I see no legal justification for paying future debts in advance especially when those funds are scarce resources required for health service procurement. Undue enrichment law derives from the common law and has been rendered obsolete/chaotic by our courts (Serfontein, 2015: 389). The argument about this piece of law is that it no longer presents legal certainty following the different court precedents, but legal experts are mapping ways of reviving it (ibid: 389).

I argue that this undue enrichment is likely to lead to disputes over the estate of the claimant among family members on the death of the claimant, as observed in one court hearing. A case in point was held at the Gauteng High Court before Judge Jody Kollapen, where a child, who developed cerebral palsy after being born at a public hospital, had fifteen million rands at the time of his death at five years of age (Broughton, 2020: 1). The biological parents, who were not taking care of him, especially the father who only saw him when he was six months old, wanted the High Court to grant them the estate (ibid). The father lost the case to the mother and grandmother. The child was raised by the grandmother after the mother disappeared also (ibid). Fifteen million rands of funds the South African government could have used for health services for more people was shared between two people. Undue enrichment is not morally justifiable.

2.8 The Effects of Award Determination

It was mentioned earlier that the disadvantage of the court system is its inefficiency in calculating the lump sum amount to be paid for future medical expenses (SALRC,

2017: 49). It was mentioned also that the calculations either lead to an over- or under-payment (ibid). This, I think, was a case of the failure to calculate life expectancy by the court--it is failure of the court in that it allocated too much money for future medical expenses. The estate of the claimant was unjustly enriched, and if a different method of payment of future medical expenses other than the lump sum payment method (like payment of monthly instalments) was used, the estate would not have been unjustly enriched. The challenge is that even if the calculations for life expectancy were underestimated, the claimant would have suffered in that they would have to spend their final years without sufficient medical cover. I argue that the above case demonstrates in part that the advance lump sum payment of future medical expenses in medico legal cases is not justifiable in that, regardless of whether money is abused or not, it either leaves the claimant suffering (in case of under-payment) or unjustly enriched (in case of over-payment).

2.9 Medico-Legal Case Dispute Resolution

The claiming process for future medical expenses in medico-legal cases is mostly court-based, adversarial and does not aim at a peaceful resolution of the dispute (Walters, 2014: 1; Taylor et al, 2018). The process is adversarial in nature and lacks transparency, characteristics that are blamed for its inability to have the two parties in the dispute reconcile (ibid). I suspect the profit motive of the claimant's lawyer makes it difficult for the two sides to attempt to settle the dispute using cheaper methods like mediation. The court route is also costly and lengthy--the longer it takes to resolve the case, the costlier it is both for the patient and the health institution/health worker involved (Walters, 2014: 1). The costs are borne by the plaintiff and the defendant

(Walters, 2014: 1; Contingency Act, s2; Mathimba, paras 41-4). The shortest case has taken about five years (SALRC, 2017: 20-2). I argue that advance lump sum payments for future medical expenses in medico-legal cases are morally unjustifiable in situations where cheaper and quicker methods that could bring about peaceful resolution to the dispute are available but not followed.

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2.10 Possible Objections by Defenders of the Lump Sum System

Defenders of the advance lump sum payment of future medical expenses in medico-legal cases might argue that the patient was not forced to be a client of the lawyer, that the patient agreed to be a client voluntarily and this constitutes consent. The point being made here concerns client information that has been unethically passed to the lawyer by health workers. The patient would have been approached by the lawyer or his agent and agreed to be represented by that legal practitioner. Indeed it would appear like the patient consented and was not forced. The patient's information would have been used without their consent when shared with the lawyer or his agent by a health worker. Disclosure of patient information, is regulated by the HPCSA and the National Health Act. The patient must be informed before consenting to their information being shared with third parties and the consent must be in writing (NHA, s14(2)(a); HPCSA, 2016b para 11.1.2). Informed consent involves respecting a patient's right to decide their fate after sufficient information has been provided in a language that is understandable to them (HPCSA, 2016d para 3.1.3). Since medico-legal litigation aims to correct a wrong by the health worker, an attempt to right this wrong cannot have a wrong basis itself, such as unconsented disclosure of patient health information (Metz, 2007: 18).

Another objection by the defenders of the lump sum payment system could be that the proposal to do away with payment of an advanced lump sum in medico-legal cases is unjust to the claimant. The main objection to the proposal is that victims of medical negligence and or malpractice deserve the lump sum payments for future medical expenses, because they deserve some compensatory justice (Dhai, 2015: 1). I agree that victims deserve compensation for the injustice from medical malpractice or negligence. However, my overall argument is that an award can be structured as follows: once off lump sum payment of general damages and loss of earnings; and monthly instalments for future medical expenses. My opinion is that this type of payment arrangement should be able to relieve pressure on the paying health professional or institution to allow them to spend it on something else and relieving the pressure from paying a lump sum. Hospitals do not have budgets for medico-legal fees, and as a result medico-legal costs compete with the provision of health services delivery (SALRC, 2017: 21). In my opinion, some private hospitals and health practices might be overwhelmed by these lump sum damages payments and be forced to close their businesses. If my opinion turns into a reality, the patients serviced by these institutions could be adversely affected by the closure and face access challenges to using health services. These types of institutions would benefit from a different payment system such as monthly payments. It is my opinion that compensatory justice is satisfied when general damages for pain and suffering are paid as a lump sum, while future expenses are paid in future or as instalments or in kind. Also, I am of the opinion that lump sum payment for future medical expenses ought to be paid when they are due, that is, in the future, or as periodic payments or in kind. Considerations

of the interests of justice and distributive justice require that payment of future medical expenses be made in kind (MEC, 2019: 68).

