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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

DAMAGES FOR MEDICAL NEGLIGENCE: WHAT DOES "ONCE AND FOR ALL" REALLY MEAN?

Future medical expenses form a substantial part of awards of damages for medical negligence, especially in respect of cases involving obstetrics. These (often considerable) sums of money are required to be paid in one lump sum to a successful plaintiff, in accordance with the "once and for all" rule.

INDEPENDENT SCHOOLS AND THE CONSTITUTION: A DELICATE BALANCE

The right of a child to attend an independent school arises from the contract between the parents of the child and the school and not from the right to a basic education enshrined in the Constitution. Likewise, the right of an independent school to cancel the contract and effectively expel a child or to take other action for breach of the parent contract, arises from the terms of that contract. But does the Constitution have any impact here or is the issue purely contractual? Is an independent school beholden only to its contract?

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DAMAGES FOR MEDICAL NEGLIGENCE: WHAT DOES "ONCE AND FOR ALL" REALLY MEAN?

Froneman J held that the applicant failed to plead sufficient factual material to support the development or abolition of the "once and for all" rule, and that damages for future medical expenses must thus be paid in one lump sum of money.

The Court held that the reasonableness of future damages claimed can only be assessed once evidence regarding the adequacy of alternative health care has been considered.

Future medical expenses form a substantial part of awards of damages for medical negligence, especially in respect of cases involving obstetrics. These (often considerable) sums of money are required to be paid in one lump sum to a successful plaintiff, in accordance with the "once and for all" rule.

The "once and for all" rule, which is entrenched in our common law, simply requires that a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action. Its purpose is to prevent a multiplicity of claims based on one cause of action, and thus to ensure that there is a clear end to litigation.

The Constitutional Court (Court) in *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) was recently called upon to consider the application of the "once and for all" rule in the context of damages for medical negligence – does the rule allow for payment of future expenses as and when the need arises, or by means of future provision of actual medical services? Alternatively, should the rule be developed or abolished?

In response to the above questions, Froneman J, in the majority judgment, confirmed that:

1. damages due by law are to be awarded in money;
2. the "once and for all" rule requires that past and prospective damages be claimed and quantified in one action, and that future damages may therefore not be paid in instalments; and
3. a plaintiff may not be compensated by means of the actual rendering of medical services.

Froneman J held that the applicant failed to plead sufficient factual material to support the development or abolition of the "once and for all" rule, and that damages for future medical expenses must thus be paid in one lump sum of money.

The Court did, however, confirm the approach taken by the *Appellate Division in Ngubane v South African Transport Services* 1991 (1) SA 756 (AD), accepting that defendants, such as hospitals or their insurers, may bring evidence that medical services at a lesser cost than that of private medical care (and of the same or higher standard) will be available to the plaintiff in future. Should it be found that the damages claimed by the plaintiff are excessive and unreasonable, damages in the amount of the loss actually established must be awarded. The Court held that the reasonableness of future damages claimed can only be assessed once evidence regarding the adequacy of alternative health care has been considered. Damages may therefore be quantified using the cost of adequate public health care services in certain instances, and the rule that a plaintiff is obliged to reasonably mitigate its damages was thus confirmed.

It must be noted that Jafta J, in his minority judgment, differs from the majority judgment on the issue of periodic payment of damages. He argues that the "once and for all" rule does allow for periodic payment of damages, as the rule

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DAMAGES FOR MEDICAL NEGLIGENCE: WHAT DOES "ONCE AND FOR ALL" REALLY MEAN?

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It remains to be seen whether private hospitals or their insurers will make future endeavours to develop the way in which the rule is applied to private parties in our law.

does not govern the actual execution of payment, but simply intends to prevent a multiplicity of lawsuits based on a single cause of action. Jafta J further argues that a court derives its power to issue orders from the Constitution, and not from the common law.

Although the "once and for all" rule has survived judicial scrutiny in this case, we may well see future judgments that accord with Jafta J's interpretation of the courts' power to allow periodic payments. This is supported by the majority's finding that the "once and for all" rule may be developed incrementally or in its entirety in future cases, should sufficient factual material be provided to support such development. Furthermore, should the rule be so developed, it is conceivable that such developments may also extend to damages for future loss of income.

In response to the *DZ* judgment, the State Liability Amendment Bill (B16-2018) (Bill) was introduced to the National Assembly on 30 May 2018. The Bill requires that in successful claims against the State arising from wrongful medical treatment that exceed an amount of R1 million, courts are required to order that compensation be paid to successful claimants in terms of a structured settlement, which may provide for periodic payments for future costs. In addition, a court may order that, in lieu of monetary compensation, the State must provide medical treatment to the injured party at a public health establishment. Finally, the State may apply for a variation of the payment plan, should the circumstances of the injured party substantially change.

