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The Bill of Rights and State Liability for Medical Negligence: A Case for Judicial Development of the Common Law (Part 2)

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Abstract

There has been a dramatic increase in the number of delictual claims instituted against provincial health departments for medical negligence, which has wrongfully caused children to be born with cerebral palsy. Where the State is held liable, South African courts are required under two common law rules to order compensation in money, and in one lump sum that accounts for all past and future harm. These enormous damages awards have a crippling effect on the public healthcare system, and reports indicate that the funds are not always used for the benefit of the injured child. The Constitutional Court has confirmed that it would be justifiable to develop these rules to allow for compensation through the provision of medical services and items, or in periodic monetary instalments. Thus far, the Johannesburg and Bhisho High Courts have developed the common law in this context, to differing degrees.

This article, which follows up on part 1 in the previous issue, summarises and analyses relevant case law from the Constitutional Court and various divisions of the High Court. It argues

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that the incremental development of these two common law rules is desirable, to align the common law with the Bill of Rights. These claims are important because they seek to remedy the harm done by State hospitals to individuals, but also serve to vindicate constitutional rights. Nevertheless, considering their broader societal impact, alternative measures should be investigated. While courts should ensure that the individual victim's harm is remedied in the most appropriate way, the impact of these remedies on the State's capacity to fulfil its health-care obligations must also be prioritised. Greater remedial flexibility should therefore be applied, also to ensure that funds from public health programmes are actually used to benefit the injured victim. Legislative reform remains relevant, but interim judicial developments may protect resources needed to address the causes of negligent medical services.

Keywords: medical malpractice crisis; public healthcare; development of law of delict

6 INTRODUCTION

In the first part of this article the legal position in relation to two common law rules, which together require delictual damages to be paid in one lump sum of money, where a person has suffered harm arising from medical malpractice in the public healthcare sector was analysed. It explained the impact of these rules on the resources allocated to provincial health departments, which are currently threatened by a dramatic increase in claims against the State, particularly on behalf of children born with cerebral palsy due to medical negligence in State hospitals. It then summarised relevant case law of the Constitutional Court and various divisions of the High Court, in which the potential development of the two common law rules was considered, and finally described the current legal status of the two rules, in light of that case law.

Part 2 now evaluates some of the arguments that courts have considered when deciding whether to develop these two common law rules. It relies primarily on the Bill of Rights in arguing in favour of judicial development of the common law, pending legislative reform.

5 AN EVALUATION OF SOME OF THE ISSUES PERTAINING TO THE DEVELOPMENT OF THE LAW RELATING TO LIABILITY FOR MEDICAL MALPRACTICE IN THE PUBLIC HEALTHCARE SECTOR

5 1 Delictual Damages as a Means to Vindicate and Promote Constitutional Rights

Compensation arising from medical malpractice in the public healthcare sector is generally sought through the institution of common law delictual claims for patrimonial and non-patrimonial loss. However, medical malpractice and resultant claims also typically involve two constitutional rights: freedom and security of the person, and healthcare rights.[1] In the context of cerebral palsy (CP) claims, the birthing person's right to bodily integrity, including the right to make reproductive decisions, their right to freedom from violence, and their right not to be treated in

1 Depending on the circumstances, other rights, including the rights to dignity and equality, may also be implicated.

a degrading or inhuman way,[2] is undermined by negligent medical treatment that wrongfully causes their child to be born with a lifelong condition. The child's bodily and psychological integrity is also undermined by the affliction of CP. Furthermore, medical malpractice in public healthcare facilities is committed in the course of the State's fulfilment of its obligation to provide access to reproductive healthcare services,[3] and undermines the birthing person's full enjoyment of that right. Arguably, the right not to be refused medical treatment may also be infringed, in the event of a lack of urgent medical attention during the birthing process.[4] Multiple rights in the Bill of Rights, and corresponding duties on the State, are thus implicated by CP and other medical malpractice claims.

It is well-established that delictual damages may also serve to vindicate and promote rights embraced in the Bill of Rights.[5] For a birthing person and their child, this may be the most appropriate remedy for the various types of patrimonial and non-patrimonial harm arising from the violation of their constitutional rights. Further, the Constitutional Court has recently reiterated that constitutional damages generally should not be granted in circumstances where a claim for damages in delict is available.[6] In certain cases, where appropriate, constitutional infringements may thus be remedied *only* by way of delictual damages.[7] As a result, in the context of medical malpractice litigation against the State, delictual damages may be regarded as a remedy that vindicates constitutional rights, and potentially even deters their future violation.[8] While delictual damages may not necessarily be regarded as a constitutional remedy, it may nevertheless seek to achieve the goals of appropriate relief for violations of rights in the Bill of Rights. In this regard, one may recall the remarks of Jafta J, who stated that "[r]emedies that serve the purpose of enforcing the Constitution, by design, transcend the interests of litigants in a particular case."[9] As such, when confronted with a medical malpractice case, and where a court determines whether — and possibly how much — damages is payable to a litigant, it may be necessary for courts also to consider the broader public policy and socio-economic impact of the application of common law delictual remedies, particularly also when developing