Another criticism is that the argument made above about lawyers unfairly defames practitioners participating in the medico-legal process. This is a fair criticism, and I need to state at this point that I believe there are many lawyers, and many health practitioners and actuaries doing a good job and earning an honest living in this country. However, there are a few of these professionals who care less about ethics and do not abide by the law who tend to overshadow the good work by the majority. The need for money and competition can be the impetus for illegal and unethical behaviour. The former health minister who is now the Minister of Home Affairs, Dr. Aaron Motsoaledi, in fact, claimed that syndicates exist and consist of some members of management in health establishments and in the office of the State Attorney, who tip off lawyers and deliberately mismanage cases so that the state can lose cases (Motsoaledi, 2015: 3; Bateman, 2016: 1).

2.11 Conclusion

What this chapter sought to demonstrate is that although lump-sum payment system is not necessarily on its own or inherently immoral, the system does contain risky features that may ultimately be detrimental to the victims of medical malpractice. The risky features can be deduced from: the fact that some lawyers are able to circumvent their own code of conduct in order to deduct more than their legal fees; the fact that some health professionals are able to risk being disciplined by their professional bodies for a little incentive; and the fact that it can potentially drive some professionals

to defensive medical practice in fear of litigation. The system can entice, encourage or even act as a catalyst to unethical behaviours. The amount of money involved in medico-legal cases has shown to be more of an incentive to such behaviours.

The behaviours covered in this chapter included the following: lawyers circumventing their code of conduct by employing touts and overreaching their clients; touts buying medical records and approaching and recruiting patients; health workers violating their code of conduct by disclosing patient information and receiving bribes; health professionals practicing defensive medicine; and, court system issues (Mathimba, para 102 & 106; SALRC, 2017: 49- 50; Walters, 2014: 1). The above incidents point to the weaknesses of the advance lump sum system. The weaknesses have a potential of enticing people to engage in unethical behaviour. I have also dealt with possible objections to my argument. I am now going to argue, in chapter three, that these resultant behaviours are inconsistent with Ubuntu, and therefore render the whole process and payment of advance lump sum payment of damages for future medical expenses in medico-legal cases to be morally unjustifiable.

CHAPTER THREE: UBUNTU MORAL THEORY

3.1 Introduction

A guiding principle, according to Ubuntu moral theory is that the essence of being is communal, hence the ‘umuntu ngumuntu ngabantu’ maxim (Metz, 2011: 536). The maxim roughly translates to: ‘a person is a person because of other persons’ (ibid). Accordingly, individual interests aren’t supposed to trump those of the community they live in (ibid: 539). A knee-jerk reaction may perceive this as trampling on individual rights. However, Ubuntu suggests that continued existence and survival of communities is as a result of individual aptitudes and their contributions to their communities (Gyekye, 2011: 13). Gyekye argues that human beings are cultural beings and do not voluntarily choose to enter a community, and that it is human nature to have social relationships with others (ibid, 300). Communities are defined by common interests, goals and values (Gyekye, 2011: 299).

3.2 Ubuntu on the Rights of Individuals

Ubuntu supports the consideration of individual rights (ibid, 304). These rights are not absolute and may be limited by higher order values of the community (ibid, 307). Individual rights allow the autonomous, self-determining person to scrutinize and develop community practices, while at the same time developing themselves to their full potential (ibid, 305). One such right is the right to human dignity, which Gyekye argues is a fundamental human right that a community cannot deny its members (ibid, 307). He further argues that this right implies that every individual has some intrinsic worth (ibid). Treating people with human dignity allows nurturing of an individual’s

qualities that would allow a person to function to their full potential in society (ibid, 308). When allowing individual rights, Ubuntu acknowledges the intrinsic worth of the being (ibid, 311). This autonomous being would in turn use their talents and qualities to develop and lead their community to success, and the success of individual community members translates into the entire community's success (ibid, 308). If the community were to deny its members their individual rights, it would be self-destructive (ibid).

Ubuntu is mostly concerned with communal values, with the good of the wider society, and as a result, rights occupy second place to these priorities (ibid). The highly ranked community values are given prominence to rights in an Ubuntu system (ibid). Thus the goals of the community are more important than rights (ibid). Rights such as political, social and economic, are built into the ethos and practices of the community, and as such are ranked lower than moral duties in an Ubuntu system (ibid). My argument is since economic rights are built in the system of Ubuntu, and also protected by the Constitution, any consideration of individual rights would have to be weighed by the obligation individual members have towards the broader community. "The danger or possibility of slipping down the slope of selfishness when one is totally obsessed with the idea of individual rights is, thus, quite real" (Gyekye, 2011: 309). This, therefore, renders the concern with individual rights to a lump sum morally unjustifiable in an Ubuntu system, especially if the individual rights are impacting on socio-economic rights of the broader community. It follows therefore, that the individual's right to a lump sum payment for future medical expenses would be ranked lower to the community's need for health services.

