

# The Life Esidimeni arbitration and the actuarial quantification of constitutional damages

By GA Whittaker

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## ABSTRACT

In the instance of a claim for constitutional damages where an aggrieved party makes a claim against the State for damages resulting from its failure to uphold a constitutional imperative, how are such damages to be quantified? Under South African law there is no formula and extremely limited precedent outlining the calculation of constitutional damages. This paper will consider the Life Esidimeni Arbitration proceedings against the Gauteng Department of Health pursuant to the tragic mass death, torture and disappearance of mental health care users from the perspective of an actuary acting as an expert witness for the families of the deceased. There is no manual for calculating the monetary value of a life. Notwithstanding, this paper will set out the considerations made to reach monetary compensation as argued by the legal representatives of the families, as substantiated by the actuary and as eventually awarded by the Arbitrator.

## KEYWORDS

Constitutional damages; fairness; equity; comparative law; expert witness; unlawful death; torture; compensation; arbitration; life expectancy; net discount rate; pro bono

## CONTACT DETAILS

Gregory Whittaker B.Econ.Sc FSA FASSA, 222 Rivonia Road, Morningside, Sandton, 2196  
Tel: +27 (0)11 802 0263; Email: [gregory@algorithm-ca.com](mailto:gregory@algorithm-ca.com)

## 1. INTRODUCTION

This paper provides a framework for constitutional damages and highlights the role that actuaries can play in assisting civil society and non-profit organisations in holding the State to its constitutional promise. This framework was developed with regard to what has been described as one of the lowest moments in South Africa's constitutional democracy; the undisputed fact that as a result of their move out of Life Esidimeni facilities after 1 October 2015, 144 mental health care users died and 1,418 were exposed to trauma and morbidity but survived.

The Office of the Health Ombud inter alia established the following points in its report, titled "The report into the 'circumstances surrounding the deaths of mentally ill patients: Gauteng Province':<sup>1</sup>

The Gauteng Health Department... terminated its contract formally with LE (Life Esidimeni) Health Care Centre on 31st March 2016 and extended the contract for 3 further months to 30th June 2016. From 1st April to 30th June 2016, an estimated 1371 chronic mentally ill patients were rapidly transferred to hospitals and NGOs in Gauteng.

A total of ninety-four (94+) and not thirty-six (36) mentally ill patients (as initially and commonly reported publicly in the media) died between the 23rd March 2016 and 19th December 2016 in Gauteng Province.

All the 27 NGOs to which patients were transferred operated under invalid licenses.

All patients who died in these NGOs died under unlawful circumstances.

The decision was unwise and flawed, with inadequate planning and a 'chaotic' and 'rushed or hurried' implementation process.

The project has brought 'pain and anguish' to many families, it has also brought national and international disrepute and embarrassment to South Africa, particularly its Health System...

The Life Esidimeni Arbitration (Arbitration) was established following Recommendation 17 of the Ombud's report:<sup>2</sup>

The National Minister of Health must lead and facilitate a process jointly with the Premier of the Province to contact all affected individuals and families and enter into an Alternative Dispute Resolution process. This recommendation is based on the 'low trust, anger, frustration, loss of confidence' in the current leadership of the GDoH by many stakeholders. The National Department of Health must respond humanely and in the best interest of affected individuals, families, relatives and the nation. The process must incorporate and respect the diverse cultures and traditions of those concerned. The response must include an unconditional apology

1 Makgoba, MW (2017). The report into the 'circumstances surrounding the deaths of mentally ill patients: Gauteng Province'. Pretoria: Office of the Health Ombud.

2 Ibid.

to families and relatives of deceased and live patients who were subjected to this avoidable trauma; and as a result of the emotional and psychological trauma the relatives have endured, psychological counselling and support must be provided immediately. The outcome of such process should determine the way forward such as mechanisms of redress and compensation. A credible prominent South African with an established track record should lead such a process.

The State made an unqualified admission of its liability to compensate the affected mental health care users and their families individually or as a group.<sup>3</sup> The core dispute requiring Arbitration was the nature and extent of equitable redress, including compensation due to mental health care users and their families who were negatively affected by the Gauteng Mental Health Marathon Project (Marathon Project) that led to the closure of Life Esidimeni mental health care facilities after 1 October 2015. The State tendered to pay all claimants up to the amount of R200,000 for funeral expenses and general damages under South African common law. For reasons which will be set out below, in addition to what was tendered, the claimants sought constitutional damages, a head of damages which the State strenuously resisted.

Section 27, a public interest law centre, represented 63 claimants whose loved ones were moved out of Life Esidimeni into hospitals, non-governmental organisations or their homes as part of the Marathon Project, resulting in their deaths. Actuarial input was sought by Section 27 so as to introduce commercial considerations to reach a figure for compensation based on the principles of fairness and equity, as opposed to an uninformed guess.

There is no actuarial formula stipulated either by actuarial practice notes (domestically or internationally) or established in South African case law for the calculation of constitutional damages. In preparing the actuarial report furnished by Section 27 to the Arbitration as expert evidence (the Actuarial Report), consideration was given inter alia to:

- The personal data in respect of the 143 deceased (it is noted that the number of deceased varied throughout the arbitration proceedings and 143 were included in the actuarial calculations whilst 144 were mentioned in the final ruling).
- The level of subsidy paid by the Gauteng Department of Health (Department) to Life Esidimeni in respect of each of the deceased.
- Assumptions concerning the future life expectancy of the deceased had the transfer not occurred.
- The net discount rate assumption used in the capitalisation process.

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<sup>3</sup> Final Ruling in the Arbitration between: Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project and the National Minister of Health of the Republic of South Africa, the Government of the Province of Gauteng, the Premier of the Province of Gauteng and the Member of the Executive Council of Health: Province of Gauteng.

Actuarial evidence was led on 30 November 2017. On 19 March 2018, the arbitrator, former Deputy Chief Justice of South Africa Justice Dikgang Moseneke, made an award in respect of constitutional damages of R1 million to each family affected by the Life Esidimeni tragedy. On 13 June 2018, the Department paid R159,460,000 in compensation to the 134 claimants who were part of the Alternative Dispute Resolution Process (R1.2 million to the families of 67 persons who died and R1.80 million to 67 survivors).

## 2. DAMAGES REMEDIES AVAILABLE IN THE EVENT OF UNLAWFUL DEATH

Under South African common law, the following damages can be claimed in the event of an unlawful death:

- A claim for funeral expenses.<sup>4</sup>
- A general damages claim for emotional shock awardable to a dependant.<sup>5</sup> However, expert evidence is required to prove a claim for emotional and psychological damage. This requires an assessment by a clinical psychologist and a diagnosis such as post-traumatic stress disorder or a major depressive disorder. Grief does not equate to a recognised psychological injury.
- A claim for loss of support as a result of a deceased breadwinner (Milburn-Pyle & Van der Linde, 1974).

With regard to a claim for loss of support, relationships between parent and child, brother and sister, grandchild and grandparent and between spouses have, to date, given rise to duties of support for which compensation is claimable. This is not an exhaustive list and in recent times, with sufficient evidence, relationships akin to marriage have also been recognised. Any relatives of the deceased other than the deceased's spouse and child must show the court that they are indigent. The amount claimed for loss of support is inter alia dependent on the deceased's earnings at the date of death and the progression of those earnings had the death not occurred. In all circumstances, plaintiffs will not be entitled to claim for loss of support where the deceased was unable to provide support.

