



# Public health officials and MECs for health should be held criminally liable for causing the death of cancer patients through their intentional or negligent conduct that results in oncology equipment not working in hospitals

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Public health officials and Members of the Executive Council (MECs) for health who allow cancer patients to die because of a failure to renew service contracts for hospital oncology machines – without providing a viable alternative – may be found guilty of having the ‘eventual intention’ to cause such deaths, and convicted of murder if the other elements of the crime are satisfied. Should the National Prosecuting Authority (NPA) decline to prosecute them for murder, they may still be prosecuted for culpable homicide. To succeed in such a prosecution, the NPA would have to prove that reasonable public health officials in their position would have foreseen that a failure to renew service contracts for oncology machines at a hospital might deprive scores of cancer patients of early access to oncology services and result in their deaths.

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Consider the following hypothetical scenario: A provincial hospital purchases two state-of-the-art oncology machines that can each treat 100 patients a day. The purchase includes a 5-year service contract to ensure that the machines operate properly. At the end of the 5-year service contract, the Member of the Executive Council (MEC) for Health refuses to renew the contract – despite the fact that no other person or body in the country is qualified to service the machines. The machines run down and are no longer able to service cancer patients at the provincial hospital. Hundreds of cancer patients, who in the past would have been treated with the two hospital oncology machines within 2 weeks of being diagnosed, now have to wait for 9 months for treatment. As a result, their cancer progresses from treatable to terminal, and they die. The hospital's oncology staff leave because they can no longer treat cancer patients ethically and effectively, as they lack the necessary equipment. The problem is brought to the attention of the MEC and head of the health department on numerous occasions. They do not renew the service contract at ZAR400 000 a month with the authorised service providers to fix the oncology machines so that the hospital can treat 200 patients a day. Instead, the MEC and his colleagues approve a contract with a recently qualified oncology ex-department of health (DoH) employee to treat 50 cancer patients a month at a cost of ZAR2 million a month. The authorised service providers offer to fix the machines for ZAR2.5 million. Despite this offer, the MEC and his colleagues award the ex-employee's recently formed company with a contract to fix the machines at ZAR5.8 million. In addition, the MEC and his colleagues award the same company a service contract to service the hospital's two oncology machines at ZAR400 000 a month – even though it does not have the qualifications to do so. The ex-employee is unable to carry out the service contract, and the

oncology machines remain inoperative. Scores of patients continue to die as a result of having to wait months for treatment, by which time their cancer is terminal. Despite public utterances by the MEC and his colleagues to the contrary, and their call to the public to get early treatment for cancer, the machines continue to be inoperative.

The above hypothetical scenario begs the question as to whether the MEC for Health, the head of the provincial health department and any other public health officials involved in the cancellation of the service contract for the hospital's oncology machines – without providing a workable substitute – can be held criminally responsible for the deaths of the cancer patients.

It has been suggested that MECs for health, heads of health departments and other responsible public health officials involved in situations similar to those in the above scenario could be held civilly liable for any harm resulting from their conduct.<sup>[1]</sup> Apart from any criminal liability arising from breaches of the Public Finance Management Act No. 1 of 1999,<sup>[2]</sup> the question arises whether the MEC and his colleagues in the hypothetical scenario may be held criminally liable for homicide. To answer this, it is necessary to consider if the MEC and public officials may be found guilty of murder, and if not, whether they can be found guilty of culpable homicide.

## May the MEC for Health and other public health officials in the hypothetical scenario be found guilty of murder?

Murder is the intentional and unlawful killing of another human being.<sup>[3]</sup> The elements of the murder that have to be proved beyond reasonable doubt in all cases are that: (i) the accused person had the intention to kill; (ii) the person's act or omission was unlawful;

(iii) the person caused the death of the other person; and (iv) the other person killed was a human being.<sup>[3]</sup> The last is usually not in contention – and in the above hypothetical scenario it will be necessary to identify those patients who have died as a result of having their cancer treatment delayed because the oncology machines were not working.