Individual members would have moral duties towards others and particularly towards the less fortunate members of the community (ibid). Concern with individual rights can divert attention from moral duties and can show insensitivity to the needs of others in the community (ibid). This concern with individual rights is, therefore, unlikely in a community that stresses social relations, concern and compassion for others (ibid). In such societies, performing duties towards fellow community members demonstrates moral uprightness (ibid, 310). Members feel a sense of duty and are not forced to assist others (ibid).

3.3 Ubuntu on Advance Lump Sum Payments

In the context of Ubuntu, receiving lump sum payments for future medical expenses in medico-legal awards would constitute a classic case of an individual benefitting at the expense of its community. Individual community members are supposed to benefit the community, but not to benefit at its expense (Metz, 2011: 539). The issues about these payments are: that the award is not budgeted for and is difficult to budget for; it is paid upfront; the amount is huge; that it is not possible to estimate the correct amount; unscrupulous professionals use lump sum payments as their funding source at the expense of the claimant; and the payments fail to serve restorative justice.

I mentioned in the introduction that money used to pay for medico-legal cases comes from the budget reserved for health service provision. It is almost impossible to estimate potential medico-legal cases awards, thus it is practically impossible to budget for these cases. A claimant in medico-legal cases has a right to compensation

and it is just to ensure they receive it. However, advance lump sum payments for future medical expenses are not morally justified as far as their effects on health services provision to the public.

I argued in chapter two that if payment is paid before it is due, it constitutes undue enrichment, and it is not morally justifiable especially because the funds are taken from a budget reserved for public health services. The size of the amount means that huge services would be involved, thus affecting a number of public service recipients--this is especially true when the medico-legal claims are many. Since it is not easy to make the correct estimations of the awards, it would either leave a number of recipients unduly enriched, or poor and without the very future medical care the award was intended to provide.

The lump sum payments for future medical expenses fail to provide restorative justice as envisaged in Ubuntu. Ubuntu supports the achievement of restorative justice between the claimant, the claimant's family, the health worker and the community. Restorative justice has been defined as "an approach to justice that aims to involve the parties to a dispute and others affected by the harm (victims, offenders, families concerned and community members) in collectively identifying harms, needs and obligations through accepting responsibilities, making restitution, and taking measures to prevent a recurrence of the incident and promoting reconciliation" (Department of Justice and Constitutional Development, n.d.). In this way, Ubuntu is interested in reconciling the parties in a dispute, while honestly discussing and ensuring the cause of the dispute is identified to avoid recurrence in an inclusive process. Restorative

justice recognises the shortcomings of the current dispute resolution system in medico-legal cases and hopes to replace it with a morally justifiable approach. Such an inclusive approach looks at the collective interests of the participants and recognises the need to pay a lump sum when it is due, as opposed to upfront.

3.4 Ubuntu on Dishonesty

The act of deceiving is morally wrong according to Ubuntu (Metz, 2007: 324). Evidence of deception can be seen or is suspected from inception to finish in the process of claiming a lump sum payment for future medical expenses in medico-legal cases (Motsoaledi, 2015: 2; Times Live, 2018:1). The first case of deception happens when touts used by lawyers buy and are given access by a health worker to a patient's health information (Times Live, 2018: 1). Times Live reports cases where patients' health information is sold to touts who approach them for business (ibid). Touting is prohibited by the code of conduct for lawyers (SALPC, 2019 s18.22). The health worker is sworn to an oath that directs them against divulging patient records to third parties (POPI Act, 2013 s3 & s4). The custodian of the information, being the health institution or professional, would not have authorised or consented to such release of information (NHA, 2003: 14). These acts of dishonesty mentioned above constitute unethical conduct by some lawyers and health professionals. This is not aimed to suggest a causal relationship between advance lump sum payments for future medical expenses in medico-legal cases and unethical behaviour. However, it is meant to highlight vulnerabilities in the advance lump sum payment for future medical expenses in medico-legal cases system. The stolen health information would still produce positive results in that the claimant would achieve compensatory justice after a successful

court case or out-of-court settlement. Ubuntu does not allow a situation where rules of ethics are infringed to achieve good results (Metz, 2011: 540). This is unlike classical Utilitarianism, where the ends justify the means (Rachels, 2003: 102-3).

Deception and theft tend to go hand in hand, especially in this context where medical records are given out without the consent of the patient. Deception and theft go against the dictates of Ubuntu (ibid). As alluded to earlier, patients' health information can be stolen from the health institutions to initiate legal proceedings against the institution or a health professional (Times Live, 2018: 1). The touts and their lawyer employers appear to be involved in a noble cause of assisting the patient to achieve compensatory justice. In Ubuntu, a noble cause cannot be promoted through immoral acts like deception and theft (Metz, 2011: 540).