In this particular matter all of the deceased were long-term mental health care users, permanently resident in mental health care facilities. Consequently, none of these people were employed at the time of their deaths, nor would they have been employed in future. As such, no claim for loss of support was available to their dependants.

The R200,000 tendered by the State consisted of R20,000 in respect of funeral expenses and R180,000 in respect of general damages for shock and psychological trauma. The latter was due to the horrific nature of the treatment of the deceased and manner in which they died as relayed in extensive detail during the Arbitration.

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4 Commercial Union Assurance Co of SA Ltd v Mirkin & Another NNO 1989 (2) SA 584 (C)

5 Mngomezulu v Minister of Law and Order (6373/2007) [2014] ZAKZDHC 65

The remedy known as constitutional damages may be awarded as appropriate relief in compensation for loss suffered as a consequence of unlawful infringement of a constitutional right.<sup>6</sup> In this regard, a court may fashion a new remedy and make an award in the form of constitutional damages as appropriate relief to compensate for an infringement of a constitutional right.

### 3. APPROPRIATE RELIEF MEANS EFFECTIVE RELIEF

Section 38 of the Constitution of South Africa<sup>7</sup> provides that:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

The South African courts have awarded self-standing constitutional damages in only two cases, namely the matters of *Kate*<sup>8</sup> and *Modderklip*,<sup>9</sup> as discussed below in sections 3.2 and 3.3 respectively. Before examining those matters, some of the principles in one of the most preminent cases on constitutional damages, namely the *Fose* matter, is discussed.

#### 3.1 Fose

While stand-alone constitutional damages are a recognised form of remedy for the breach of a constitutional right, South Africa's need for constitutional damages is different to other jurisdictions because of section 39(2) of the Constitution.<sup>10</sup> This section enjoins the courts to develop the common law of delict to give effect to the spirit, purport and object of the Bill of Rights. The Court in *Fose*<sup>11</sup> found that this means that in:

many cases the common law will be broad enough to provide all the relief that would be 'appropriate' for breach of constitutional rights. This will of course depend on the circumstances of each particular case.

As noted above, the common law relief available to the families was extremely limited due to the unavailability of a claim for loss of support which ordinarily forms the largest head of damages in a dependant's action. In *Fose*, the Constitutional Court held that appropriate relief means effective relief, stating that:

I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any

6 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)

7 The Constitution of the Republic of South Africa, 1996.

8 *Member of the Executive Council: Welfare v Kate* [2006] SCA 46 (RSA)

9 *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT20/04) [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC)

10 The Constitution of the Republic of South Africa, 1996.

11 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)

of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.

### 3.2. Kate

In the *Kate*<sup>12</sup> matter, the Supreme Court of Appeal awarded constitutional damages to Mrs Kate in the context of the systemic failure by the Eastern Cape government to meet its constitutional obligations to pay social grants.

Mrs Kate had applied for a disability grant in April 1996. Although the evidence in that case was that it should have taken three months for her application to be considered, she was only advised in August 1999 that her application had been successful. She claimed the amount that had accrued to her (since her application was granted, she was entitled to the payment of her social grant from the date of application), plus interest on this amount. The High Court awarded interest, including for the period from the date that Mrs Kate made the application for a grant to the date it was approved.

Although Mrs Kate was not entitled to interest for this period because the debt had not yet accrued, the Supreme Court of Appeal awarded constitutional damages. It did so partly on the basis of the systemic and sustained failure of the provincial government to deliver social grants.

The amount of constitutional damages to be paid was debated given that Mrs Kate had not suffered direct financial loss as a result of the government’s delay:

In my view the only appropriate remedy in the circumstances is to award constitutional damages to recompense Kate for the breach of her right. What remains is how to measure that loss in monetary terms. It has not been shown that Kate suffered direct financial loss and it is most unlikely that she did, for the grant was destined to be consumed and not invested, but the loss was just as real. To be held in poverty is a cursed condition. Quite apart from the physical discomfort of deprivation it reduces a human in his or her dignity. The inevitable result of being unlawfully deprived of a grant that is required for daily sustenance is the unnecessary further endurance of that condition for so long as the unlawfulness continues. That is the true nature of the loss that Kate suffered. There is no empirical monetary standard against which to measure a loss of that kind. Counsel for Kate submitted that in the absence of such a measure she should be awarded an amount equivalent to the interest that is recognized in law to be payable when

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12 Member of the Executive Council: Welfare v Kate [2006] SCA 46 (RSA)

money is unlawfully withheld. Counsel for the appellant was unable to suggest any more appropriate measure and I think we ought to adopt it. Counsel were agreed that the damages ought not to accumulate such as to exceed the capital amount.

Two of the main principles enunciated upon in the Kate matter are of essential application to the position of the families of the deceased in the Arbitration:

- There is no monetary standard against which to measure the loss suffered by the families.
- Despite the families not suffering any financial loss by way of the loss of a breadwinner, their loss was just as real. In terms of the Mental Health Care Act, patients and their families who were affected by the Marathon Project are classified as mental health care users.

### 3.3 Modderklip

The farm Modderklip adjoins Daveyton Township in Benoni. During the 1990s, because of overcrowded conditions in the township, a number of its residents began settling between the township and Modderklip's farm. The settlement became known as the Chris Hani informal settlement. The municipality reacted by evicting the residents of the Chris Hani settlement. In May 2000, about 400 people moved onto Modderklip's farm where they erected some 50 informal dwellings.

In May 2000, the Benoni City Council alerted Modderklip to the unlawful occupation of its land and gave it notice in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, requiring it to institute eviction proceedings against the unlawful occupiers. Modderklip refused to do so and informed the City Council that it considered it to be the Council's responsibility. Modderklip stated however that it would cooperate with the Council should it take steps to evict the occupiers. The Council did not respond to this communication, nor did it take any steps suggested by Modderklip.

Modderklip then laid charges of trespassing against the occupiers. Those convicted were given warnings and released. The unlawful occupiers simply went back to the farm after their release by the court and resumed their occupation. The local head of the prison then requested both Modderklip and representatives of the South African Police Service not to proceed with further criminal prosecutions due to overcrowding at the prison.

For its part, Modderklip continued to search for ways to resolve the problem. It sought assistance from several organs of state, including the police and officials of the Ekurhuleni Metropolitan Municipality (the municipality) into which the Benoni City Council had become subsumed. No help was forthcoming from any of these organs of state. Modderklip also offered to sell to the municipality the portion of the farm that was unlawfully occupied at a negotiable price of R10,000 per hectare. Although the municipality initially showed some interest in the offer, nothing came of it. In the meantime, the number of unlawful occupiers continued to grow. By

October 2000 there were approximately 4,000 residential units, occupied by some 18,000 persons.