Defendants such as private hospitals or their insurers may be tempted to argue for the development of the common law to allow them to provide future treatment and services as and when the need arises, or to allow for periodic payment of damages, as opposed to being ordered to pay a lump sum upfront. Although there is the risk of administrative difficulties and enforcement of periodic compensation, such a method of compensating claimants removes much of the speculation associated with the quantification of future damages "once and for all", and allows greater certainty in awarding reasonable, realistic future damages, as is acknowledged in the Bill.

It remains to be seen whether private hospitals or their insurers will make future endeavours to develop the way in which the rule is applied to private parties in our law.

Roy Barendse and Georgia Speechly

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.

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INDEPENDENT SCHOOLS AND THE CONSTITUTION: A DELICATE BALANCE

Although s28(2) of the Constitution recognises the paramount importance of the child's best interests in every matter concerning the child, that cannot be an absolute position and each matter must be dealt with on its merits.

The right of a child to attend an independent school arises from the contract between the parents of the child and the school and not from the right to a basic education enshrined in the Constitution. Likewise, the right of an independent school to cancel the contract and effectively expel a child or to take other action for breach of the parent contract, arises from the terms of that contract. But does the Constitution have any impact here or is the issue purely contractual? Is an independent school beholden only to its contract?

Because of the route taken by the headmaster – termination without cause - the court found that the reasons for the termination were irrelevant but remarked that the approach of the school was exemplary.

Provision of a basic education in terms of s29(1)(a) of the Constitution is an obligation placed on the State which doesn't extend to an independent school. Exceptions to this might exist but are so unlikely that they can be disregarded in any general discussion.

Although s28(2) of the Constitution recognises the paramount importance of the child's best interests in every matter concerning the child, that cannot be an absolute position and each matter must be dealt with on its merits. This is so particularly in a school where the situation that presents is unlikely to affect only one child but may in fact to some degree affect every child in the school. In just such a matter, the Supreme Court of Appeal recently remarked in *A B and Another v Pridwin Preparatory School and Others* (1134/2017) [2018] ZASCA 150 (1 November 2018) that "[i]n each case what is required, therefore, is for a court to weigh the interests protected by the right [in Section 28(2)] against any countervailing interests protected by other rights to produce a legally sensible outcome".

In that matter the headmaster had decided to terminate the parent contract and exclude those children from the school. On the facts of the case and in terms of the contract the headmaster was entitled summarily to terminate the contract for cause but instead he followed the procedure in the contract for termination without cause, gave a full term's notice and before doing so made several unsuccessful attempts to resolve the issues between the school and the parents. Because of the route taken by the headmaster – termination without cause - the court found that the reasons for the termination were irrelevant but remarked that the approach of the school was exemplary. It does seem that had the headmaster opted for summary termination, which was also provided for in the contract, that too would have been upheld but that is mere speculation. Regarding the term's notice given, the parents argued that they ought to have been given a hearing before their contract could be terminated and they relied on s29(1)(a) and s28(2) of the Constitution. The Court dismissed those arguments for the reasons set out in the paragraphs above.

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INDEPENDENT SCHOOLS AND THE CONSTITUTION: A DELICATE BALANCE

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Until the issue is revisited by the Supreme Court of Appeals or the Constitutional Court, independent schools can accept that there is nothing unconstitutional in the general principle that their relationship with parents and children is governed by contract.

The parents then argued that the Promotion of Administrative Justice Act, No 3 of 2000 applied. That argument was also rejected on the basis that the school was not exercising a public power or performing a public function. Instead "it was exercising a contractual right that did not constitute administrative action". Importantly, the court found nothing in the wording or in the implementation of the contractual right of the school to terminate the contract "that offends any constitutional value or principle or is otherwise contrary to public policy". The court also remarked that on the facts there was nothing objectionable in the cancellation of the contract as the children were allowed to remain until the end of the academic year and there were several other public schools in the area that could accommodate them.

Until the issue is revisited by the Supreme Court of Appeals or the Constitutional Court, independent schools can accept:

- that there is nothing unconstitutional in the general principle that their relationship with parents and children is governed by contract;
- that they are generally entitled to follow the steps agreed with the parents regarding termination of the contract.

The latter point is subject to the caveat, however that there are no absolutes and that was underlined in the remarks of the Supreme Court of Appeals quoted above. When contemplating termination of a parent contract, whether summarily or on a period of notice, an independent school should be conservative in its approach, considering all of the relevant factors and how its actions will play in a court where a judge might be required to consider all the relevant facts "to achieve a legally sensible outcome".

Decisions made in haste, anger or under pressure from the school's car park are the ones less likely to withstand later scrutiny and more likely to be regretted.

Tim Fletcher

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