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2 Section 12 of the Constitution of the Republic of South Africa, 1996 ("Constitution") provides:
"(1) Everyone has the right to freedom and security of the person, which includes the right—
(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way.
(2) Everyone has the right to bodily and psychological integrity, which includes the right—
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent."
In *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* 2018 1 SA 335 (CC) ("*DZ*") para 89, the Constitutional Court held that personal injury claims involve the fundamental rights in s 12(1) and (2) of the Constitution. The same was said in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) ("*Fose*") paras 60–61.

3 Section 27(1)(a) of the Constitution provides that "[e]veryone has the right to have access to health care services, including reproductive health care." This right is progressively realisable, and the obligation of the State in this regard is limited to a duty to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

4 Section 27(3) of the Constitution provides that "[n]o one may be refused emergency medical treatment."

5 See *Fose* paras 58(b) and 186.

6 *Residents of Industry House v The Minister of Police* 2022 1 BCLR 46 (CC) ("*Residents of Industry House*") paras 97 and 108. See also *Fose* para 72.

7 In *Fose* para 58(b), the Constitutional Court held that "[i]n many cases the common law will be broad enough to provide all the relief that would be 'appropriate' for a breach of constitutional rights."

8 See also *Fose* para 98.

9 See *Residents of Industry House* para 129.

these remedies. This particular issue receives further attention in the next section. In summary, delictual damages can vindicate constitutional rights, but this is not to say that other remedies may not do the same. At the same time, delictual damages have significant broader societal implications, which may not be the case where other remedies are applied. The next section considers some of these implications.

5 2 Awarding Damages Against the State for Medical Malpractice and the Impact on Collective Interests

Rights in the Bill of Rights are enjoyed by individuals.[10] Bilchitz explains that socio-economic rights primarily protect the interests of individuals, and cannot be limited by societal or collective interests.[11] However, he explains, in fashioning appropriate remedies to vindicate socio-economic rights, courts must remain cognisant of their impact on communal interests.[12] After all, a remedy for one individual will have implications for others, necessitating a holistic view that considers the impact of a case on a range of other individuals.[13]

The Constitutional Court has considered the public impact of rights enforcement on a number of occasions.[14] It did so fairly recently in *Residents of Industry House v The Minister of Police* ("*Residents of Industry House*"),[15] where Jafta J held that "[i]t is in the interests of the general public that the Constitution be upheld but it plainly cannot be in the interests of the same public to bear liability for upholding the Constitution."[16] In the same case, Mhlantla J stated that "[i]t is not fair to burden the public purse with financial liability where there are alternative remedies that can sufficiently achieve that purpose. To do otherwise would effectively amount to punishing the taxpayers for conduct for which they bear no responsibility."[17]

The enjoyment of rights in the Bill of Rights commonly impacts other rights-holders' enjoyment of their rights, and courts enforcing these rights are thus required to consider the impact of that enforcement on other rights-holders. This is also the case in delictual matters, where wider societal concerns must be considered in addition to the interests of the litigants.[18] While this may be true for all constitutional remedies, enforcement of socio-economic rights is particularly

10 Of course, most individuals would be natural persons, while juristic persons may also enjoy some of the rights (to the extent that it is indeed possible to do so).

11 Bilchitz "Judicial Remedies and Socio-Economic Rights: A Response to Christopher Mbazira" 2008 *ESR Review* 11.

12 *Ibid*.

13 *Ibid*.

14 See, for example, *DZ* para 45; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) ("*PE Occupiers*") para 26; *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) ("*Soobramoney*") para 54; *Bernstein v Bester NO* 1996 2 SA 751 (CC) para 67.

15 *Residents of Industry House* (n 6). Jafta J's judgment was a concurring judgment supported by the majority of the bench. This case concerned an application for constitutional damages.

16 *Residents of Industry House* para 136.

17 *Ibid.* para 120.