The Court confirmed the decision of the Supreme Court of Appeal to award constitutional damages referring to the advantages of the remedy:

It compensates Modderklip for the unlawful occupation of its property in violation of its rights; it ensures the unlawful occupiers will continue to have accommodation until suitable alternatives are found and it relieves the state of the urgent task of having to find such alternatives. The difficulty of quantifying the compensation is met by resorting to the mechanism provided in section 12 of the Expropriation Act, thus obviating the need for Modderklip to institute new proceedings.<sup>13</sup>

As set out above, the owners of the Modderklip farm were persistent in their pursuit of a range of avenues to resolve the problem of the illegal occupants and bring an end to the unlawful infringement of their constitutional rights. This presence of persistency is also manifest in the actions of the families of the deceased in the events prior to the deaths of the decedents. Certain of the families of the mental health care users who had been living in the Life Esidimeni facilities persistently took steps to make their concerns about the planned moves clear. For instance, they had meetings at Life Esidimeni facilities, held protests, and eventually resorted to litigation. There was also widespread media coverage of the plight of families, and this too was brought to the State's attention.

In motivation for constitutional damages as appropriate relief, it was argued by Section 27 that the threat of limitless liability does not arise in awarding constitutional damages in the circumstances of this matter for these facts should never occur again. It is squarely within the power of the State to ensure that a tragedy such as this is never repeated.

#### 4. COMPARATIVE LAW

Constitutional damages should not be confused with punitive damages. Punitive damages (damages awarded in cases of serious or malicious wrongdoing to punish or deter the wrongdoer or deter others from behaving similarly) do not exist in South African law. By way of contrast, punitive damages are awarded in the United States and such awards can reach substantial values. Examples of awards for punitive damages in respect of mental health care users in the United States include:

- \$140 million dollars in punitive damages following the death of Elvira Nunziata,<sup>14</sup> a 92-year-old dementia patient at the Pinellas Park Care and Rehab Centre who fell to her death because a door was wrongfully left open while employees took a smoke break.

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<sup>13</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT20/04) [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC)

<sup>14</sup> *Trans Health Management Inc. v. Nunziata*, 159 So.3d 850 (Fla. Dist. Ct. App 2014)

- \$100 million dollars in punitive damages following the death of Juanita Jackson,<sup>15</sup> a 76-year-old who died as a result of nursing home abuse and negligence which included malnutrition, dehydration and intentional overmedication.

The trend in awards for damages in South Africa is far more conservative and such cases as those cited above do not assist in reaching a fair and equitable value. They do however illustrate the seriousness with which foreign courts treat the failure of private care givers to adequately care for the vulnerable.

The treatment of constitutional damages in some Commonwealth countries is discussed below.

In Canada in the matter of *Ward*<sup>16</sup> it was noted that:

Vindication and deterrence will support the compensatory function and bolster the appropriateness of an award of damages. However, the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award. Indeed, the view that constitutional damages are available only for pecuniary or physical loss has been widely rejected in other constitutional democracies...

... damages may be awarded to compensate the claimant for his loss, to vindicate the right or to deter future violations of the right. These objects, the presence and force of which vary from case to case, determine not only whether damages are appropriate, but also the amount of damages awarded. Generally, compensation will be the most important object, and vindication and deterrence will play supporting roles.”

Just as private law damages must be fair to both the plaintiff and the defendant, so s. 24(1) damages must be fair — or ‘appropriate and just’ — to both the claimant and the state. The court must arrive at a quantum that respects this. Large awards and the consequent diversion of public funds may serve little functional purpose in terms of the claimant’s needs and may be inappropriate or unjust from the public perspective. In considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests.

In New Zealand in the matter of *Taunoa*<sup>17</sup> it was noted that:

I wish, finally, to refer to the question of the relationship between vindication and compensation. It is important that there be no double counting as a consequence of the vindicatory amount being paid to the plaintiff. If what is enough to vindicate

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15 *Trans. Healthcare, Inc. v. Estate of Jackson*, 41 So.3d 904 (Fla. Dist. Ct. App 2010)

16 *Vancouver (City) v. Ward*, [2010] 2 SCR 28, 2010 SCC 27

17 *Taunoa v. Attorney General*, [2007] NZSC 70, [2008] 1 N.Z.L.R.

is also enough to compensate, that amount is all that should be awarded. The same applies if the amount which is appropriate to compensate is also enough to vindicate. This approach implicitly involves considering how much is necessary to achieve each purpose and then awarding the higher of the two sums. Save to the extent of the excess of one sum over the other, every dollar awarded can properly be regarded as serving both purposes because of its impact on both the plaintiff and the defendant.

The present case is one in which no damage has been suffered by the appellants which would give rise to private law claims for damages. Nor are the circumstances such as to call for a remedy which deters future illegal conduct by public officers. The cause of the breaches of rights was an institutional one, which was addressed in the course of the proceedings. It would be astonishing if the circumstances giving rise to it were ever to recur. The breaches were, however, serious ones.

In *Trinidad and Tobago in the matter of Ramanoop*<sup>18</sup> it was noted that:

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award.

As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of State power.

In the United Kingdom in the matter of *Rookes*<sup>19</sup> it was noted that:

In *Benson v. Frederick* (1766) 3 Burr. 1845 the Plaintiff a common soldier, obtained damages of £150 against his Colonel who had ordered him to be flogged so as to vex a fellow officer. Mansfield C.J. said that the damages 'were very great, and beyond the proportion of what the man had suffered'. But the sum awarded was upheld as damages in respect of an arbitrary and unjustifiable action and not more than the defendant was able to pay.

These authorities clearly justify the use of the exemplary principle; and for my part I should not wish, even if I felt at liberty to do so, to diminish its use in this type of case where it serves a valuable purpose in restraining the arbitrary and outrageous use of executive power.

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18 Attorney General of Trinidad and Tobago v. Ramanoop, [2005] UKPC 15, [2006] 1 A.C. 328

19 *Rookes v Barnard* [1964] AC 1129 (HL)

## 5. COMPARATIVE PRINCIPLES FROM TORTURE LEGISLATION

The Arbitrator found that the mental health care users were subjected to acts of torture prior to their deaths. In light of this, it is useful to consider the formulae, if any, applicable in quantifying damages claimable by victims of torture by the State and/or others under international torture law.

Article 14(1) of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>20</sup> (Convention) provides that:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

The Convention has been incorporated under South African law in the form of the Prevention and Combating of Torture of Persons Act.<sup>21</sup> This Act does not expressly provide for compensation to dependants of victims of torture, rather relying on the existing legal avenues available in this regard and making clear that this Act does not affect “any liability which a person may incur under the common law or any other law”.<sup>22</sup> This means that victims of torture and/or their dependants have to rely on the remedies for damages available in terms of the common law described above.

In Nepal, the Compensation for Torture Act (1996)<sup>23</sup> provides for the following matters to be taken into consideration when determining the amount of compensation:

- (a) The physical or mental pain or hardship caused to the victim, and their gravity.
- (b) Decline in income-earning capacity of the victim resulting from physical or mental harm.
- (c) Age of the victim and his family liabilities in case he has suffered physical or mental damage which cannot be treated.
- (d) In circumstances when the damage can be treated, the estimated expenses of such treatment.
- (e) In case the victim of torture dies, the number of members of his family dependent on his income, and the minimum amount necessary for their livelihood.
- (f) Other proper and appropriate matters from among those contained in the claim filed by the victim.

In the Maldives, the Act on the Prohibition and Prevention of Torture<sup>24</sup> provides for economic and non-economic compensation, giving concrete examples such as compensation for any financial loss suffered; any past, present or future medical

20 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

21 Prevention and Combating of Torture of Persons Act (2013)

22 Section 7 of the Prevention and Combating of Torture of Persons Act (2013)

23 Nepal Compensation for Torture Act (1996)

24 Maldives Prohibition and Prevention of Torture (2013)

treatment of the victim; for any court process for torture cases; or compensation for any bodily damage suffered or loss of the function of an organ for instance. Rehabilitation is also foreseen and this Act tasks their Ministry of Health and other authorities to set up such programmes.