3.5 Ubuntu on Trust Relationships

Trust between the employer and employee in health institutions can be violated for marginal gain. I argue that the employer-employee relationship should be based on trust. The employee and employer should have integrity. Violation of trust is morally repugnant according to Ubuntu (Metz, 2007: 324). Trust is violated when the health worker steals from their employer, and when the health worker-patient relationship is abused by the theft of medical records by the health worker. The trust relationship between a health worker and a patient is also governed by the HPCSA (HPCSA 2016a, para 4.1).

3.6 Decision Making in Ubuntu

Where decisions need to be made, Ubuntu does not support a winner-takes-all or a winner-loser approach (Metz, 2007: 324). This approach is not supported because it leaves one member of the dispute upset, and it does not aim to resolve the dispute and reconcile the disputants (ibid). Ubuntu is about a loving relationship and reconciliation (ibid, 325). “Some contemporary African philosophers have sought to extend consensus-based decision–making to a modern, urban setting…..” (ibid, 324). The current system of claiming for future medical expenses in medico-legal cases resembles a winner-loser system because there is no attempt at reconciling the disputants, but instead each side of the disputants square up in court to argue and win their case; the focus is only on compensation or winning. No one seems to care about what happens to the claimant-healthcare worker relationship after the court decision. Ubuntuists prefer mending relationships in cases where there is discord between individuals or groups of people (Metz, 2010: 52).

Retribution is considered morally wrong according to Ubuntu and the focus is always on reconciliation (ibid). I argue that while the court is aimed at restorative justice, the manner of achieving this borders on being retributive in that the loser is left feeling punished. This feeling can be blamed on the adversarial nature of the court system and its failure to reconcile the disputants. The health institution or professional is left feeling punished after the resolution of the case (ibid). The court system, as it is currently, is about winners and losers and thus exacerbates conflict between the claimant and the health institution/professional (ibid).

3.7 Mediation of Disputes

A reconciliatory form of system, like mediation, is required to achieve what the current system fails to do, that is, ensure reconciliation between the claimant and the institution or health professional that wronged the claimant in medico-legal cases. Reconciliation brings harmony between the disputing parties. The system proposed at the Medico-legal Summit is that of mediation. The Medico-legal Summit was a meeting of the NDoH attended in 2015 by health stakeholders and lawyers organised to discuss the problem of medico-legal claims (SALRC, 2017: 3). Section 34 of the South African Constitution states that: “Everyone has a right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum” (The Constitution, s34). According to this section, it is legal to move the medico-legal disputes to another tribunal, like mediation, whereby the purposes of the disputants would be met, and the two would be reconciled at the resolution of the dispute.

3.8 Ubuntu on Wealth Creation and Distribution

Ubuntu requires that wealth be created for the benefit of the broader community rather than for the self and family only (Metz, 2007: 326). It was earlier argued that the advanced lump sum payment system is used as a funding source for certain individuals, and this system is in contrast to the Ubuntu requirement. If the above proposition was understood and accepted as morally correct, it would make sense that future medical expenses in medico-legal cases should be paid when expenses are incurred or in instalments or in kind. These payment methods are in the interest of the broader community in that when payment is made, there is allowance for the

remainder of what would have constituted a lump sum to be used for other community members.

Sharing one's wealth is weighed favourably in Ubuntu (ibid). Community members are expected to share with the less fortunate, and it would be difficult for the current medico-legal damages claiming practice of paying a lump sum for future medical expenses to be acceptable in the Ubuntu system, in that it would be seen as excessive payment to an individual instead of sharing (ibid). Each member of the community is expected to be generous and generosity is seen as a moral duty (ibid, 328).

Ubuntu requires that wealth should be distributed in terms of need, but not in terms of individual rights (ibid, 326). In the case of medico-legal cases, the patient should receive what is due to them at the given time when there is need for the funds or in instalments.

Greed or not sharing with the under-privileged would be frowned upon in communities practising Ubuntu (ibid). I argue that it is greedy of lawyers to use touts, and health workers to accept payments from touts/lawyers to supply patient information. As mentioned earlier, both lawyers and health workers are infringing their code of conduct when engaging in these behaviours (SALPC, 2019 s18.9; SANC: 5; HPCSA, 2016a para 4.1). Here again the weaknesses of the system for claiming advance lump sum payment for future medical expenses in medico-legal cases are exploited by these unethical individuals.

It is generally believed that a lawyer acting for a client in a medico-legal case is acting out of good will, and that the lawyer is interested in the client's well-being (Walters, 2018: 1). Based on the above discussion of Ubuntu moral theory, we know that good will and shared identity plus solidarity equals harmony or a friendly relationship; this is the essence of Ubuntu (Metz, 2010: 51-3). I argue that Ubuntu does not support the court process, because it is adversarial and does not encourage reconciliation.

