SUBMISSION ON BEHALF OF SOUTH AFRICAN MEDICAL MALPRACTICE LAWYERS ASSOCIATION IN RESPONSE TO:

THE STATE LIABILITY AMENDMENT BILL

Submitted to: The Portfolio Committee for Justice and Correctional Services

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TABLE OF CONTENTS

INTRODUCTION 3
NEGLIGENCE IN THE HEALTH SECTOR: THE CONTEXT 7
ACCOUNTABILITY AND REDRESS AS A RESULT OF NEGLIGENCE 9
ACCESS TO COURTS IN RESPECT OF NEGLIGENT CLAIMS 12
THE CONSTITUTIONAL PRINCIPLES AGAINST WHICH THE BILL FALLS TO BE ASSESSED 15
Constitutional principle 1: Legislation must provide reasonable certainty 16
Constitutional principle 2: Legislation must meet a legitimate government purpose 16
Constitutional principle 3: Legislation must give effect to the right that it seeks to protect 18
Constitutional Principle 4: Legislation may not draw arbitrary distinctions or lines of differentiation 22
Constitutional Principle 5: Rights of access to private health care services may not be unduly curtailed 23
COMMENT ON SPECIFIC PROVISIONS OF THE BILL 24
Section 2A(1): the obligation to pay compensation in terms of a structured settlement 24
The lawfulness of the structured payment regime 25
The implications for the once and for all rule 26
The differentiation that underlies the provision 28
Impact on the patient 29
The deterrent effect 32
Section 2A(2)(a) and (b): periodic payments or access to treatment at a public health establishment 33
Section 2A(2)(c): Standard of compliance for treatment at public health establishments 34
Section 2A(2)(d): Rate of compensation for treatment at private health facilities 36
Section 2: Application of the Bill to pending proceedings 37
CONCLUSION 39

INTRODUCTION

1. This Submission is made on behalf of the South African Medical Malpractice Lawyers Association:

2. The entities on whose behalf this Submission is made are, in the main, a group of different firms of attorneys who are involved in the litigation of medical malpractice claims on behalf of persons who have suffered harm and consequent loss as a result of the negligence of health care providers ("**Plaintiffs**"). A large portion of their litigation is against the State and the primary method through which these firms act on behalf of Plaintiffs is by way of contingency fee arrangements that are concluded pursuant to the Contingency Fees Act No 66 of 1997 ("**the Contingency Fees Act**").

3. Our interest in making this Submission lies in the fact that, in our view, if the State Liability Bill ("**the Bill**") was to be adopted in its current form, the consequence thereof would be: (a) that a structured settlement on a claim for damages against the State would not serve the interests of the patient who has suffered harm as a result of the negligent conduct of the health care professional; and (b) to inhibit litigation against the State in respect of claims of medical negligence because the Bill (if adopted) will have the effect of deterring legal representatives from acting for Plaintiffs against the State in terms of a contingency fee arrangement.

4. We welcome the opportunity to engage in this process and to contribute to a piece of legislation that will ultimately serve to further our common goal of ensuring that there is a system that allows for accountability by persons and entities who have acted negligently, while ensuring that the potential for abuse within the system is mitigated to

the greatest extent possible, without compromising the rights of persons who have been wronged.

5. To this end, there are, in our view, two guiding principles that ought to inform the Bill, namely: (a) it must pass constitutional muster; and (b) it must be capable of practical implementation.

6. The remainder of this Submission is structured as follows:

6.1. First, we provide a contextual background against which the Bill falls to be assessed.

6.2. Second, we address the context against which claims for negligent conduct arises in the health sector.

6.3. Third, we address the principles of accountability and redress.

6.4. Fourth, we address the crucial issue of access to Courts.

6.5. Fifth, we address the constitutional principles against which the Bill falls to be analysed.

6.6. Finally, we identify aspects of the Bill which, in our view are susceptible to challenge.

7. Before addressing each of these issues in turn, there is a preliminary issue that warrants consideration, namely the timing of this Bill. There is presently a process that is underway before the South African Law Reform Commission ("**the SALRC**") that is

aimed at investigating medico-legal claims. That investigation is the result of a request by:

7.1. The Department of Health "*mainly because of the challenges faced by the health sector due to the escalation in claims for damages based on medical negligence and the increasing financial implications thereof for the public health sector*".[1]

7.2. The Minister of Justice and Correctional Services, who, pursuant to the judgment in the unreported case instituted under case number 09/41967 in the Gauteng South High Court, handed down in April 2014 ("**Souls Cleopas**"), expressed the opinion that the legislation proposed by the Gauteng Department of Health would in effect abolish the common law —once and for all rule in respect of certain issues, "*without an in-depth investigation having been conducted into the matter*". The Minister was of the view that it would be advisable to await the outcome of such an investigation and therefore requested an in-depth investigation into the matter.[2]

8. Notwithstanding the view expressed by the Minister of Justice and Correctional Services, this Bill has been introduced prior to the conclusion of the process before the SALRC. According to the Bill's Memorandum on its Objects, it is intended to be an interim measure, "*pending the outcome of the larger investigation into medico-legal claims by the South African Law Reform Commission*". The Bill, if adopted, accordingly results in a short circuiting of the SALRC process and providing for an interim framework, which will not only work to the grave detriment of Plaintiffs but is also unlikely to pass constitutional muster. We are accordingly of the view that the Bill is a premature

[1] Issue Paper 33; Project 141; Medico Legal Claims; page 1; par 1.2.
[2] Issue Paper 33; Project 141; Medico Legal Claims; page 1; par 1.3. and 1.4.

measure that will inevitably result in grave adverse consequences for Plaintiffs; it will also introduce a level of uncertainty given its period of intended limited application. The concerns in respect of the parallel process as well as the lawfulness of the Bill cannot be over-emphasised. Indeed, the SALRC Issue Paper on the subject, reached *inter alia*, the following conclusions:

8.1. First, that a Court would not impose a structured settlement or a periodic payment on an unwilling Plaintiff.[3]

8.2. Second, that in the majority of jurisdictions which allow for a structured settlement or a periodic payment, this is left to the discretion of a Court. [4]

9. Notwithstanding these conclusions, the Bill, as presently framed, seeks to do the direct opposite. Section 2A(1) is peremptory in the sense that a Court must order a structured settlement; in so doing, a Court is not afforded any discretion whatsoever in respect of whether a structured settlement is indeed appropriate on the evidence in a particular matter.