In Uganda, the Prevention and Prohibition of Torture Act<sup>25</sup> provides for compensation, rehabilitation and restitution. Restitution may include the return of property confiscated and the payment for harm or loss suffered. Compensation is provided for any economically assessable damage such as material damage, lost opportunities and expert assistance. Rehabilitation includes medical and psychological care.

In the Philippines, the Anti-Torture Act of 2009<sup>26</sup> provides that any person who has suffered torture or other cruel, inhuman and degrading treatment or punishment shall have the right to claim for compensation. In no case shall the compensation be any lower than ten thousand pesos (P10,000.00). The victim shall also have the right to claim for compensation from such other financial relief programmes that may be available to him/her.

It would therefore appear that there are no fixed formulae in these jurisdictions for the calculation of the compensation for torture contemplated by their legislation. The factors mentioned above, especially those in the Nepalese legislation, could be useful in determining a starting point for the valuation of constitutional damages pursuant to acts of torture. What is also useful in a scenario akin to that of the Arbitration involving vulnerable members of the population, who were not employed at the time of the torture, is that such factors do not necessarily link to the future loss of earnings due to injuries sustained by the claimant in the torture or loss of support claims of the dependants of the torture victim.

## 6. ACTUARIAL INVOLVEMENT

The 1885 matter of *Clair*<sup>27</sup> is the earliest account of an actuary being of assistance to South African courts in calculating damages. Numerous actuaries throughout the last 132 years have since contributed to South African case law.

Nicholas JA explained in *Bailey*<sup>28</sup> that two possible approaches are available to the court in assessing loss of earnings:

Any enquiry into damages for loss of earning capacity is of its nature speculative... All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical

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<sup>25</sup> Uganda Prevention and Prohibition of Torture Act

<sup>26</sup> Philippines, the Anti-Torture Act of 2009

<sup>27</sup> *Clair v Port Elizabeth Harbour Board* (1885) 1887) 5 EDC 311

<sup>28</sup> *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A)

calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.... In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an 'informed guess', it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's 'gut feeling' (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess.

The claim of the families of the decedents in the Arbitration was not a straightforward loss of earnings related claim. It was therefore not strictly necessary for Section 27 to have utilised an actuary to formulate the value of their claim. There is no manual for calculating the monetary value of a life; nor of the price-tag of the grief and trauma that the families have endured. However, the families refrained from presenting an uninformed figure and chose instead to place evidence before the Arbitrator that justified the quantum for constitutional damages.

It was critical that whatever method was going to be employed to value this loss would have to be deeply rooted in the constitutional values of equity and fairness. The only monetary measure that was in existence in relation to the mental health care users was the costs of their maintenance in the Life Esidimeni and/or alternative facilities for the remainder of their lives. This was essentially the only objective parameter available to act as any kind of starting point to measure their existence in monetary terms.

There are occasions where actuaries are asked to value the existence of a person where they should not have existed but for the delictual action. If one considers the principles applied in cases where parents claim against medical practitioners for the wrongful birth of a child (following for example a failed sterilisation), the actuary would value the living expenses of that child for their period of dependency and that would be the basis of such damages. If one employs similar rationale, in an instance where the deceased should have continued to exist but no longer does due to the action of the State, the living expenses of that person for the remainder of their dependency can be a quantifiable starting point to claim the value of their continued existence but for the delictual action.

At the time of the transfer, the State was making payment of a subsidy in respect of each of the mental health care users to Life Esidimeni, which subsidies would have continued for as long as that person lived. The calculation of the amount that would have been spent on the deceased as dependants of the State had the transfer not occurred and had the deceased survived (and the subsequent claim for constitutional damages based on this amount) can be viewed as putting the State in the same

financial position in which it would have been had the unlawful deaths not occurred. Another way of interpreting the calculations was that the unlawful deaths resulted in an unlawful saving to the State.

## 7. TECHNICAL BASES

### 7.1 Data

Section 27 provided an electronic data file containing the names, gender, dates of birth and dates of death for each of the 143 deceased. Dates of birth were missing for five of the deceased. The date of birth for one of the deceased was derived from his reported age. The dates of birth in respect of the remaining four deceased for which no information was available was taken as the average date of birth of the 139 deceased for which dates of birth were known or could be derived.

Out of the 143 deceased, 96 were male and 47 were female. The average age at death was 55.5 years. The youngest of the deceased was 21.2 years old. The oldest of the deceased was 103.4 years old. The date of birth of the oldest person to die was verified by the Department of Home Affairs' electronic service.

### 7.2 Subsidy

The subsidy paid by the Gauteng Department of Health to Life Esidimeni was R320 per day per patient for the year from 1 April 2014 to 31 March 2015.<sup>29</sup> The subsidy of R320 per day per patient was assumed to be in 1 April 2014 money terms. No details were available as to what the subsidy would have been for the year from 1 April 2016 to 31 March 2017.

The subsidy at 1 April 2016 was estimated by adding inflation for a period of two years in line with Statistics South Africa's medical services index (6.5% on 1 April 2015<sup>30</sup> and 6.0% on 1 April 2016<sup>31</sup>). The annual subsidy in 1 April 2016 money terms was taken as R131,940 per annum per patient.

### 7.3 Population Mortality Tables

The last complete set of life tables published by Statistics South Africa (formerly the Central Statistical Service) were the South African Life Tables 1984/1986.<sup>32</sup> Those tables are still widely in use in the damages field and have been cited inter alia in *Singh and Another v Ebrahim*<sup>33</sup> and *AD and Another v MEC for Health and Social Development, Western Cape Provincial Government*.<sup>34</sup>

29 Makgoba, MW (2017). The report into the 'circumstances surrounding the deaths of mentally ill patients: Gauteng Province'. Pretoria: Office of the Health Ombud

30 Statistics South Africa (2015). Consumer price index March 2015. Pretoria: Statistics South Africa

31 Statistics South Africa (2016). Consumer price index March 2016. Pretoria: Statistics South Africa

32 South African Life Tables 1984–1986. Report No. 02-06-04, Central Statistical Service. Pretoria: Government Printer.

33 *Singh and Another v Ebrahim* (413/09) [2010] ZASCA 145

34 *AD and Another v MEC for Health and Social Development, Western Cape Provincial Government* (27428/10) [2016] ZAWCHC 116

Various estimates of life expectancy have been made for the South African population for all causes of mortality including HIV-AIDS.

The Rapid Mortality Surveillance Report<sup>35</sup> provides an estimate of life expectancy at birth of 60.3 years for males and 66.4 years for females in 2015. Statistics South Africa's Mid-year Population Estimates<sup>36</sup> provides an estimate of life expectancy at birth of 60.6 years for males and 66.1 years for females in 2016.

Many mathematical models have been developed to describe different aspects of the South African HIV epidemic. The Thembisa<sup>37</sup> model was developed in an effort to synthesise four previously-developed models, including those developed by the Actuarial Society of South Africa. The Thembisa model provides an estimate of life expectancy at birth of 60.5 years for males and 67.5 years for females in 2016. The Thembisa model provides mortality rates for each age for all causes of mortality and excluding HIV-AIDS.