### Intention

The element of ‘intention’ in murder may take the form of either ‘actual intention’ or ‘eventual intention’. Where a person directs their will to kill a particular person and knows that their act or omission is unlawful, he or she is guilty of ‘actual intention’.<sup>[4]</sup> Where he or she does not mean to kill a person, but subjectively foresees the possibility that a person may die as a result of their act or omission and continues with such conduct regardless, he or she is guilty of ‘eventual intention’.<sup>[4]</sup> This happened in the Oscar Pistorius case,<sup>[5]</sup> where the court held that Pistorius must have subjectively foreseen that if he fired shots into a small bathroom and toilet where somebody was hiding he might kill the person. As a result, he was found to have had the ‘eventual intention’ to kill his girlfriend who was hiding there.<sup>[5]</sup>

The question arises as to whether, in the above hypothetical scenario, the MEC for Health, the head of the provincial DoH and any other public health officials involved in the decision not to renew the oncology-machine service contract with the qualified service provider had the ‘actual’ or ‘eventual intention’ to allow the cancer patients to die. It is self-evident that they did not have the ‘actual intention’ to kill the patients, as this would clearly result in a murder charge. However, did they have the ‘eventual intention’ to do so? Did they subjectively foresee that by not renewing the service contracts, the machines would not function, and up to 200 patients a day in the hospital concerned might be left without treatment – unless alternative arrangements were made? Once they knew that there were no viable alternatives, and that the waiting period for patients in urgent need of oncology treatment had increased from a manageable 2 weeks to a fatal 9 months, there was a legal duty on them to act expeditiously to have the machines repaired. According to the scenario, they were warned, and must have subjectively foreseen, that such a lengthy waiting period would result in the deaths of the patients concerned. Therefore, legally, they had the ‘eventual intention’ to let the patients die.

### Unlawfulness

Whether or not the conduct of a person accused of murder is unlawful will depend upon the legal convictions of the community,<sup>[6]</sup> as informed by the provisions of the Bill of Rights in the South African Constitution.<sup>[7]</sup> The Bill of Rights is clear that everyone should have access to healthcare services (section 27(1)(a)) and that the state must ‘take reasonable legislative and other measures within its available resources to achieve the progressive realisation’ of this right (section 27(2)). Furthermore, children have the right to ‘basic healthcare services’ (section 28(1)(c)) – not merely access to such services. In addition, everyone has the right to life (section 11). Clearly, any breach of these provisions that results in the death of patients is unlawful.

The question is whether, in terms of the above hypothetical scenario, the MEC for Health, the head of the provincial DoH and any other public health officials involved in the decision not to renew the oncology-machine service contracts with the qualified service provider

acted unlawfully. From the scenario, it is clear that the state officials could not argue that they did not have the ‘available resources’ to get the authorised service provider to fix the machines and to enter into service agreements with them. On the contrary, such officials have squandered the provincial DoH’s financial resources by: (i) paying the ex-employee twice as much to fix the machines as the authorised service providers would charge – ZAR5.8 million instead of ZAR2.5 million; and (ii) by paying the ex-employee ZAR2 million a month to treat 50 patients monthly, or 600 patients a year for ZAR24 million. The two hospital oncology machines could have treated 600 patients in 3 months at a cost of ZAR400 000 a month for a total of ZAR1.2 million. Consequently, there is no doubt that legally, the conduct of the state officials mentioned in the scenario was unlawful.

### Causation

The last question to be answered for criminal liability in a murder charge is whether the conduct of the accused person caused or contributed to the death of the deceased person.<sup>[8]</sup> In law, the alleged murderer must have both factually and legally caused or contributed to the death of the deceased. The test for factual causation is whether ‘but for’ the act or omission of the accused person the deceased would not have died.<sup>[9]</sup> In the hypothetical scenario the question would be: Can it be said that ‘but for’ the failure of the MEC for Health and his colleagues to renew the service contract with the authorised service provider and to keep the two oncology machines operational, scores of patients would not have progressed from treatable cancer to terminal cancer and died? If the answer is in the affirmative – as it must be in the hypothetical scenario – the element of factual causation is satisfied.