10. Indeed, the approach adopted in the Bill is also at odds with the recent *dictum* of the Constitutional Court where it observed that resolving the dilemma presented by medical negligence cases "*may lie in leaving the choice at the level of each individual case, depending on which form of payment will best meet its particular circumstances*". The Constitutional Court reasoned as follows[5]:

> "*[54] Although the 'once and for all' rule, with its bias towards individualism and the free market, cannot be said to be in conflict with our*

[3] Issue Paper 33; Project 141; Medico Legal Claims; par 4.23.
[4] Issue Paper 33; Project 141; Medico Legal Claims; par 4.23.
[5] MEC For Health and Social Development, Gauteng v DZ Obo WZ 2018 (1) SA 335 (CC).

constitutional value system, it can also not be said that the periodic payment or rent system is out of sync with the high value the Constitution ascribes to socioeconomic rights. There is no obvious choice at this highest level of justification. What appears to be called for is an accommodation between the two. Is that possible? At an abstract level it might be more difficult, as Professor Fleming observes:

> *'André Tunc recently described both capital and rent solutions as frankly catastrophic. This is especially true if a categorical choice between them, one way or the other, is demanded in the abstract as one of overriding general policy. What makes it so invidious is that comparison falters really at two levels. At one level there is the uncertainty about goals: we are torn between the paternalistic and the individualistic social philosophy, and yet cannot have both; one or the other must be sacrificed. On a second level, the difficulty is that each system has a different advantage over the other in meeting policy objectives which themselves are incontrovertible: for example, rent is better able to cope with the problem of death or other aggravation in the victim's physical condition, while capital conceivably provides a better hedge against inflation.'*

[55] If the only choice open to us was at this level then it would probably be better to leave reform to the legislature. But this may not be so. Resolution of the dilemma may lie in leaving the choice at the level of each individual case, depending on which form of payment will best meet its particular circumstances:

> *'Reducing the decision from the abstract or general to the concrete or particular will frequently allow us to minimise the dilemma of subordinating one advantage to another. For example, in cases of greatly reduced life-expectancy, the spectre of inflation becomes negligible compared with the advantages of a periodical award in coping with the problems associated with the uncertain date of death and the desirability of making provisions for the victim's family thereafter. Even on what I called the first-level problem, the pressure may well be greatly reduced when there is concrete evidence that the particular plaintiff is either incapable of being entrusted with a large sum of money or has, to the contrary, an attractive plan for employing it in founding a new career.'"*

NEGLIGENCE IN THE HEALTH SECTOR: THE CONTEXT

11. In our experience, negligence on the part of the health care professionals is as a result of a range of factors, which include:

11.1. The lack of skill or experience: for example, there are numerous examples of spinal surgery undertaken by specialists who are not suitably skilled resulting in devastating consequences such as paraplegia and lifelong permanent disability for the patients.

11.2. Commitment or issues of morale: our experience has shown that there have been instances of callous treatment by nurses due to low morale, commitment or attitude. For example, we have come across cases of: (a) an irritable nurse ripping a central venous line out of a patient's neck resulting in a stroke and lifelong disability for the patient; (b) uncaring nurses ignoring pleas of pregnant mothers about to give birth resulting in the babies suffering intrapartum compromise and consequent cerebral palsy; (c) a nurse warming a saline solution in a coffee urn for use during an operative procedure causing the patient's bladder to be irreparably burnt; (d) Non-adherence to e.g. Guidelines for Maternity Care published in 2007.

11.3. Lack of follow-up: due to doctors being too busy or simply not deeming it necessary, follow up after surgery does not always occur as it should. This results in crucial post-operative complications being missed, leading to loss of limbs, brain damage and death.

11.4. The failure to adhere to basic protocol: basic principles are often not adhered to in the treatment of patients such as regular foetal monitoring with CTG or at least Doppler Studies, implementing spinal precautions to prevent paraplegia when moving a patient following a high impact accident to prevent paraplegia

or referring the patient for a radiological study to diagnose a subdural haemorrhage that needs urgent surgery are often not adhered to.

11.5. Overburdened public health facilities: the general theme relating to cases brought against public healthcare facilities is, regrettably underpinned by a lack of hygiene, inadequacy of treatment and facilities.

11.6. Poor record keeping and safe and monitored custody of such records.

12. Claims for damages as a result of a wide range of negligent conduct serves an indispensable role in: (a) ameliorating the plight of Plaintiffs who have suffered loss as a result of negligent conduct by a health care professional; and (b) facilitating accountability on the part of the health care professional and ultimately the State.

13. At the outset, it must be emphasised that it is the negligent conduct of a health care professional, or the poor, unhygienic facilities that gives rise to a claim for damages. At its simplest, what this means is that had it not been for the actions of the health care professional, the Plaintiff would not be incurring costs of past and future medical expenses; this is the underlying purpose of compensation.

ACCOUNTABILITY AND REDRESS AS A RESULT OF NEGLIGENCE

14. The Constitution provides for a right of access to health care services. This right imposes correlative obligations on the State and the private sector, in order to ensure, amongst other things, that health care services are rendered in compliance with the appropriate standards of care and free from negligence.