#### 7.4 South African studies into the Mortality of Psychiatric Patients

The only South African study is the Khamker et al. (2010) study that examined deaths that occurred at Weskoppies Hospital between 1 January 2001 and 31 December 2005. The salient features of that study were as follows:

- Out of 6,968 males, there were 98 deaths for an all cause mortality rate of 0.0141.
- Out of 3,652 females, there were 64 deaths for an all cause mortality rate of 0.0175.
- The average age at death was 55 years. The youngest of the deceased was 20 years old. The oldest of the deceased was 86 years old.
- “The sex-specific all cause mortality rates, standardised to the South African population, were 0.0177... and 0.0163... for males and females respectively... The all cause mortality rates for the South African male and female population were 0.0188 and 0.0170 respectively (not significantly different....)”
- “Results of this study revealed lower mortality rates than those found in other studies from developed countries with regard to both natural and unnatural causes. This discrepancy is most likely as a result of the excess mortality in the general population in South Africa.”

The authors note some limitations of their study including:

- “The quality of clinical note-keeping restricted the amount of data available for each subject”;
- “Disparities between internal mortality reporting and official death notification reports”; and
- “Misplaced clinical notes that limited the availability of pertinent information.”

35 Dorrington RE, Bradshaw D, Laubscher R & Nannan N. (2016). Rapid mortality surveillance report 2015. Cape Town: South African Medical Research Council

36 Statistics South Africa (2017). Mid-year population estimates. Pretoria: Statistics South Africa.

37 Online at: <https://www.thembisa.org/>

## 7.5 Mortality Experience of Life Esidimeni prior to Transfer

The Life Healthcare Group Integrated Annual Reports<sup>38</sup> provide the following data for Life Esidimeni.

TABLE 1 Life Esidimeni statistics

Life Esidimeni	Year from 01/10/2011 to 30/09/2012	Year from 01/10/2012 to 30/09/2013	Year from 01/10/2013 to 30/09/2014	Year from 01/10/2014 to 30/09/2015	Year from 01/10/2015 to 30/09/2016
Number of facilities	13	13	12	12	9
Number of beds	4,165	4,165	3,967	3,794	2,424
Paid patient days	1,533,056	1,518,765	1,473,893	1,394,745	1,122,878

Occupancy rates cannot be directly derived from paid patient days and the number of beds and hence various occupancy rates were illustrated in Table 2 below.

Life Healthcare reported to the media that:

... the 462 patient deaths at its Life Esidimeni facilities over four years were natural and not caused by neglect or malnutrition. Weekend media reports revealed these numbers, spanning October 2011 to June 2016<sup>39</sup>

The 462 patient deaths at Life Esidimeni are stated to have been from October 2011 to June 2016. A conservative approach was adopted and 462 deaths were assumed from October 2011 until September 2015 inclusive (a period of four years).

On the basis of 462 patient deaths from 1 October 2011 until 30 September 2015, the following relative risk of mortality for various occupancy rates was calculated.

TABLE 2 Estimates of relative mortality risk at Life Esidimeni

Assumed occupancy rate	100%	90%	80%	70%
Number of lives from 01/10/2011 to 30/09/2015	16,091	14,482	12,873	11,264
Number of deaths from 01/10/2011 to 30/09/2015	462	462	462	462
Crude death rate	0.0287	0.0319	0.0359	0.0410
South African population death rate (20–89)	0.0129	0.0129	0.0129	0.0129
Relative risk	2.2	2.5	2.8	3.2

On the basis of the Thembisa model<sup>40</sup> projected to 2016, the all cause mortality rate for the South African population (age 20 to age 89 inclusive) is 0.0129.

38 Online at: <http://lifehealthcareir2016.co.za/> and <https://www.lifehealthcare.co.za/media/1244/2014-integrated-annual-report.pdf>

39 Online at: <https://www.businesslive.co.za/bd/companies/healthcare/2017-02-08-life-healthcare-says-462-patient-deaths-were-natural-and-not-from-neglect/>

40 Online at: <https://www.thembisa.org/>

## 7.6 International Studies into Psychiatric Disorders

As noted in Wandl (2006) there has been a progressive decline in excess mortality associated with psychiatric illness internationally, since the introduction of effective psychotropic drugs. Nevertheless, all psychiatric disorders have an increased risk of premature death.

It must be noted that a general problem with mortality studies in psychiatry is that in the vast majority of studies the number of patients is too small and the follow-up period too short to yield a precise estimate of mortality ratios.

There are a number of areas that have been studied with respect to excess mortality in patients with psychiatric disorders. These include attempted suicide, dementia, substance-related disorders, alcohol-related disorders, substance dependence, schizophrenia, schizoaffective disorders, brief psychotic disorder, mood disorders, depressive disorders, bipolar disorders, anxiety disorders, panic disorder, somatoform disorder, personality disorder, eating disorders, adjustment disorders, post-traumatic stress disorder and mental retardation.

Some of the above psychiatric disorders and examples of excess mortality ratios obtained from Brackenridge, Croxson and Mackenzie (2006) are discussed below.

## 7.7 Mental Retardation

Mental retardation is characterised by significantly below average intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two skills out of communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.

Severe forms of mental retardation due to genetic, congenital or hormonal disorders would not be insurable. Slightly impaired forms (IQ range of 68 to 85) are insurable. Ratings for applicants in the slightly impaired category (IQ range of 68 to 85) can range from +75% to +150%.

## 7.8 Dementia

Dementia is characterised by the development of multiple cognitive deficits and memory impairment that are due to the direct physiological effects of a general medical condition, to the persisting effects of a substance, or to multiple causes.

It is unlikely that persons suffering from dementia would be regarded as suitable risks for most forms of insurance. Nevertheless, physicians can be asked to make an estimate of life expectancy of such individuals. For multi-infarct dementia (dementia resulting from multiple small strokes), extra mortality loadings at the age at which dementia was first evident ranges from +560% at age 55 to +140% at age 85.

## 7.9 Schizophrenia

Schizophrenia is characterised by distortion of thinking and perception and is usually accompanied by emotions that are inappropriate. Schizophrenia is an insurable disease.

The time lapse since the last schizophrenic episode must be more than two years for the patient to be accepted for insurance. The rating generally decreases proportionally in relation to the time since recovery.

The extra mortality loading can range from +300% in the second year since recovery to +50% in the tenth year since recovery for those under the age of 30. The extra mortality loading can range from +200% in the second year since recovery to +50% in the tenth year since recovery for those over the age of 30.

### 7.10 Bi-polar Disorders

Bi-polar disorders are characterised by the presence or history of manic, mixed or hypomanic episodes, usually accompanied by the presence or history of major depressive episodes. Manic episodes last at least one week. Manic depression is insurable. The time lapse since the last episode of manic depression must be more than two years for the patient to be accepted for insurance.

Ratings for manic depression range from an addition to the mortality rate of five per thousand from the second year since the last acute episode to three per thousand from the fifth year since the last acute episode to standard rates thereafter.

### 7.11 International Paper cited by the Health Ombudsman

In Professor Makgoba's supplementary report,<sup>41</sup> he notes the study of Walker, McGee and Druss (2015) that calculated the relative risk of mortality among those with mental disorders (from 148 studies) was 2.22. Of these, 135 studies revealed that mortality was significantly higher among people with mental disorders than the comparison population.