3.9 Uncaring Behaviour of Some Lawyers

Community members in Ubuntu are considered a group with common ends who care for each other. Some of the lawyers also do not seem to see themselves and their clients as a group with common ends, in that they take a significant amount of the same funds intended for future medical expenses for themselves as has been shown in Mathimba. They display some uncaring behaviour towards fellow community members. In another case reported by The Star newspaper, an Mpumalanga-based lawyer embezzled the client's money by depositing some of it in his business account and paying a stokvel account (Nkosi, 2019: 1). On hearing that the law society was investigating him, he called the client and paid some of the money back and claimed that the payment was just delayed (ibid). The judge found that by paying back the money, he actually defeated the ends of justice (ibid). He was struck off the roll of attorneys (ibid).

3.10 Possible Objections to Ubuntu

The first objection from people opposed to Ubuntu could be that services are adversely affected by poor planning by the government, not by claiming lump sum awards from medico-legal claims. While it is true that some government managers may lack the ability to do their job, it would be fair to note that it is a stereotype to believe that all government managers fail to plan. Perceptions about government hospitals' failure to maintain good standards exist and have been shown to be just that, perceptions, and not a true reflection of the real situation (MSM, para 161- 67). In MSM, the court was convinced from evidence of the Charlotte Maxeke Academic Hospital (Johannesburg) staff, and a tour of the hospital, that most of the perceptions expressed in newspapers were untruthful, and the hospital proved to be one of the well managed government institutions (ibid). This perception does not disturb the fact that if large resources are taken out of any health institutions, the health of people served by the institution may be affected adversely.

Another objection from the supporters of the lump sum payment system is that government inefficiency would disturb future claiming for future medical expenses. This objection is directly linked to the poor government planning objection dealt with in the preceding paragraph. The objection is based on perceptions people have about government institutions being unable to do a proper job, which was addressed in the preceding paragraph. Again it would depend on the type of payment agreed on, and the safety mechanisms undertaken. In MSM, internal and external/private case managers have been appointed to see the process of ensuring the patient's rights are protected and that the government follows the Court's instruction (MSM, para 214.3).

In this case, the court ordered that a case manager be appointed at the expense of the MEC to supervise the process of the provision of services in kind to K, the claimant/patient, at Charlotte Maxeke Hospital (ibid). The hospital appointed their own case manager, who would do the same and report to the CEO of the hospital (ibid). The private case manager reports to the court if the MEC is not providing the health services as promised and directed by the court (ibid). The courts are ready to supervise the process if needs be, as can be seen from the judgment in the above case.

3.11 Conclusion

In this chapter I have argued that the behaviour of the few people who use the advance lump sum payment for future medical expenses in medico-legal cases as their funding source is contraindicated in an Ubuntu society. In Ubuntu, individual members ought to be thinking about their duties to the less fortunate community members, rather than being concerned with individual wealth. The claimants in medico-legal cases fall within the category of the less fortunate, and they deserve compensatory justice. I have further indicated how I think payments should be made and how payments for future medical expenses should be treated. I have argued that over and above compensatory justice, claimants deserve restorative justice and that is what the system should aim to achieve. In essence, I argued that the advance lump sum payment for future medical expenses is morally unjustifiable according to the Ubuntu moral theory. I now turn to the next chapter which aims to demonstrate that the common law that damages in medico-legal cases ought to be paid in money is behind the advance lump sum

payment and is a rule that should be amended according to the prescripts of the Constitution.

CHAPTER FOUR: THE COMMON LAW RULE

4.1 Introduction

In the previous chapter I argued that advance lump sum payments for future medical expenses in medico-legal cases are not morally justifiable according to the Ubuntu moral theory. Now I turn my focus on a rule whose existence makes it impossible for payment in kind to be effected. The common law rule that damages must be paid in money prevents payment in kind while promoting the payment of a lump sum. This chapter aims to argue that this rule is archaic and borders on being unconstitutional. It aims to argue that advance lump sum payments for future medical expenses in medico-legal cases are not morally justifiable in that they are prescribed by a rule that is archaic and due for amendment. Although implemented in the interests of justice, the common law rule is an impediment towards the state's fulfilment of its constitutional mandate and needs to be amended.

4.2 Development of the Common Law

Two sections of South Africa's Constitution dictate considerations for a decision to develop the common law. Section 39(2) of the South African 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" (Constitution, s39(2)). The Court interpreted the section to give effect to the amendment of any law if it is inconsistent with the Bill of Rights (DZ, para 33). Section 173 of the South African Constitution states that, "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa

each has inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice" (Constitution, s173). In essence the two sections quoted above allow amendment of the common law on two grounds, when it is inconsistent with the Constitution and when it violates the interests of justice.

4.3 Reasons for Amending the Common Law

The common law rule that prescribes damages to be paid in monetary form violates the interests of justice (MSM, para 194). This was the judgment passed by Judge Raylene Keightley in the MSM case cited in chapter one above. She ordered that the rule be developed to allow the court to order compensation in kind. Individual interests are balanced against public interests because section 173 introduced a possible conflict of interest between the claimant and the public who receive services from the government in this case, and in cases where claims are made against the government (MSM, para 180). This balancing act was explained by Judge Keightley:

> Such development requires a balancing of rights and interests: on the one hand the established individual rights of K to some form of compensation for the harm she has suffered and the infringement of her constitutional rights, and on the other hand, the collective interests of the broader public to access health care services, which the state is obliged to provide. This balancing between individual and collective interests is a direct and unavoidable product of our constitutional framework and its deliberate advancement of socio-economic rights (ibid, para 180).