The next question is whether the MEC for Health, the provincial head of health or other public health officials involved legally caused the death of the deceased. The traditional tests for legal causation were the foreseeability test,<sup>[10]</sup> the direct-consequence test<sup>[11]</sup> and the adequate-cause test.<sup>[12]</sup> The foreseeability test provides that if a person would have reasonably foreseen the likelihood of death resulting from their act or omission and persisted with such conduct, the accused person is regarded as having legally caused the death of the person.<sup>[10]</sup> The direct-consequence test states that a person is liable for the direct consequences of their act or omission unless some new act intervened between such act or omission and the death of the deceased.<sup>[11]</sup> According to the adequate-cause test, a person has caused the death of another if such death is ‘adequately connected’ to the act or omission of the accused person.<sup>[12]</sup>

The above three tests are now regarded as ‘subsidiary tests’<sup>[13]</sup> and the courts apply a ‘flexible approach’ based on policy considerations such as whether it would be reasonable, fair or just to regard the consequences of a person’s conduct as not being too remote.<sup>[13]</sup> On this basis, the courts determine ‘whether or not a sufficiently close connection exists between conduct and its consequences’.<sup>[13]</sup> The ‘subsidiary tests’ may be used to assist the court in making such a determination, but are not in themselves decisive.<sup>[13]</sup> Whether one applies the three ‘subsidiary tests’ or the flexible test, it seems that in the hypothetical scenario the MEC for Health and his colleagues can be said to have legally caused the deaths of the deceased patients, for the reasons set out below.

Under the foreseeability test, a reasonable person in the position of the MEC and his colleagues would have foreseen that early-stage

cancer patients who had to wait 9 months – instead of 2 weeks – for oncology treatment, because the two machines at the hospital were non-operational, might progress from treatable to terminal cancer and die. Similarly, it can be said that the deaths of the patients in these circumstances were a direct consequence of the service contracts not being renewed and no alternative treatment being available. There is also an ‘adequate connection’ between the failure to renew the service contracts and the deaths of the patients from terminal cancer. Finally, under the ‘flexible approach’ it would be reasonable, fair and just to find that there was a ‘sufficiently close connection’ between the omission by the MEC for Health, the provincial head of health or any other public health official to renew the service contracts with an authorised service provider, and the resulting deaths.

### May the MEC for Health and other public health officials in the hypothetical scenario be found guilty of culpable homicide?

The question arises as to whether if the NPA declines to indict the MEC for Health, provincial head of health or any other public health official for murder, based on their eventual intention to cause the deaths of the cancer patients, such officials may be charged with culpable homicide for negligently causing the deaths of the patients. The crime of culpable homicide consists of negligently and unlawfully causing the death of another person.<sup>[14]</sup> Except for the requirements of negligence, which are objectively based on conduct – rather than the accused person’s subjective state of mind – the other elements of unlawfulness, causation and the death of a human being are the same, and will not be repeated.

### Negligence

As mentioned above, negligence deals with a person’s conduct rather than their state of mind. The test for liability in negligence cases is objective, not subjective. According to the common law, a person is negligent if a reasonable person in their position would have foreseen the likelihood of harm and taken steps to prevent it happening.<sup>[15]</sup> The test for negligence in this case would be: Would a reasonable official in the position of the MEC for Health, provincial head of health or other public health officials involved, have foreseen that by failing to renew the service contracts for the oncology machines at the hospital, such failure might result in the machines not functioning, and that as a result scores of cancer patients would be denied access to oncology services?

The answer must be in the affirmative. A reasonable person in the position of the MEC and his colleagues as reflected in the hypothetical scenario would have foreseen that if such patients were compelled to wait for 9 months instead of 2 weeks to receive the

necessary treatment for early-stage cancer – because no alternative services are available – this might result in them progressing from curable to incurable terminal cancer by the time they are scheduled for treatment. There is little doubt that the conduct of the MEC for Health, the provincial head of health or other public health officials referred to in the scenario was negligent, and could result in them being convicted of culpable homicide.

### Conclusion

Provided the other elements of the crime of murder are present, MECs for health, provincial heads of health or other public health officials who allow cancer patients to die because of a failure to renew service contracts for hospital oncology machines – without providing a viable alternative – may be found guilty of having the ‘eventual intention’ to cause such deaths, and convicted of murder.

Where such MECs and their colleagues are not charged with murder, they could still be charged with culpable homicide – if it can be shown that reasonable officials in their position would have foreseen that failure to renew service contracts for the oncology machines at a hospital might deprive scores of cancer patients of access to oncology services and result in their deaths.

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