### 7.12 Application to the Deceased

In this particular matter, a clinical diagnosis in respect of each of the deceased was not available. Professor Makgoba<sup>42</sup> recorded that: "The most frequent diagnosis was severe intellectual disability (N = 15), followed by epilepsy (N = 13), dementia and schizophrenia (each N = 12) and cerebral palsy (N = 8)."

The determination of life expectancy in a damages claim is normally a multi-disciplinary process. Without the benefit of an assessment by a specialist physician in consultation with another suitable expert such as a psychiatrist concerning future life expectancy for each individual, an aggregate approach was adopted.

The average future normal life expectancy for the 143 deceased was 21.2 additional years at 1 April 2016 based on the Thembisa model where the Thembisa model is projected to provide mortality rates for 2016.

If an extra mortality loading of 120% is applied (in other words, if the normal

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41 Makgoba, MW (2017). Final summary on deceased Life Esidimeni patients prepared for the ADR process. Pretoria: Office of the Health Ombud.

42 *ibid*.

chance of death is 2.2 times the general population chance of death), the average future life expectancy reduces to 14.0 additional years. This represents an average reduction in life expectancy of 7.2 years compared to the general South African population life expectancy.

If an extra mortality loading of 220% is applied (in other words, if the normal chance of death is 3.2 times the general population chance of death), the average future life expectancy reduces to 11.1 additional years. This represents an average reduction in life expectancy of 10.1 years compared to the general South African population life expectancy.

### 7.13 Net Discount Rate

For the calculation of the present value of any claim for damages, the net discount rate – represented by the difference between the after tax rate of investment return net of investment manager fees and the rate of inflation of the item or items in question – is the most critical assumption that the actuary sets. In South Africa the net discount rate is not mandated by legislation or prescribed by the Actuarial Society of South Africa.

Lump sums are calculated when future anticipated streams of monies are discounted back to the current date, and the present value thus calculated represents a fair monetary exchange for the stream of anticipated monetary flows. If an individual was offered the lump sum or the future payments, that individual should be equally satisfied. It should be acknowledged that there is no single correct answer as to what the net discount rate should be under a particular set of circumstances. The net discount rate is not determinable by scientific enquiry since it is a matter of beliefs as to the future.

### 7.14 Net Discount Rate Case Law and Practice in South Africa

The net discount rate used to calculate the capitalised value of future medical expenses has varied from case to case. There are no fixed rules in this regard and each case depends on the evidence before it (See Koch, 2011 and Lowther, 2011). Set out below are examples of discount rates that have been used.

- A net discount rate of 2.5% per annum compound was adopted in the matter of *AD and Another v MEC for Health and Social Development, Western Cape Provincial Government*.<sup>43</sup>
- A net discount rate of 2.0% per annum compound was adopted in the matter of *Lochner v MEC for Health and Social Development, Mpumalanga*.<sup>44</sup>
- A net discount rate of 1.5% per annum compound was adopted in the matter of *Gallie NO v NEG Insurance*.<sup>45</sup>

43 *AD and Another v MEC for Health and Social Development, Western Cape Provincial Government* (27428/10) [2016] ZAWCHC 180

44 *Lochner v MEC for Health and Social Development, Mpumalanga* (2012/25934) [2013] ZAGPPHC 388

45 *Gallie NO v NEG Insurance* 1992 2 SA 731 (C)

- A net discount rate of 1.0% per annum compound was adopted in the matter of *Oberholzer v NEG Insurance*.<sup>46</sup>
- A net discount rate of -0.3% per annum compound was adopted in the matter of *Singh and Another v Ebrahim*.<sup>47</sup>
- A survey conducted into medical net discount rates in 2015<sup>48</sup> revealed that out of 16 practitioners, five capitalised at 2.5% per annum compound; one at 2% per annum compound; one at 1.9% per annum compound; seven at 1.5% per annum compound; one at 1% per annum compound and one at 0% per annum compound. The average net discount rate was 1.75% per annum compound.

### 7.15 Other Practice Areas subject to a Legislated Net Discount Rate

In terms of Section 14B(2)(a)(i)(bb) of the Pension Funds Act, 1956, one of the methods prescribed by Board Notice 270 of 2013<sup>49</sup> requires that the discount rate applicable prior to retirement be determined with reference to the Index Linked Gilt Yield. The discount rate derived from the use of this method is the annualised yield on long-dated index-linked gilts (bonds) with reference to the 10-year rate on the real government zero coupon yield curve as published by the Johannesburg Stock Exchange and adjusted as follows:

- +1.35% being an allowance for a risk premium;
- -1.00% being an allowance for salary increases in excess of the change in the Consumer Price Index;
- -0.30% being an allowance for asset management fees.

At 31 March 2016 the net discount rate using the Index Linked Gilt Yield method was 1.92%.<sup>50</sup> That rate is not directly comparable to the net discount rate used in damages claims, since the former is before taxation (pension assets attract no taxation).

### 7.16. Net Discount Rate in the United Kingdom

In the United Kingdom the net discount rate is prescribed by the Lord Chancellor. In 2001 the rate was set at 2.5% per annum compound for all heads of damages.<sup>51</sup> The rate was reflective of the real rate of return adjusted for income tax and is based on yields on Index-Linked Government Securities (ILGS) calculated over a period of three years up to 8 June 2001. The rate had not been revisited even though yields on ILGS steadily had decreased since 2001 in the United Kingdom.

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46 *Oberholzer v NEG Insurance* 1988 4 QOD A3-1 (C)

47 *Singh and Another v Ebrahim* (413/09) [2010] ZASCA 145

48 Online at: [http://robertjkoch.com/document-library/download?path=Old+newsletters%2FNEWS93\\_1512.pdf](http://robertjkoch.com/document-library/download?path=Old+newsletters%2FNEWS93_1512.pdf)

49 Online at: [http://www.gov.za/sites/www.gov.za/files/37188\\_bn270.pdf](http://www.gov.za/sites/www.gov.za/files/37188_bn270.pdf)

50 Online at: [https://www.fsb.co.za/Departments/actuarial/pensions/Documents/FSB\\_ILG\\_EY1%2031%20October%202017.pdf](https://www.fsb.co.za/Departments/actuarial/pensions/Documents/FSB_ILG_EY1%2031%20October%202017.pdf)

51 Online at: <http://www.legislation.gov.uk/uksti/2001/2301/article/2/made>

In 2017 the United Kingdom legislated a revised net discount of  $-0.75\%$ .<sup>52</sup> As noted above, the change came about due to the fact that Index-Linked Government Stocks have dropped since 2001. It is understood that the rate may be reviewed every three years and currently a rate between 0% and 1% is being viewed as being realistic.

### 7.17 Net Discount Rate in the United States of America

In the United States of America, in some states the net discount rate is mandated either by statute or prescribed by case law or jury instructions. For example, the Supreme Court of Pennsylvania ruled in the 1980 matter of *Kaczowski v Bolubasz*<sup>53</sup> that:

Moreover, we find as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting. Thus, the courts of this Commonwealth are instructed to abandon the practice of discounting lost future earnings.