The constitutional requirement draws its attention to the common law rule. With this rule intact, the balancing fails because a payment in kind is not possible since the rule states that payment has to be in money. The judge had to decide between two interests, those of K, who was wronged by the government, and her rights to future health care for injuries sustained at Leratong Hospital on the one hand, and on the other hand, the general public's right to access health care as enshrined in Section 27 of the Constitution. This is because, she said, a lump sum would reduce government resources and affect government's duty to provide access to health services (ibid, para 178). Failure of balancing between these rights would be where the holders of the rights on each side are not catered for in the decision. The decision to amend the common law rule allows for the balancing in that K's needs would be catered in kind, while the government is allowed to save some resources for use by the other users of public health facilities. I argue that if K is paid a lump sum amount for future medical expenses, the balancing would have failed. It would be in her favour and against the public's interests. I am saying this considering that today it is K, but tomorrow we may be faced with many claims against the state or any health institutions. The effects of such a scenario would be more devastating to a private health institution or a private medical practice than to a state institution.

Section 27(1) of South Africa's Constitution states: "Everyone has a right to have access to (a) health care services, including reproductive health care" (Constitution, s27(1)(a)). Section 27 (2) states: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights" (ibid, s27(2)). Section 27 obliges the government to provide access to health care to everyone and further directs the state to work towards realising the right

within its available resources (ibid). State resources are limited, and medico-legal cases adversely affect the movement towards realisation of the right of access to health care (SALRC, 2017: 21-2). This obligation to provide access to health care is hindered by the rule that damages for medico-legal cases should be paid in money. That is, if damages were to be paid in money, not in kind, the state would have challenges meeting its obligation of progressively realising the provision of access to health care for everyone within its available resources, because the effects of the rule reduces the same resources (ibid). I argue that the rule is clearly archaic in that, as already declared by Judge Raylene Keightley, it does not consider instances where the interests of justice need to be served as prescribed by s173 of the South African Constitution and it tends to interfere with the public's constitutional right of access to health care services (Constitution, s27(1)(a) & s173).

Section 27(2) is a prescription by the Constitution to the state and obliges the state to progressively move toward realisation of its socio-economic obligations to everyone within its borders (MSM, para 178). This prescription, the Court argued, imposes a new way for how the state should deal with its negligence in medico-legal cases (ibid). The new way is considering amending the laws to allow for payment in kind (ibid). Is the rule that payments should be made in money in conflict with the government's obligation to progressively move towards realisation of access to health services by everyone within its borders? I say yes. A yes means that over and above the prescripts of Section 173, that it does not take into account the interests of justice; this rule would not survive the dictates of Section 39 (2) for being inconsistent with the Constitution, because it fails to promote the spirit, purport and objects of the Bill of Rights (Constitution, s39(2)). If the common law rule retards the state in its fulfilment of its

constitutional obligations, then the Constitutional Court should render it unconstitutional. Judge Raylene Keightley further highlighted the challenges faced by the state, as follows:

> A further factor to consider is that public health institutions are required under the Constitution to render services to all. They cannot lawfully turn away pregnant women who seek assistance in the delivery of their babies. The strain on state resources in this regard was alluded by Ms Bogoshi, who testified that when she was at Chris Hani Baragwanath Hospital, they performed up to 70 caesarean sections per day…..Thus, the inevitable consequence of the state's constitutional duty to render health care services to all who need it is at greater risk of being held liable for medical negligence leading to cerebral palsy births than is the private sector (MSM, para 184).

The state itself is aware of its exposure to being sued for medical negligence and the challenges of paying a lump sum and has since placed a bill to amend the State Liability Act of 1957 before Parliament in May 2018 (ibid: para 188). The long arm of the State Liability Amendment Bill [B16-2018], states that the Bill aims: "To amend the State Liability Act, 1957, so as to provide for structured settlements for the satisfaction of the claims against the State as a result of wrongful medical treatment of persons by servants of the State; and to provide for matters connected therewith".

Judge Raylene Keightley referred to this conflict using the analogy of the double-edged sword faced by the state, which she describes as paying huge damages claims and providing health care services at the same time (MSM, para 186). The more government pays, the fewer the resources that are left for the provision of health

services. This is how Judge Raylene Keightley in the Gauteng Local Division of the High Court of South Africa puts it in her own words:

> This is evident from the junction placed on the state in s27(2) that it must take reasonable measures to achieve this right, and that it must do so progressively within its available resources: if reparation in kind achieves the purpose of making good the harm that has been inflicted, while at the same time acting as a measure to guard against a reduction in the state's resources, and hence its ability to meet its obligations under s27(2), this would seem to me to be a reasonable and compelling basis on which to consider developing the common law (MSM, para 179).

The rule suffers a deficiency in that it does not take the interests of justice into account as alluded to in Mokone, cited in DZ, a case referred to and explained in chapter one (DZ, para 32). And, Judge Raylene Keightley has argued the need for it to be reformed precisely.