15. In applying the test for negligence, a court will assess two key questions: (a) whether the healthcare professional could foresee the reasonable possibility of his conduct injuring another person and causing patrimonial loss and could take reasonable steps to guard against such occurrence; and (b) whether the healthcare professional failed to take such steps.

16. The test for reasonable conduct on the part of the healthcare professional was described as follows[6]:

> *"A medical practitioner is not to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care. And in deciding what is reasonable the court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs."*

17. The Courts have also emphasised that the following factors are relevant to the establishment of negligence[7]:

17.1. Where a person enters a profession he becomes an expert and the standard of care expected is raised to the level of a practitioner of such vocation.

17.2. The circumstances in which the medical negligence occurs are taken into account.

17.3. Existing knowledge and methods of treatment are taken into account as is knowledge of new developments in medicine.

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[6] Van Wyk v Lewis 1924 AD 438.
[7] Otto SF. Medical negligence. SAJR. 2004 Aug: 19-22.

17.4. The practitioner must ensure that he acquaints himself with new developments and that his patient is not prejudiced by use of outdated methods.

17.5. Lack of skill is reckoned as fault but the law does not require the doctor to be infallible in his conduct, an error of judgment will not constitute negligence where the proper standard of care has been followed.

18. The proof of negligence occurs on a balance of probabilities. The onus of proof rests on the plaintiff, and negligence as well as damage due to the negligence must be proven. Expert evidence is usually needed to assist the court in determining the reasonable man standard.

19. The test remains always whether the practitioner exercised reasonable skill and care or, in other words, whether or not his conduct fell below the standard of a reasonably competent practitioner in his field.[8]

20. Despite the relatively high threshold in establishing a case of negligence on the part of a health care professional, the alarming rate at which plaintiffs succeed in establishing negligence on the part of health care providers is cause for concern. In addressing this issue, we submit that effective State intervention is undoubtedly required. The answer however does not lie in stifling claims against the State for negligent conduct but in addressing the underlying source issues.

21. Access to reasonable compensation, which we submit the Bill does not allow for, is in our view, a fundamental aspect to facilitating accountability.

[8] Buthelezi v Ndaba 2013 (5) SA 437 (SCA) para 15.

ACCESS TO COURTS IN RESPECT OF NEGLIGENT CLAIMS

22. Section 34 of the Constitution provides for a right of access to Court.[9] However, the sad reality is that, particularly in the area of civil claims, access to funds in order to litigate such claims is an immediate impediment to aggrieved individuals or their families obtaining recourse.

23. Even if a litigant is able to obtain funds for an initial legal consultation, our experience has shown that in the vast majority of cases, the Plaintiff in matters against the State is not able to afford the costs of running a trial, including the costs of: (a) expert witnesses; (b) counsel's fees; (c) attorneys' fees; (d) disbursements such as costs of MRI investigations and/or other radiological examinations.

24. The problem is compounded by the fact that the State legal aid system does not provide for access to legal aid in respect of malpractice claims.

25. A key mechanism that facilitates access to Court is the Contingency Fees Act. In terms thereof:

    25.1. A contingency fee agreement is concluded; this is an agreement between a legal practitioner and his/her client to the effect that the legal practitioner will charge no fees if the client's claim has no merit/ court case is unsuccesful. The litigant may thus instruct a legal practitioner on a "*no win, no pay*" basis.

[9] Section 34 of the Constitution provides as follows: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

25.2. Should the client win the case, the fee payable to the legal practitioner is recovered from the proceeds of the litigation, namely double the legal practitioner's normal hourly fee – to a maximum of 25% of the capital recovered. This is so because the legal practitioner bears, inter alia, the risk of not being compensated in a number of cases. The legal practitioner does not just forego his fees – he has to pay all the attorney and client costs such as counsel, experts and other disbursements. Numerous safeguards were included in the Contingency Fees Act to protect the public.

26. The Contingency Fees Act strikes a balance that, on the one hand, facilitates access to courts and on the other, seeks to minimise the potential for abuse. By way of example, the Contingency Fees Act:

26.1. Requires that where a matter is to be approached on a contingency basis, a compliant contingency fee agreement must be concluded. The Act requires and Judges insist on seeing the agreement and supporting affidavits before an Order of Court is made.

26.2. Sets a maximum limit in respect of legal fees (as explained).

26.3. Imposes a range of requirements in respect of the content of a contingency fee agreement.

26.4. Imposes certain requirements in respect of a settlement that occurs pursuant to a contingency fee agreement.

26.5. Provides for a Plaintiff who feels aggrieved by the fees charged by a legal practitioner, to review those fees and/or the underlying agreement.

27. At the heart of this Submission lies the concern that the Bill will have the effect of deterring attorneys from providing services in accordance with the Contingency Fees Act notwithstanding the fact that contingency litigation is the primary means by which victims of negligent conduct, are able to obtain legal recourse. This inevitable consequence is by no means an exaggerated one. The following basic explanation demonstrates the point:

27.1. Most persons accessing State health care services do not have the means to fund litigation against the State in the event that they or their families are victims of negligent conduct.

27.2. The State is unable to provide a mechanism by which such Plaintiffs are able to vindicate their rights; the State legal aid system provides no assistance in this regard.

27.3. Contingency arrangements are often the only recourse mechanism that poor people have to assert their rights in Court.

27.4. In deciding whether to enter into a contingency fee agreement, a key consideration for lawyers relates to the prospects of success. In other words, if there are reasonable prospects of success, lawyers are more inclined to conclude such agreements and the incentive to do so is the fees that they are entitled to in the event of a successful outcome.