In the US Supreme Court decision *Jones & Laughlin Steel Corporation v Pfeifer*<sup>54</sup> the following test for assessing damages is provided:

The discount rate should be based on the rate of interest that would be earned on 'the best and safest investments'... Once it is assumed that the injured worker would definitely have worked for a specific term of years, he is entitled to a risk-free stream of future income to replace his lost wages; therefore, the discount rate should not reflect the market's premium for investors who are willing to accept some risk of default. Moreover, since... the lost stream of income should be estimated in after-tax terms, the discount rate should also represent the after-tax rate of return to the injured worker...

Most states in the United States of America allow for evidence to be led on suitable net discount rates and there is a rather substantial body of literature produced by forensic economists. In a 2015 survey among members of the National Association of Forensic Economists (Luthy et al., 2015) the mean discount rate for a 30-year period in respect of loss of income was 1.36% per annum. By way of comparison the mean discount rate for a loss of income calculation for a 30-year period was 2.13% in 1999, 1.89% in 2003, 1.76% in 2009 and 1.61% in 2012.

### 7.18 Net Discount Rate in Canada

In Canada's ten provinces and three territories, net discount rates are mandated in all but Alberta, Newfoundland and Labrador, and Yukon.

British Columbia mandates a net discount rate of 1.5% as being the future difference between the investment rate of interest and the rate of increase of earnings

52 Online at: <http://www.legislation.gov.uk/ukxi/2017/206/article/2/made>

53 Online at: <http://law.justia.com/cases/pennsylvania/supreme-court/1980/491-pa-561-0.html>

54 Online at: <http://www.admiraltylawguide.com/supct/Jones&Laughlin.htm>

due to inflation and general increases in productivity, and a net discount rate of 2.0% is deemed to be the future difference between the investment rate of interest and the rate of general price inflation.<sup>55</sup>

Ontario mandates a net discount rate of 0.0% for trials from 1 January 2016 in respect of the 15-year period from the start of the trial. Thereafter, an ultimate real rate of 2.5% per annum compound is applied.<sup>56</sup>

Saskatchewan mandates a net discount rate of 3.0%.<sup>57</sup>

The mandated net discount rates assume that the plaintiff is not expected to invest in risky investments. Rather it is assumed that a mixed portfolio of short, medium and long-term Government of Canada bonds is the preferred investment choice.

### 7.19 Net Discount Rate in Australia

In Australia, whilst the High Court of Australia determined that a reasonable discount rate would be 3% in the 1980 matter of *Todorovic v Waller*,<sup>58</sup> most jurisdictions (with the exception of the Australian Capital Territories) legislate a net discount rate of 5% or higher. New South Wales<sup>59</sup> and Victoria<sup>60</sup> mandate a net discount rate of 5%.

Discount rates are inconsistent across different jurisdictions and have not been amended in accordance with expectations about returns on reasonably safe investments. When the net discount rates were written into law, various states were successfully lobbied that using 3% would produce results that are unaffordable (even though a rate as low as 3% might be required to fairly compensate a plaintiff for their loss).

### 7.20 Net Discount Rate in Hong Kong

In Hong Kong, in the 2013 decision of *Chan Pak Ting v Chan Chi Kuen and Another*,<sup>61</sup> extensive actuarial evidence was provided by two eminent actuaries in Hong Kong.

In ruling on whether, having regard to economic developments from 1995 up to the present time, the *Cookson v Knowles* assumption of a net rate of return of 4.5% remains valid in Hong Kong, the Judge ruled that for periods up to five years a net discount rate of -0.5% applies; for periods from five to ten years a net discount rate of 1.0% applies; and for periods over 10 years a net discount rate of 2.5% applies. This represented a significant increase in damages awards in Hong Kong.

The reference portfolio for periods from zero to five years consisted of 20% in

55 Online at: [http://www.courts.gov.bc.ca/supreme\\_court/documents/Discount\\_Rates\\_%20Information.pdf](http://www.courts.gov.bc.ca/supreme_court/documents/Discount_Rates_%20Information.pdf)

56 Online at: [https://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/pecuniary\\_damages.php](https://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/pecuniary_damages.php)

57 Online at: <http://www.qp.gov.sk.ca/documents/English/Regulations/Regulations/A35R3.pdf>

58 Online at: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1981/72.html?stem=0&synonyms=0&query=Todorovic%20Waller>

59 Online at: <http://www.legislation.nsw.gov.au/#/view/act/2002/22/part2/div2/sec14>

60 Online at: [http://www.austlii.edu.au/au/legis/vic/consol\\_act/wa1958111/s28i.html](http://www.austlii.edu.au/au/legis/vic/consol_act/wa1958111/s28i.html)

61 Online at: <http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2013/179.html?stem=&synonyms=&query=chan%20pak%20ting>

12-month time deposits plus 80% in Exchange Fund Notes (Hong Kong Government issued bonds with maturity dates of up to 15 years). There was no offset for investment fees since these securities are available without fees. The reference portfolio for periods from five to ten years consisted of 15% in 12-month time deposits plus 85% in high quality bonds including some Exchange Fund Notes offset by 0.75% for investment fees. The reference portfolio for periods greater than ten years consisted of 10% in 12-month time deposits plus 70% in high quality bonds plus 20% in high quality blue chip equities. The offset for investment management fees was not stated.

### 7.21 Net Discount Rate in Bermuda

In Bermuda, in the 2015 decision of *Warren v Harvey*,<sup>62</sup> the Court accepted actuarial and economic evidence that the appropriate net discount rate for Bermuda should be  $-0.25\%$  for heads of damages likely to be affected by price inflation and  $-1.85\%$  for heads of damages likely to be affected by real earnings increases. It was noted that:

Finally using ILGS/TIPS will assist the parties in other cases to adjudicate or settle future loss claims without the need for expert evidence. The yields on such instruments from time to time are regularly published and easily ascertainable. Absent a presently unforeseeable economic earthquake, the uncontradicted expert assessments as to the likely future price inflation rate... and the real earnings growth rate... for Bermuda are potentially valid for years to come. How the mixed portfolio/safe fund concept could be conveniently applied in future cases without expert evidence is very doubtful and in any event was never satisfactorily explained.

### 7.22 Results

A range of results was provided at a net discount rate (per annum compound) of 1.5%, 2.0% and 2.5% for a normal future life expectancy, an extra mortality loading of +120% and an extra mortality loading of +220% as shown in Table 3 to Table 5 below.

TABLE 3 Results at a net discount rate of 1.5% per annum compound

Life expectancy basis	Average future life expectancy of the 143 deceased	Total present value of the subsidy to Life Esidimeni for the 143 deceased	Average per deceased
Normal	21.2 additional years	R321,959,114	R2,251,462
Loading of 120%	14.0 additional years	R224,193,342	R1,567,786
Loading of 220%	11.1 additional years	R181,966,108	R1,272,490

<sup>62</sup> Online at: <https://www.gov.bm/sites/default/files/SC1506-Argus-Ins-et-al-v-Somers-Isles-et-al-2015-SC-Bda-37-Civ-22-June-2015.pdf>

**TABLE 4** Results at a net discount rate of 2.0% per annum compound

Life expectancy basis	Average future life expectancy of the 143 deceased	Total present value of the subsidy to Life Esidimeni for the 143 deceased	Average per deceased
Normal	21.2 additional years	R301,587,662	R2,109,005
Loading of 120%	14.0 additional years	R213,175,060	R1,490,735
Loading of 220%	11.1 additional years	R174,239,473	R1,218,458

**TABLE 5** Results at a net discount rate of 2.5% per annum compound

Life expectancy basis	Average future life expectancy of the 143 deceased	Total present value of the subsidy to Life Esidimeni for the 143 deceased	Average per deceased
Normal	21.2 additional years	R283,410,080	R1,981,889
Loading of 120%	14.0 additional years	R203,141,183	R1,420,568
Loading of 220%	11.1 additional years	R167,133,082	R1,168,763

A valuation was conducted on an individual basis with the above extra mortality loadings and then the results were aggregated and presented on an aggregate basis. Results were presented as a uniform amount so that every life lost was treated the same and the constitutional values of fairness and equity prevailed.

