

## MEDICINE AND THE LAW

# Public health officials and MECs should be held liable for harm caused to patients through incompetence, indifference, maladministration or negligence regarding the availability of hospital equipment

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There have been several reports of state hospitals not having functional equipment such as radiological equipment. Where these are due to incompetence, indifference, maladministration or negligence by the public officials concerned, they may be held personally liable for the resulting harm to patients. However, the courts have often observed that where the State has been sued vicariously for the wrongs of public officials, it has not obtained reimbursement from the offending official. It has therefore been suggested that irresponsible public servants should be sued in their personal capacity (in addition to the State), to prevent taxpayers always having to pay for their misdeeds. If an individual public official cannot afford to pay all the damages awarded, the injured party can recover the balance from the State by citing it as a vicarious joint wrongdoer.

*S Afr Med J* 2016;106(7):681-683. DOI:10.7196/SAMJ.2016.v106i7.10722

Shortages of radiology equipment machines in the South African (SA) public health sector, resulting in harm to patients, have been reported, which undermines the public's confidence in the public sector health facilities and its ability to host a national health insurance scheme.

In Gauteng Province in 2014, a broken X-ray machine at the country's largest hospital resulted in 'many botched operations in the orthopaedics department'.<sup>[1]</sup> Furthermore, a broken computed tomography (CT) scanner – one of two that could not be repaired because previous repair bills had not been paid – resulted in urgent cases not being attended to because there were too many patients for one scanner.<sup>[1]</sup>

In KwaZulu-Natal Province in 2015, in several hospitals vital CT scanner machines were not serviced, had broken down or had not been acquired.<sup>[2]</sup> The problems began in 2011 at the province's premier hospital, but were not addressed. The 'waiting time for a CT scan for inpatients increased from the usual 24 - 48 hours to an unacceptable 5 - 10 days', while outpatients had to wait for 4.5 months. The situation was 'catastrophic for patients whose health depended on early detection of disease through CT scans'.<sup>[2]</sup> Similar problems occurred at other hospitals across the province. There were no service contracts for broken machines, CT scanners broke down regularly and promises to replace them had come to nothing.<sup>[2]</sup>

In the Western Cape Province in 2016, 'a shortage of radiologists and radiological equipment was negatively affecting the quality of healthcare services in the public sector'.<sup>[3]</sup> The public sector was 'chronically understaffed and under-equipped [and] ... Old CT scanners in provincial public hospitals – which performed nearly four times as many scans a year per machine as in the private sector – took longer to operate than the new multi-detector machines in the private sector which could scan a patient in 30 seconds'.<sup>[3]</sup>

It must be considered whether, if the harm caused to patients is the result of incompetence, indifference, maladministration or negligence by hospital administrators and/or provincial authorities,

they should be held personally liable to compensate such patients, or whether the relevant Department of Health (i.e. the taxpayers) should pay compensation. The answer will depend on whether: (i) public servants have immunity against being personally sued for harm caused through incompetence, indifference, maladministration or negligence; (ii) vicarious liability by the State excuses public officials from personal liability; and (iii) the courts are prepared to impose personal liability on public servants acting in the course and scope of their employment.

## Do public servants have immunity from being sued personally?

Public officials in SA who are incompetent, indifferent or negligent, and who cause harm to others, have no immunity. They can be held personally liable provided that the injured person can prove that their conduct was either negligent or intentional. Where several public officials have caused the harm, all of them may be held personally liable.<sup>[4]</sup>

## Negligent conduct

Incompetence and maladministration are often the result of negligence. Negligent conduct means that a reasonable person in the position of the wrongdoer ought to have foreseen the likelihood of harm and would have taken steps to guard against it.<sup>[5]</sup>

For example, where hospital managers ought reasonably to foresee that patients will be harmed if they do not have working radiological equipment and do not take reasonable steps to prevent such harm by ensuring that broken machines are fixed or replaced, they may be held personally liable for harm caused to patients. The State may also be held vicariously liable for their misconduct.<sup>[6]</sup> In such situations healthcare managers could be held liable for negligently failing to arrange for the repair or replacement of medical equipment – unless they have to rely on the relevant department of health official or member of the executive committee (MEC) for health to procure

the items. In the latter case, the public health official or MEC would be liable if they ought to have foreseen that a failure to fix or replace defective equipment would harm patients, and there are sufficient resources to purchase them.

If, however, available resources have been negligently wasted or squandered through incompetence or maladministration, the responsible public officials may also be held personally liable for the foreseeable harm caused to patients. Public officials who negligently harm patients may be sued for damages such as loss of income, medical expenses, pain and suffering, reduced life expectancy and loss of support for dependents of patients.<sup>[6]</sup>

### Intentional misconduct

Intentional misconduct may occur where as a result of indifference persons deliberately refrain from acting because they do not care, or intentionally engage in malpractice which harms patients, and when their will is directed to do or not to do things which they know are unlawful.<sup>[6]</sup> For example, where hospital managers, public officials or MECs for health are informed of the likely harm to patients should radiological equipment not be repaired or replaced and they fail to rectify the situation – despite having available resources – they may be held personally liable for harm caused to patients.<sup>[6]</sup> Liability depends on who has the authority to enter into the procurement arrangements, whether they wilfully refrained from doing so, or knowingly enter into procurement arrangements with inadequately qualified persons.