27.5. The consequence of a structured settlement is that even if a claim is successful, the lawyer acting on contingency has no guarantee that his/her fees will be received. Indeed, it is highly unlikely that legal fees can be met at all by way of a periodic payment, and even if, on a theoretical level, they may be met, the mere prospect of a periodic payment and the uncertainty attendant thereon, will constitute a grave and serious impediment to lawyers acting on contingency. Furthermore, attorneys will be required to keep files open for longer periods, continue to incur costs over many years and in the event of breach of the court order be required to intervene many years into the future.

27.6. The result is this: an increased lack of accountability at State facilities which has a disproportionate impact on poor people in circumstances where there is a great unlikelihood of those persons ever being able to litigate such cases.

THE CONSTITUTIONAL PRINCIPLES AGAINST WHICH THE BILL FALLS TO BE ASSESSED

28. We are of the view that the Bill falls to be assessed against the following constitutional principles:

28.1. First, it must provide reasonable certainty.

28.2. Second, it must meet a legitimate government objective.

28.3. Third, it must give effect to the rights that it seeks to protect.

28.4. Fourth, it may not draw arbitrary distinctions and lines of differentiation.

28.5. Fifth, in granting recourse it may not unduly curtail rights of access to private health care.

Constitutional principle 1: Legislation must provide reasonable certainty

29. The Constitutional Court identified certain guiding principles in relation to the law-making function of government, including the following[10]:

29.1. The Rule of Law requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity or absolute certainty of laws.

29.2. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.

29.3. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives.

Constitutional principle 2: Legislation must meet a legitimate government purpose

30. It is now well-established that the exercise of all legislative power is subject to at least two constitutional constraints[11]:

30.1. The first is that there must be a rational connection between the legislation and the achievement of a legitimate government purpose. Parliament cannot act

[10] Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at par 108.
[11] Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) at par 74; see too par 77.

capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.[12] The idea of the constitutional State presupposes a system whose operation can be rationally tested.[13] The requirement is meant "*to promote the need for governmental action to relate to a defensible vision of the public good*" and "*to enhance the coherence and integrity*" of legislative measures.[14] A challenge on the ground of rationality requires that a court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.[15]

30.2. The second constraint is that the legislation must not infringe any of the fundamental rights enshrined in the Constitution.[16]

31. The reasoning of the Constitutional Court in **New National Party of South Africa v Government of the Republic of South Africa and Others** 1999 (3) SA 191 (CC) (though in the context of the right to vote) is instructive in this regard:

31.1. The implementation of an Act which passes constitutional scrutiny at the time of its enactment, may well give rise to a constitutional complaint, if, as a result of circumstances which become apparent later, its implementation would infringe a constitutional right.[17] In assessing the validity of such a complaint, it becomes necessary to determine whether the proximate cause of the infringement of the right is the statutory provision itself, or whether the

[12] New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC) at par 19.
[13] Affordable Medicines; par 74.
[14] Law Society of SA v Minister for Transport 2011 (1) SA 400 (CC) at par 32.
[15] Albutt v Centre for the Study of Violence and Reconciliation, and Others 2010 (3) SA 293 (CC) at par 51.
[16] New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC) at par 20.
[17] At par 22.

infringement of the right has been precipitated by some other cause, such as the failure of a governmental agency to fulfil its responsibilities. If it is established that the proximate cause of the infringement, in the light of the circumstances, lies in the statutory provision under consideration, that provision infringes the right.[18]

31.2. It is necessary to apply an objective test in deciding whether the Act of Parliament is valid. Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving its goal.[19]

Constitutional principle 3: Legislation must give effect to the right that it seeks to protect

32. The Bill must ultimately ensure that it gives effect to three specific constitutional provisions that protect health care services, namely:

32.1. The right of access to health care services as protected in section 27 of the Constitution. The section provides:

> *"27 Health care, food, water and social security*
>
> *(1) Everyone has the right to have access to-*
>
> *(a) health care services, including reproductive health care;*
>
> ....
>
> *(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*

[18] At par 22.
[19] At par 23.

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

32.2. The right of children to basic health care services as protected by section 28(1)(c) of the Constitution.

32.3. The right of detained persons (including every sentenced prisoner) to medical treatment.

33. It is clear from the wording of section 27(2) that the legislative measures that the State takes, must meet the threshold of reasonableness. According to the case-law of the Constitutional Court, the constitutional threshold requires:

33.1. First, that whatever programme is adopted "*must be capable of facilitating the realisation of the right*".[20]

33.2. Second, the State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive. These policies and programmes must be reasonable both in their conception and their implementation.[21]

33.3. Third, a programme that excludes a significant segment of society cannot be said to be reasonable.[22]

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[20]Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at par 40.

[21] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at par 42.

[22] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at par 43.

33.4. Fourth, any deliberately retrogressive measures would require the most careful consideration and would need to be fully justified by reference to the totality of the rights protected and in the context of the full use of the available resources.[23]

33.5. Fifth, socio-economic rights, as with other constitutional rights are understood as imposing an obligation upon the State to refrain from interfering with the exercise of the right by citizens (the so-called negative obligation or the duty to respect).[24]

33.6. Finally, there is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.[25]

34. In the event that the Bill is found to infringe a constitutional right, the State would have to justify the offending provisions in light of section 36 of the Constitution[26]. The following considerations are relevant to this enquiry:

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[23] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at par 45.

[24] Mazibuko v City of Jhb 2010 (4) SA 1 (CC) at par 47. See too: Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC) at par 31 to 34

[25] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at par 46.