Following consultation with the families, a middle-of-the-road approach was adopted and an amount of R1,500,000 was claimed in respect of each affected family. Of that amount the family had indicated a willingness to each donate R500,000 back to the Gauteng Department of Health necessitated by the consistent decrease in the mental health budget, and the shrinking proportion of the mental health budget in relation to the overall budget of the Gauteng Department of Health.

In its submission, Section 27 noted that no evidence was led as to why the government would not be able to pay the amount claimed or the impact on the public purse. With regard to the impact on the public purse, the Court in *Kate*<sup>63</sup> (discussed above) stated that:

It is indeed troubling, as pointed out by counsel for the appellant, that the public purse, upon which there are many calls, should be depleted by claims for damages. If the provincial administration must seek further funds, in addition to those that have been appropriated for providing social assistance, in order to meet claims for damages, hopefully its accountability to the legislature will contribute to a proper resolution. But the cause for that is the unlawful conduct of the provincial administration and it does not justify withholding a remedy.

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63 Member of the Executive Council: *Welfare v Kate* [2006] SCA 46 (RSA)

## 8. ARBITRATION PROCEEDINGS

### 8.1 Parties

Three categories of claimants were represented:

- Section 27, a public interest law centre, represented 63 claimants whose loved ones were moved out of Life Esidimeni into hospitals, non-governmental organisations or their homes as part of the Marathon Project and then died.
- Hurter Spies Attorneys represented four claimants whose loved ones died during and as a result of the Marathon Project.
- Legal Aid South Africa represented 68 claimants who were mental health care users who were inter alia caused trauma and morbidity but survived the Marathon Project.

The respondents were the National Minister of Health of the Republic of South Africa; the Government of the Province of Gauteng; the Premier of the Province of Gauteng; and the Member of the Executive Council of Health: Province of Gauteng. The State was represented by Werksmans Attorneys. The Arbitrator was the former Deputy Chief Justice of South Africa, Justice Dikgang Moseneke. The Arbitrator appointed two advocates as evidence leaders, namely Advocate Nontoantla Yina and Advocate Patrick Ngutshana.

### 8.2 Duration of Proceedings

The arbitration proceedings commenced on 9 October 2017 and ended on 9 February 2018. The proceedings were open to the affected families, the public and all media. The hearings sat for 45 days inclusive of two days of legal argument. The proceedings were televised by the national broadcaster.

During the arbitration proceedings, 60 witnesses took to the stand and gave evidence under oath. Of the 60 witnesses, one was the Health Ombudsman; 12 were senior State officials; five were middle management government employees; one was a senior officer in the South African Police Service; one was the managing director of Life Esidimeni at the time of the Marathon Project; three were managers or owners of non-governmental organisations to which mental health care users were moved; six were expert witnesses; 22 were family members of deceased persons and nine were family members of surviving victims. Actuarial evidence was led on 30 November 2017.

### 8.3 The Record

Fifty-nine affidavits were submitted by Section 27 in relation to witnesses who chose not to testify orally and 42 affidavits were handed in by Legal Aid South Africa. In addition to the Arbitration record which was over 3,000 pages, a total of 173 documentary exhibits were admitted to the record.

## 8.4 The Award

On 19 March 2018, the Arbitrator made inter alia the following award:

The Government is ordered to pay R1,000,000 (one million rand) to each of the claimants listed in Annexures A, B and C as appropriate relief and compensation for the Government's unjustifiable and reckless breaches of section 1(a), (c) and (d), section 7, section 10, section 12(1)(d) and (e), section 27(1)(a) and (b) and section 195(1)(a), (b), (d), (e), (f) and (g) and multiple contraventions of the National Health Act 61 of 2003 and the Mental Health Care Act 17 of 2002 that caused the death of 144 mental health care users and the pain, suffering and torture of 1418 mental health care users who survived and their families.<sup>64</sup>

## 9. PRO BONO COMMITMENT

Public impact litigation undertaken on behalf of indigent litigants by non-profit law NGOs serves as an opportunity for consulting actuaries to provide such services on a pro bono basis. Pro bono litigation can be brought to a complete halt without expert witnesses who are prepared to assist at either a reduced rate or at no cost. The following noteworthy comments were made by the Arbitrator in relation to this:

All expert witnesses who appeared for the parties did so without a qualifying fee. I am grateful for their selflessness. I have been suitably encouraged to donate all my arbitrator's fees to chosen law schools that will hopefully help nurture young women and men committed to the high values of our Constitution and to the calling to defend the vulnerable against the abuse of the high and mighty.<sup>65</sup>

The actuarial profession is in general in the service of high end consumers. Involvement in public impact and social reform litigation allows consulting actuaries to contribute to the positive change in South Africa in a real and measurable manner.

## 10. CONCLUSION

The common law is subservient to the Constitution and not the other way around. As noted by the Arbitrator:

What is the common law equivalent of a claim based on the State's breach of the right of access to healthcare; right of access to food and water; freedom from torture; protection from cruel degrading and inhuman treatment? Similarly what is the common law equivalent of a claim against the State for breaching the rule of law, for disregarding protections provided by legislation that is meant to give

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<sup>64</sup> Final Ruling in the Arbitration between: Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project and the National Minister of Health of the Republic of South Africa, the Government of the Province of Gauteng, the Premier of the Province of Gauteng and the Member of the Executive Council of Health: Province of Gauteng.

<sup>65</sup> Ibid.

effect to constitutional guarantees or a claim arising from a breach of international obligations on Mental Health care?<sup>66</sup>

Pursuant to a review of South African case law, international case law and torture legislation, some criteria can be deduced for a stand-alone claim for constitutional damages to be considered:

- The common law does not offer an adequate remedy for the facts, such as those at play in this matter.
- The granting of constitutional damages should not avenge death but rather serve to affirm rights.
- The presence of persistency should be manifest in the actions of those seeking to bring an end to the unlawful infringement of the constitutional rights.
- The loss does not need to be a direct financial loss. A loss which amounts to a reduction of human dignity is just as real and an empirical monetary standard against which to measure a loss is not required to exist in order for such a loss to be claimed (Fose).
- The multitude and the seriousness of the constitutional rights breaches.
- The presence of arbitrary abuse of State power.
- While punitive damages do not form part of South African law, the role of vindication of the right and deterrence of future violations of the right can be recognised as supporting reasons for compensation. It then follows that actuarial calculations to calculate constitutional damages, subject to the circumstances of the case, can be fashioned so as to:
  - Be fair and equitable to the claimants and to the State.
  - Be limited to no more than what the State would have expended had the violation not occurred.
  - Result in a uniform award across various categories of claimants so as to treat each life affected the same.

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66 Ibid.

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