The argument advanced by the courts for the existence of the common law rule that payment in medico-legal cases must be in money, as already mentioned above, is that "money is a measure of all things" (DZ, para 14). Is money a measure of all things? Whose standard is this? Can we really measure good health in monetary terms? From the earlier presentation on Ubuntu, it is clear that money is not considered a measure of all things by Ubuntuists (Metz, 2007: 327). Africans used other provisions like paying in kind, and the barter system, than money to pay debts and appease those they have offended (Ronnback, 2020: 3). It is argued in DZ that the judges, in the Wynberg Valley Railway Company case, argued that money is just one of the tokens used, and that

the saying that it is a measure of all things may be challenged successfully (DZ, para 38). The judges in that case were prepared to let go of the rule and allow a payment in kind, had it not been that the Wynberg Valley Railway Company legislation precluded it (ibid). Judge Froneman. In DZ also warned against allowing ourselves to be bound by the past (ibid: para 39).

The common law enjoyed a higher status than indigenous law in the past in South Africa in the pre-constitutional era (van Niekerk, 2001: 5-9). This higher status was abolished by the Constitution, which put both laws at the same level as sources of law in the country (ibid). Had this been the same status when the common law rule was adopted in South Africa, I believe there would have been a different version to this rule. If indigenous law had been considered, it could have shown that there are many other provisions which would satisfy a debt of this nature other than money. Monetary compensation in itself is not enough for human relations and harmony, according to Ubuntu, as has been argued in the previous chapter (Metz, 2007: 327). As already explained, indigenous law is the law practised by black South Africans, and it is based on their cultural practices and customs.

The fact that the RAF, among others, introduced paying future medical expenses in kind is also proof that the rule is outdated (RAF Act, 1996 s17).

4.4 Possible Objections to Alternatives of Lump Sum Payments

Defenders of the rule might argue that the common law rule has been practiced since time immemorial and cannot just be abandoned now because health institutions/health workers do not want to pay in cash. Maybe it is true that the rule has run its course and served humanity; unfortunately now the prescripts of the Constitution dictate against it and the Constitution is the supreme law of the Republic. Section 2 of the Constitution states that: “The 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” (Constitution, s2). Other than this prescription, I have shown that justice to the victims of medical negligence and to the broader society can be better served with payment in kind. Payment in kind makes good the harm caused by medical malpractice, and because it does, we can say that money is not necessarily a measure of all things, as payment in kind replaces money easily.

Others may argue that only money can satisfy future medical expenses to be paid by the claimant. As argued above, the debt would be upset by provision of health services for free to the claimant. As shown in MSM, the health services to be provided at Charlotte Maxeke Academic Hospital are comprehensive and multidisciplinary in nature, and thus far better than what money can buy in the private sector (MSM, para 170).

Another objection by the defenders of the common law rule that damages awards must be paid in money might be that it is not this rule, but the ‘once and for all’ common law rule, which needs revising (SALRC, 2017: 38). In DZ it was explained that the ‘once

and for all rule' aims to have a plaintiff claim in one action all damages, which include past, present and prospective, arising from a single cause of action (DZ, para 16). The 'once and for all rule' aims to prevent a situation where people open cases repeatedly against each other for matters that have already been adjudicated by the courts, harassment of respondents, and contradictory judgments based on the same matter (ibid). The rule requires that matters brought before the courts should be decided upon once and for all (ibid). What happens is that issues of liability and compensation are decided in a single judgment once and for all, and the court may not sit again about the same matter (ibid). Like Judge Chris Jafta put it in the minority judgment in DZ, the rule is concerned with the judicial process, but not the execution of the payment of the judgment debt, which he considers an administrative process that follows a judgment (ibid: para 75). As he stated:

> But more importantly, I do not agree that the "once and for all" rule prohibits periodic payments. This rule regulates judicial process and not execution of the payment of a judgment debt. The rule does not require that once the amount of compensation is determined it must be paid in a single payment. It may well be that in a particular case the judgment debtor does not have funds or assets which cover the entire debt. In that event the judgment creditor may exact payment of part of the debt (DZ, para 75).

I argue that the common law rule that the payment of damages in medico-legal cases must be made in money is central to the lump sum system in that it prescribes to the courts as to the method of payment to be accepted. The payment, according to the rule, can only be made in money and thus payment in kind is ruled out at the onset.

Once this rule is amended or invalidated, methods other than lump sum payments can be considered. I argue that this common law rule, not the once and for all rule, threatens the state's ability to provide access to health services to everyone.

4.5 Conclusion

I have presented and argued why the common law rule that payments in medico-legal cases should be made in money is archaic and should be amended. I have also addressed possible objections to my argument by the defenders of the common law rule that payment in medico-legal cases be made in money. I now move to the conclusion of my argument.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

The first chapter served to introduce issues about the practice of the advance payment of a lump sum in lieu of future medical expenses in medico-legal cases. Chapter two sought to demonstrate how medico-legal cases are prone to abuse and can potentially be turned into money-making schemes rather than providing restorative justice to claimants in medico-legal cases. I further demonstrated that if the practice is left in its current format, it has a potential to adversely affect the provision of health services. The participants, namely claimants, health workers, lawyers, actuarial scientists and medical expert witnesses, could find themselves involved in dishonest practices like stealing and buying patient information, lying under oath in court, and lawyers using touts. I have also demonstrated that the process of claiming in medico-legal cases itself has a potential to encourage the unethical behaviour, while at the same time, it is costly and expensive for the claimant and the health sector, while not geared towards reconciliation.