[26] Section 36 of the Constitution provides as follows:

"36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

34.1. The balancing of different interests must take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.[27]

34.2. The law that limits a fundamental right must do so for reasons that are acceptable in an open and democratic society based on human dignity, equality and freedom. In addition, the law must be reasonable in the sense that it should not invade rights further than it needs to in order to achieve its purpose.[28] In other words, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purposes of the law)."[29]

34.3. Where a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law — usually the organ of state responsible for its administration — must put material regarding such considerations before the court.[30]

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[27] National Coalition for Gay & Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) at par 35.
[28] Currie and De Waal, "The Bill of Rights Handbook", (6th Edition), page 163.
[29] Currie and De Waal, "The Bill of Rights Handbook", (6th Edition), page 163.
[30] Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) 2001 (4) SA 491 (CC) at par 19. See too: Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Dev 2014 (2) SA 168 (CC).

34.4. A limitation will not be proportional if other, less restrictive means could have been used to achieve the same ends. And if it is disproportionate, it is unlikely that the limitation will meet the standard set by the Constitution, for section 36 "does not permit a sledgehammer to be used to crack a nut".[31]

34.5. A provision which limits fundamental rights must, if it is to withstand constitutional scrutiny, be appropriately tailored and narrowly focused.[32]

Constitutional Principle 4: Legislation may not draw arbitrary distinctions or lines of differentiation

35. The correct approach to be adopted when legislative measures are challenged is to determine whether there is a rational connection between the means chosen and the objective sought to be achieved.

36. A mere differentiation does not render a legislative measure irrational. The differentiation must be arbitrary or must manifest "naked preferences" that serve no legitimate governmental purpose for it to render the measure irrational.[33] According to the Constitutional Court[34]:

> *"It is by now well settled that, where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.*
>
> *It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the*

[31] S v Manamela and Another (Director-General of Justice Intervening) 2000 (3) SA 1 (CC) at par 34.
[32] Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC) at par 49.
[33] Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) at par 32 and 33.
[34] Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) at par 32 and 33.

lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this account, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad."

Constitutional Principle 5: Rights of access to private health care services may not be unduly curtailed

37. The Constitutional Court has found that imposing public health tariffs on road accident victims amounts to restricting them to treatment at public health institutions, if they cannot fund the health care themselves. The Constitutional Court found that the public sector is not able to provide adequate services in a material respect. It must follow that the means selected are not rationally related to the objectives sought to be achieved (i.e. to provide reasonable health care to seriously injured victims of motor accidents).[35]

38. As regards access to private health care services, the Courts have further reasoned[36]:

    38.1. By making use of private medical services and hospital facilities, a plaintiff, who has suffered personal injuries, will in the normal course (as a result of enquiries and exercising a right of selection) receive skilled medical attention and, where the need arises, be admitted to a well-run and properly equipped hospital. To accord him such benefits, is both reasonable and deserving.

    38.2. For this reason it is a legitimate basis on which a claim for future medical expenses is determined. Such evidence will thus discharge the onus of proving the cost of such expenses unless, having regard to all the evidence, including that adduced in support of an alternative and cheaper source of medical services, it can be said that the plaintiff has failed to prove on a preponderance of

[35] Law Society of SA v Minister for Transport 2011 (1) SA 400 (CC) at par 96 to 100.
[36] Ngubane v SA Transport Services 1991 (1) SA 756 (A) at 784.

probabilities that the medical services envisaged are reasonable and hence that the amounts claimed are not excessive.

COMMENT ON SPECIFIC PROVISIONS OF THE BILL

39. The proposed section 2A of the Bill provides for structured settlements in respect of claims against the State arising from wrongful medical treatment. In what follows, we identify challenges in relation to the different subsections of this provision.

Section 2A(1): the obligation to pay compensation in terms of a structured settlement

40. In terms of section 2A(1), a Court must in a successful claim against the State resulting from wrongful medical treatment that exceeds an amount of R 1 million, order that compensation be paid to the creditor in terms of a structured settlement.

41. There are five issues of concern that arise from section 2A(1) in its current form:

41.1. First, the lawfulness of the structured payment regime.

41.2. Second, the implications of a structured payment for the once and for all rule.

41.3. Third, whether the differentiation that it draws (on multiple levels) will pass constitutional muster.

41.4. Fourth, it could result in the structured settlement not meeting the needs of the patient and thereby adversely impacting on the health rights of the patient.

41.5. Fifth, it will serve as a deterrent to attorneys acting on a contingency fee basis.

42. In our view, the adverse impact of structured payments are as follows:[37]

42.1. The need for initial capital expenditure;

42.2. The initial level of periodic payment needed;[38]

42.3. Administrative capacity and liquidity of the State as Defendant in order to meet future payments;

42.4. Unforeseen needs arising after settlement;[39]

42.5. Lack of liquidity and loss of discretion.[40]

The lawfulness of the structured payment regime

43. It must be emphasised that the consequence of a structured payment regime is that the State will incur a debt over a protracted period of time. Despite this, the Public Finance Management Act No 1 of 1999 ("**the PFMA**") does not provide for a budgeting mechanism beyond the Medium-Term- Expenditure-Framework ("**MTEF**").

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37 These are some of the disadvantages listed by Lewis R, The Merits of Structured Settlement: The Plaintiff's Perspective. Oxford Journals of Legal Studies, Vol 13, 4, pp 530-547.

38 According to Lewis, "This will be the case if the damages are too low to fund even the initial level of payments required." "Although damages in such a case will be exhausted earlier if not structured, it may be preferable for this to occur and for the plaintiff's actual needs now to be met if only for a short time, rather than leaving him with a permanently inadequate source of funds to offer insufficient protection against needs which have yet to occur."

39 Lewis: "If a structure is to be put in place, the plaintiffs' advisers have the difficult task of trying to arrange as much room to manoeuvre as possible whilst taking maximum advantage of the benefits conferred by the annuity system. This means that usually they should make allowance for a contingency fund and, in some cases, for deferred 'balloon payments'. However, these may not always prove sufficient. A plaintiff may then regret that his capital has been locked away in the structure. In this respect there is no substitute for the single lump sum paid under the traditional system"

40 Lewis: The plaintiff is unable to gain ready access to the capital sum used to purchase annuities as part of the structured settlement. This is one of the main prices to be paid for the benefits offered by a structure. The plaintiff loses discretion over the disposition of his damages; he does not have the freedom to spend whatever sum he chooses, whenever he likes." This would clearly apply primarily to plaintiffs who are able to manage their own affairs.