If hospital managers, public health officials and MECs responsible for health have intentionally depleted resources allocated for repairs to, or replacement of, medical equipment through wasteful expenditure, they too may be held liable for the resultant harm suffered by patients. Public officials who intentionally harm patients will be liable for damages that can be measured in monetary terms and ‘sentimental’ damages (i.e. damages for hurt feelings).<sup>[6]</sup>

### Misconduct by more than one public official

If several public officials (e.g. the public hospital manager, procurement officer and chief executive officer of the relevant department of health) are found personally liable for harming a patient, the damages may be apportioned among them and each will be liable for a proportion of the damages to the patient.<sup>[4]</sup> The courts usually hold joint wrongdoers ‘jointly and severally liable’ which means that any one of them can be made to pay all the compensation, and the person paying may then claim a contribution from the others in proportion to their fault.<sup>[4]</sup>

If a public health official who is held personally liable by the court cannot afford to compensate the harmed patient in full, the patient may always cite the relevant provincial MEC for health or Minister of Health as a joint wrongdoer vicariously liable to pay the balance. The parties will be ‘jointly and severally liable’ but the court may order each to pay a proportion of the damages.<sup>[7]</sup>

### Vicarious liability

In common law vicarious liability refers to situations where one person is liable for another’s unlawful conduct irrespective of fault by the first person.<sup>[8]</sup> Vicarious liability usually refers to the employer-employee relationship. An employer will be held liable for the harmful negligent or intentional wrongful acts or omissions of their employees if: (i) there was an employer-employee relationship; (ii) the employee committed an unlawful act or omission; and (iii) the employees acted in the course and scope of their employment, even if this was in an improper way.<sup>[8]</sup>

These principles apply to the public and private sectors.<sup>[6]</sup> The State is in the same position as private employers, and the State Liability Act provides that the State is vicariously liable for the wrongful acts or omissions of State employees.<sup>[9]</sup> Thus the MECs for health and provincial Departments of Health may be held vicariously liable for the wrongful acts of their employees committed within the course and scope of their employment,<sup>[10]</sup> even if they intentionally failed to carry out or obey instructions.

It has been said that where there is a shortage of resources, a Health Department or hospital cannot be expected to exercise a standard of care that is beyond its financial resources.<sup>[11]</sup> However, where the shortage has arisen because of intentional or negligent harmful acts or omissions by public health officials or hospital management, patients would have a valid claim against them for any harm suffered. The State would be vicariously liable for such conduct by the public health officials or hospital administrators. However, even where the State is vicariously liable for the conduct of its public officials, the latter may still be held personally liable.<sup>[12]</sup> Such public officials may be personally sued, or may be cited as joint wrongdoers together with the State. Where the State has been held vicariously liable for the conduct of such public officials, the latter may be required to reimburse the State for any damages paid out to injured or harmed patients.

### Are the courts prepared to impose personal liability on public servants?

The courts have realised that shaming of public officials ‘no longer works’, and that ‘[e]ven the strongest exhortation of our highest courts’ for public officials to be held accountable has fallen ‘on deaf ears’.<sup>[13]</sup> It has been suggested that: ‘Individual public responsibility, in contrast to nominal responsibility, could be enhanced by forcing individual public officials to explain and account for their own actions, as parties to the litigation.’<sup>[14]</sup> The individual responsibility of public servants could be improved if they were sued in their personal capacity in addition to the State’s being sued vicariously. Several cases have made public servants personally liable for wasted costs incurred in indefensible matters,<sup>[13]</sup> but the same principles apply to holding them personally liable for harming patients.

In deciding whether or not to impose personal liability on public servants acting in the course and scope of their employment, the courts have recognised that ‘to err is human’, but ‘indifference’, ‘incompetence’ and ‘not caring’ have been sanctioned by the courts, for instance by awarding costs against public officials in their personal capacity. The courts have observed that ‘[T]he public should not have to suffer this complete indifference and incompetence at the hands of public servants.’<sup>[15]</sup>

The State is bound to ‘respect, protect, promote and fulfil the rights in the Bill of Rights.’<sup>[16]</sup> The State must act so that their fundamental rights are realised and the Constitution requires constitutional obligations to ‘be performed diligently and without delay’.<sup>[17]</sup> ‘[I]ncompetence undermines the Constitution and with it the social contract underlying it ... If personal accountability among public officials does not come naturally it must be inculcated. Somehow these officials must be taught that their actions (or lack thereof) have consequences.’<sup>[18]</sup> The courts have observed further that ‘the taxpayer also has an interest in these matters, as public funds are at risk in matters where damages against the Minister are claimed’.<sup>[19]</sup>

MECs of provinces have been held individually liable where they have been personally involved in decisions and have also been held vicariously liable in their representative capacity for the wrongs of their employees.<sup>[10]</sup>

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11. Cf. Collins v Administrator, Cape 1995 (4) SA 73 (C).
12. Cf. Feldman (Pty) Ltd. v Mall 1945 AD 733.
13. Lushaba v MEC for Health, Gauteng 2015 (3) SA 616 (GJ) para 90.
14. Kate v MEC for Department of Welfare, Eastern Cape 2005 (10) SA 141 (SE) para 11.
15. Lushaba v MEC for Health, Gauteng 2015 (3) SA 616 (GJ) paras 70, 71.
16. Constitution of the Republic of South Africa 1996, Section 7(2).
17. Mlatsheni v The Road Accident Fund 2009 (2) SA 401 (E) para 14.
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*Accepted 11 March 2016.*