I believe, in line with Ubuntu, disputes should end with the disputing people reconciling (Metz, 2007: 5). Conflict resolution methods aim to create loving relationships and discourage unfriendly relationships (Marcus, Dorn and McNulty, 2011: 288).

I have also discussed possible objections to my arguments by the defenders of the common law rule and those who defend the current status quo of claiming lump sum amounts. I did not only rebut the objections, but I also presented an alternative to the current system. I believe that victims of malpractice deserve compensatory justice that

should be obtained without trampling on other people's rights or tempting others to commit crimes or unethical conduct. The proposal is to have a system where the court system is abandoned in favour of a mediation process. Mediation is a cheaper and quicker process and aims to reconcile the disputants. Following the mediation, the claimant can be paid a lump sum for the loss already incurred, and future medical expenses are paid in kind, where the offender can prove that they have the facilities and capable staff. Alternatively, there must be an undertaking to pay on incurring the expense, while some allowance is paid in instalments if there is a need.

I went further in chapter three to show that if the moral theory of Ubuntu were to be applied to the current system of claiming advance lump sum payment for future medical expenses in medico-legal cases, it would be found to be morally unjustifiable. Behaviours associated with the system of claiming for future medical expenses in medico-legal cases are morally reprehensible according to this Ubuntu theory, and the system of paying advance lump sums for future medical expenses in medico-legal cases ought to change to mediation, as I proposed in the previous paragraph.

In chapter four I argued that the common law rule that medico-legal cases be settled using only money is archaic and that it should be amended. I showed from case law that it does not only offend the normative aspects of the Constitution, but it has been rendered inadequate by Section 173 of the Constitution and that it deserves amendment due to the interests of justice. I agree with Judge Raylene Keightley that the common law rule is in conflict with the Constitution in that it conflicts with the interests of justice according to Section 173 of the Constitution, and she ruled that the

child born with cerebral palsy at Leratong Clinic would receive her future medical services at the Charlotte Maxeke Hospital in lieu of a lump sum payment for future medical expenses (MSM, para: 214.2). It should be noted that part of the judgment was that expenses for pain and suffering, loss of earning capacity, motor transport and Trust account be paid as a lump sum (ibid).

The parties at the Medico-legal Summit in 2015 recommended mediation to be considered in medico-legal cases. I agree with them, and I think mediation should be legislated in the form of the Arbitration Act of 1965. The long arm of the Arbitration Act states that the Act: “provides for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals”. I believe it should be mandatory for disputes to be referred for mediation first. The next step following failure of mediation should be arbitration and finally court procedures. It would be preferable if special courts were created to attend to medico-legal cases. During registration of the cases, the special courts could use its discretion in referring cases to mediation and taking the most serious cases (Walters, 2014: 2).

Mediation is a form of Alternative Dispute Resolution (ADR) where the disputants are guided by a neutral person to reach a settlement accepted by both (Marcus, Dorn and McNulty, 2011: 228). The complainant gets an opportunity to state his problem to the defendant, and the defendant gets to understand it from the complainant and to give his side of the story (Walters, 2014: 1). The ADR mechanism was developed by legal reformers seeking alternatives to challenges presented by the court system of taking

too long to conclude cases, high legal costs, and the contentious framework of the system (Marcus et al., 2011: 223). Scharf adds that ADR is quick, cost-effective and held in private, thus saving the affected health practitioner from humiliation and the claimant from media attention (Scharf, 2015: 173). He further states that the medical expert witnesses would feel free to express their opinions without the aggression of the courtroom in cases of arbitration, and the system would avoid what he calls case building by the experts and lawyers and that confidentiality would be guaranteed (ibid: 174). Another advantage of mediation is that unlike court proceedings, mediation compensates for unavoidable error (Walters, 2014: 1). Mediation also would assist in ensuring that money spent on legal costs gets redirected to health care (ibid).

In arbitration, the arbitrator/s is/are appointed to adjudicate and make a decision. The arbitrator gives an award which the parties have to accept. Evidence is presented by both sides. I also support Scharf's (2015: 179) recommendation that medical expert witnesses should be held liable for unprofessional conduct for their conduct during the medico-legal proceedings.

The argument presented in this research report shows that the advance lump sum payments of future medical expenses in medico-legal cases is not morally justifiable. The practice ought to be replaced with a mediation system proposed above. The system is both fair to the claimant of medical negligence and to the public and reconciles the claimant with the defendant. The system is fair to the claimant in that settlement of the claim is quick and saves money. The system is fair to the public in

that money saved from the transaction can be used to ensure the health system is accessible.

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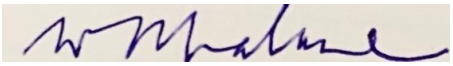
Signature: 

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