44. The effect of this is that if an Order of Court is granted for a structured payment (say over a thirty year period), there is no mechanism in terms of which the State is obliged to budget for such a debt. For that reason alone, the State would, in the ordinary course not be permitted to incur such a debt.

45. The consequence of the Bill is that it will result in extensive debt being incurred on the part of the State, in the absence of any guaranteed funding mechanism to facilitate the State being able to make good on its obligations in this regard. Such a result, we submit is plainly unlawful.

46. There is a further very serious consequence, we submit, in respect of the Bill. It is that the effect of the Court Order is that future budgets must account for a contingent liability. This is being imposed possibly several years in advance of a budget for a particular year being developed and adopted. In other words, what it results in is this: the Courts would be prescribing to the State the content of future budgets in the absence of any regard to the financial and other context in which those budgets are being adopted.

47. It also, in our view, runs contrary to section 215 of the Constitution which requires that "*National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.*"

The implications for the once and for all rule

48. In **Standard Chartered Bank of Canada v Nedperm Bank Ltd** 1994 (4) SA 747 (A) (Standard Chartered Bank) at 782D – F, Harms JA, 'conscious of stating the obvious', pointed out that:

"The purpose of an Aquilian claim is to compensate the victim in money terms for his loss. Bell J pointed out as long ago as 1863 that when damages are due by law they are to be awarded in money because money is the measure of all things [5] . . . . This rule still stands . . . ."

49. In **Evins v Shield Insurance Co Ltd** 1980 (2) SA 814 (A) at 835C – H Corbett JA explained the import of the once and for all rule:

> *"Expressed in relation to delictual claims, the rule is to the effect that in general a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action . . . . This rule appears to have been introduced into our practice from English law. . . . Its introduction and the manner of its application by our Courts have been subjected to criticism . . . but it is a well-entrenched rule. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation."*

50. As recently described by the Constitutional Court in **MEC For Health and Social Development, Gauteng v DZ Obo WZ** 2018 (1) SA 335 (CC), closely allied to the once and for all rule is the principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions. The claimant must sue for all his damages, accrued and prospective, arising from one cause of action, in one action and, once that action has been pursued to final judgment, that is the end of the matter.[41]

[41] MEC For Health and Social Development, Gauteng v DZ Obo WZ 2018 (1) SA 335 (CC).

51. According to the Constitutional Court, in relation to delictual claims, the "once and for all" rule is to the effect that a plaintiff must generally claim in one action all past and prospective damages flowing from one cause of action. The corollary is that the court is obliged to award these damages in a lump sum, the object of which is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions. It is buttressed by the res judicata principle, the purpose of which is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.[42]

52. The effect of structured settlements is, we submit, to run counter to the once and for all rule, in the absence of a sufficiently reasoned basis for doing so.

The differentiation that underlies the provision

53. Section 2A(1) of the Bill draws the following direct distinctions:

    53.1. First, the provision applies only to claims as against the State.

    53.2. Second, the provision applies only in respect of claims that exceed an amount of R 1 million.

54. However, the impact of section 2A of the Bill is that it disproportionately affects the most vulnerable segments of South African society, whose needs are most desperate and who are most reliant on the proceeds of a damages claim. This is so for the following reasons:

[42] MEC For Health and Social Development, Gauteng v DZ Obo WZ 2018 (1) SA 335 (CC) at par 16.

54.1. First, given that it applies only to claims that are in excess of R 1 million, this means that it targets persons who have suffered harm and loss of a particularly serious nature on account of the negligent conduct of a health care professional.

54.2. Second, given that it targets only Plaintiffs in the State sector it is undoubtedly aimed at restricting the claims of poor people (i.e. persons who do not have the resources to access private health care facilities). It must be emphasised that the damages claims for this category of persons provides a particularly important line of assistance.

54.3. Third, it applies to both past and future expenses. What this means is that even where loss and expenses have already been incurred by poor and vulnerable persons, they are subjected to a structured settlement.

55. We submit that the net effect of the Bill is to bear disproportionately and unfairly on the poorest and most marginalised segments of South African society.

Impact on the patient

56. The proposed structured settlement also ignores its impact on the poor and vulnerable. By way of example:

56.1. First, as stated, most plaintiffs in claims against the State are from low income families. As such, housing is relatively basic and generally overcrowded, with public transport being the only means of getting around. In most cases, the first basic requirement of a family with a severely disabled child/person who receives compensation is to buy a house that is big enough to allow them to

continue living together, while properly accommodating the disabled child/person and also purchasing a vehicle as means of transport.

56.2. Limiting the first lump sum payment to the items listed in the proposed section 2A (a) to (d), and having regard to the irrecoverable legal expenses, State-plaintiffs will, with the proposed structured settlement system, remain trapped in their (poor) circumstances which are ill-suited to living as a disabled person, e.g. not being able to access therapies resulting in a worsening condition of the patient requiring more intensive intervention.

56.3. A method of alleviating this, within the framework of the Bill, would be to provide for a first lump sum payment amount. According to Lewis:

> *"Another factor affecting the level at which a [periodical payment order] may be made and the extent they will be used is that, in most serious injury cases, the claimant should be left with a contingency lump sum fund to meet unexpected needs. It is essential that this element of flexibility exists to safeguard the future, even though it is not mentioned in the legislation. There are fears that judges will not take it into account sufficiently. Capital may be needed not only to buy and adapt accommodation, but also to care for the claimant, for example, in the event of the unexpected death or divorce of his carer spouse. Capital might also be needed if care costs outpace price inflation, as discussed below. For structured settlements in the past, on average, only about half of the award was used to arrange the periodic payments. The remainder was accounted for by interim payments, the capital needed to discharge debts and pay for immediate purchases, and the contingency fund."*[43]

56.4. Second, the compensation awarded must provide for the level of care required. It is common that there are enormous differentials between costing set out by the experts for the claimant and those for the defendant when attempting to

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[43] Lewis R. The Politics and Economics of Tort Law: Judicially Imposed Periodical Payments of Damages. The Modern Law Review, Vol 69, 3, PP418-442. P427.

quantify how much damages a claimant is entitled to. There is no guarantee that periodic payments will sufficiently cover all the costs incurred by the injured party for therapy, mobility devices, medication etc.

56.5. Third, the language used in section 2A strongly implies that a top-down[44] method is to be applied. This involves the parties determining the total value of the claim and future care requirements and then, with that information to hand, determining the amount of the periodic payments. Although there is provision in section 2A(4) that a court can be approached for a variation, the Bill does not provide for ongoing need assessments.

56.6. Fourth, section 2A provides for the threshold amount of R1 million, with no provision for an annual gazetted increase, as is in effect with the salary cap in the RAF Act. Given the peremptory wording of the Bill ("a court must"), and with a narrow interpretation of the Court's discretion provided for in sub-section 2A(2)(c)(iii), difficulties will arise in the case of smaller awards, one ponders here for example the possibility of an amputee who is awarded future loss of income which has been somewhat reduced by a theoretical residual earning capacity. In such an instance the plaintiff may find himself receiving an inadequate annual amount to substitute his lost income, whereas he would be able to put to far better use a lump sum to provide capital funding to start an

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[44] According to Lewis (fn 2, p428). "The … top down approach begins only after arriving at the traditional lump sum. It then calculates the income stream which can be derived from that capital, and this can be used to assess whether it will meet the claimant's annual needs." "By contrast, for a PPO the new legislation requires a bottom up approach. Unlike top down, this does not require the lump sum to be calculated at all. Instead, irrespective of the capital cost, the court assesses the periodical payments the claimant needs for the future. These payments do not have to be multiplied to take account of the speculative estimates of life expectancy or projected investment return"

entrepreneurial business to secure his future.[45] He could conceivably become destitute and dependant on the State for support, further burdening the State coffers.

The deterrent effect

57. Irrespective of what specific method is used in getting to the final detail of an award and periodical payment order, there are considerable costs both in regard to attorney and medico-legal disbursements. Attorneys will thus remain a crucial part of the recovery, both as regards funding and facilitating litigation and quantification.

58. Attorneys however, do not litigate malpractice claims alone. They are largely dependent on competent experts and Counsel. These medicolegal service providers and counsel are required to be paid as and when services are rendered. In most cases attorneys perform the required work to prosecute the claim and advance the disbursements over a period of four years or more.

59. The effect of section 2A is that attorneys who assist a claimant who has suffered damages as a result of medical negligence by State employees, will no longer be able to prosecute these claims. Most often the preparation involved in finalising the issue of liability is

[45] See also in this regard Lewis (supra, p426), "One area of uncertainty is the level of damages below which it might not be worthwhile to move towards a periodic award because its size may not merit the time and trouble involved." "Although in theory any award of future loss could therefore be paid periodically, in practice a [periodical payment order] will be less appropriate in certain types of claim. For example, although there is nothing to prevent a court imposing an order no matter what the age of the claimant, the objection for an elderly person to being paid periodically might be expected to have more force given the shorter duration of the payments." And further, at p427, "one area of concern with regard to when an order may be made is whether the award of damages is to be reduced for contributory negligence [or in clinical negligence cases, a risk discount]. If there is to be a reduction in damages, a periodical payment order may not then be enough to pay the cost of the claimant's immediate nursing needs. It might then be thought better to award a lump sum."

between R 600 000.00 (where there is an out of court settlement) and R-2 million rand (where the trial runs in excess of 10 days).

60. The effect of Section 2A is that if an attorney proceeds to assist a claimant to finalize the issue of liability, and in light of the structured settlements envisaged by the Bill, the attorney will incur a loss. This will undeniably have the effect of deterring attorneys from accepting instructions in these matters which will in turn leave the injured party without proper representation and without the means to investigate and finalise the issue of liability.

61. This in turn violates the injured party's rights in terms of section 34 of the Constitution and his/her common law right to seek redress for wrongful medical treatment. We refer to what we have already stated in this regard.

Section 2A(2)(a) and (b): periodic payments or access to treatment at a public health establishment

62. In terms of section 2A(2), where the State is liable to pay for the cost of future care, future medical treatment and future loss of earnings of an injured party:

62.1. The court must subject to subsection 4, order that compensation for the said costs be paid by: (a) way of periodic payments at such intervals which may not be less often than once a year; (b) only during the lifetime of the injured party concerned; and (c) on such terms as the court considers necessary.

62.2. The court may: (a) in lieu of the amount; or (b) at a reduced amount, of compensation that would have been paid for the future medical treatment of the

injured party, order the State to provide such treatment to the injured party at a public health establishment.

63. The following aspects of this proposed amendment are susceptible to challenge:

63.1. First, while this provision does afford a court to some degree of discretion, it does so only in relation to the frequency (and presumably the amount) of the periodic payments which may not be less than once a year, it places an added burden on a Plaintiff to motivate for a particular frequency of payment and a particular rate. What this means, in effect is that even though a Plaintiff has suffered damage in a particular amount and is therefore entitled to be compensated by way of damages in accordance with the loss sustained, in terms of the Bill the Plaintiff bears the added responsibility of making out a case for a particular frequency of payment, at a particular rate.

63.2. Second, the provision provides the Court with a discretion in respect of treatment being provided at a public health establishment. Based on the case-law that we have referred to, it is plain that a public health facility cannot provide an equivalent level of services to that of private health care facilities. This notwithstanding, in terms of the Bill, the Court may order the State to provide such treatment at a public health establishment.

Section 2A(2)(c): Standard of compliance for treatment at public health establishments

64. Section 2A(2)(c) provides that where the State is ordered to provide for future medical treatment at a public health establishment, the public health establishment concerned

must be compliant with the norms and standards as determined by the Office of Health Standards Compliance established in terms of section 77 National Health Act.

65. This provision gives rise to a range of practical difficulties and grave uncertainty as demonstrated by the following examples;

65.1. If a Court was to order that a plaintiff is to receive care at Provincial Hospital A, which at the time of the order does comply with the "norms and standards", but which subsequently is found by the Office of Health Standards Compliance to no longer be compliant, the Plaintiff may be presented with the following certainties:

65.1.1. Being compelled to travel to Provincial Hospitals B or C only once the Order of Court has been varied;

65.1.2. Being entitled to receive the treatment privately, in which event it would be unclear as to how reimbursement would apply.

65.2. If a Plaintiff, in the exercise of his or her rights of freedom of movement was to relocate to a different Province or area, the Bill presents the following further uncertainties:

65.2.1. Is a Plaintiff precluded from relocating to a different area on account of an Order by a Court that a particular health establishment provide the treatment in question?

65.2.2. Is a Plaintiff required to go back to Court so as to obtain an alternative order?

65.2.3. What is the consequence if there is no public health establishment in the area to which the Plaintiff relocates and no alternative facility in close proximity?

Section 2A(2)(d): Rate of compensation for treatment at private health facilities

66. In terms of section 2A(2)(d), where future medical treatment has to be delivered in a private health establishment, the liability of the State shall be limited to the potential costs that would be incurred if such care was provided in a public health establishment.

67. This provision gives rise to multiple difficulties. By way of example:

67.1. First, there can be little dispute that State health services are inferior to private health care. The result thereof is undoubtedly that the costs of accessing a service at a State facility are much cheaper than the costs of accessing the same service at a private facility. There is therefore an inherent irrationality in costing services against a benchmark of State services.

67.2. Second, the effect of this provision is that there will (almost inevitably) be a shortfall between the costs of a service at a private health facility and the costs at which a Plaintiff will be reimbursed for that service. Particularly poor and vulnerable Plaintiffs will not be able to meet that shortfall and will therefore not be able to access private health care services at all. What this means, at a practical level is this: a public health establishment may not be equipped to provide particular services at the standard required, yet a Plaintiff will be precluded from obtaining these services at a private health facility because he

or she lacks the means of meeting the shortfall. This, we submit, plainly infringes the right of access to health care services.

Section 2: Application of the Bill to pending proceedings

68. Section 2 of the Bill seeks to amend section 4 of the Act. One of the key amendments effected is that the amended section 2A will apply in any proceedings where compensation is being claimed from the State for damages resulting from the wrongful medical treatment of a person by a servant of the State and "*which have not been instituted or concluded prior to the commencement of section 2A, must be instituted, continued and concluded in accordance with the provisions of section 2A.*"

69. The effect of this amendment is plainly to make the amended provisions applicable to pending proceedings. This, we submit amounts to an unjustifiable retrospective application of the amended legislation.

70. One of the time honoured principles that is of global application in our law is that, based upon the Roman-Dutch law, no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws), unless the Legislature clearly intended the statute to have that effect.[46]

71. Retrospective legislation, has the effect of impairing existing rights and obligations, for example, by invalidating current contracts or impairing existing property rights. The Constitutional Court pointed out in **Veldman v Director of Public Prosecutions** 2007

[46] Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others 1999 (4) SA 1 (SCA) and Kaknis v Absa Bank Ltd and Another 2017 (4) SA 17 (SCA) at par 37.

(3) SA 210 (CC) at par 26 that the presumption against retrospectivity is founded on the rule of law.

72. We submit that the retrospective application of the Bill is unconstitutional and operates in flagrant disregard of the Rule of Law for at least the following reasons:

72.1. First, contingency fee agreements have been concluded on the basis of the law as it stood at the time of concluding those agreements. In concluding those agreements, the attorneys who agreed to act on a contingency fee basis did so in the full knowledge that there was no issue of structured settlements and that if a Plaintiff succeeded in a claim, the attorney would be entitled to remuneration pursuant to the contingency fee agreement as concluded.

72.2. Second, attorneys would have continued to act pursuant to a contingency fee agreement that was concluded. What this meant is that the work that has been undertaken in all contingency fee matters (including securing experts and briefing counsel), was done on the basis of a vested right to remuneration in terms of the agreement.

72.3. Third, the effect of the amendment (if carried in its present form) is notwithstanding the terms of the contingency fee agreement, the vested rights pursuant to that agreement and the work that has been undertaken in matters in terms of such agreement, attorneys acting in those matters are unlikely to receive any remuneration (as they are entitled to under the agreement) on account of the proposed amendment.

73. In addition to the unconstitutionality of the Bill on account of its retrospective application, it also has a wide ranging and serious impact on both parties to a contingency fee agreement:

73.1. As regards attorneys, they face extensive losses in fees under such agreements. This is likely to have catastrophic consequences for attorneys who act on contingency in medico-legal claims and, in our view, constitutes a arbitrary deprivation of property.

73.2. As regards litigants, many of their cases may not be carried to finality on account of the retrospective application of the Bill.

74. For all of these reasons, we submit that the Bill, if adopted at all, ought to apply only prospectively.

CONCLUSION

75. For all of these reasons, we are of the view that the Bill is unlikely to pass constitutional muster.