18 For instance, where courts deal with liability for pure economic loss, they must consider the potential impact that the imposition of liability may have on actors and stakeholders functioning in the sphere of the defendant as well as the possibility that it may give rise to unlimited liability being imposed on the defendant. Related to the latter is the fear that the imposition of liability in a particular case may lead to an overwhelming multiplicity of claims being instituted, impacting adversely on the administration of justice by the courts. See generally *Fourway Haulage SA Pty (Ltd) v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA); *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC); Loubser and Midgley *The Law of Delict in South Africa* (2017) 274–281; Wessels "Establishing Legal Certainty in Novel Pure Economic Loss Cases" 2020 *THRHR* 329–330.

complex, because these rights "will almost inevitably give rise to [budgetary] implications",[19] which will affect everyone else's enjoyment of these rights. Fuller refers to the type of claims with such implications as "polycentric" — a change in one variable will produce changes in others. Consequently, not only the parties to the dispute are affected.[20] The Constitutional Court in *Soobramoney v Minister of Health (KwaZulu-Natal)*[21] explained the polycentric nature of the right to healthcare in these terms:

> Traditional rights analyses … have to be adapted so as to take account of the special problems created by the need to provide a broad framework of constitutional principles governing the right of access to scarce resources and to adjudicate between competing rights bearers. When rights by their very nature are shared and inter-dependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights (which would then have to be justified in terms of section 36), but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.[22]

The court further cautioned against interpreting rights in the Bill of Rights in a way that would require courts to order hospitals to furnish plaintiffs with "the most expensive and improbable procedures, thereby diverting scarce medical resources and prejudicing the claims of others."[23]

When the State is held vicariously liable for delict as a result of harm arising from medical malpractice, courts are (in practice) also granting compensation for constitutional rights violations, which occur in the course of the State's purported fulfilment of its constitutional obligation to provide healthcare. This liability has obvious budgetary implications for the State. Given the polycentric nature of these claims, it becomes particularly important for the courts, when adjudicating these disputes, to consider the broader interests of society, and the effect of successful litigation on the State's limited resources.[24] Indeed, it may affect State resources, and equally undermine the State's ability to protect and promote the rights of everyone else.[25]

These issues are particularly pronounced in provinces with the highest proportions of the population reliant on public health care, such as the Eastern Cape, KwaZulu-Natal and Limpopo,[26] which are also the provinces with the greatest contingent liability.[27] Within these areas, most medical negligence claims arise from understaffed rural hospitals.[28] With some

19 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC) paras 77–78; Currie and De Waal *The Bill of Rights Handbook* 7 ed (2013) 566.

20 Fuller "The Forms and Limits of Adjudication" 1978 *Harv Law Rev* 353, 394ff; Currie and De Waal *Bill of Rights Handbook* 566.

21 *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC).

22 *Ibid.* para 54.

23 *Ibid.* para 58. The court was considering whether to require dialysis treatment for a terminal patient, contrary to State policy.

24 This plays a significant role in constitutional litigation. See also *Residents of Industry House* para 94.

25 This can be illustrated particularly clearly when considering the impact of medical malpractice claims on the right of access to healthcare. To reiterate one example given above, the Eastern Cape Department of Health's contingent liabilities for medicolegal claims exceed its current allocation of resources. These increasing claims thus threaten the public healthcare system as a whole — see Affidavit of Sean Frachet, Chief Director of Integrated Budget Planning in the Eastern Cape Department of Health, in support of the EC MEC's Founding Affidavit ("Sean Frachet's Supporting Affidavit") para 29.3.

26 *Ibid.* para 7.

27 South African Law Reform Commission *Medico-legal Claims* Project 141 (2017) ("SALRC Issue Paper") para 2.23.

28 Sean Frachet's Supporting Affidavit, para 10.

State hospitals performing up to 70 caesarian sections a day,[29] one can understand how errors can occasionally occur — even in well-resourced hospitals.[30] However, in hospitals with fewer resources (and not necessarily fewer patients), there is a higher risk of mistakes and resultant medical malpractice claims.[31] Additionally, since damages for CP claims are paid out of the resources allocated to the hospital responsible, smaller hospitals with smaller budgets are harder hit.[32] These claims, which reduce resources for already under-resourced hospitals,[33] thus affect health care programmes for a greater part of the population in these areas, and threaten the sustainability of the public health system.[34] The vicious circle described by the SALRC is therefore most acute in these more vulnerable areas.

The impact of individual rights to compensation on communal interests is perhaps what Froneman J alluded to in *DZ*,[35] where he stated that "it is arguable that the fundamental right of everyone to have access to healthcare services and the state's obligation to realise this right by undertaking reasonable measures introduce factors for consideration that did not exist in the pre-constitutional era." It ought to be recalled that Froneman J also took particular effort in emphasising that it is "necessary to start giving serious attention to how African conceptions of our constitutional values should be used in the development of the common law in accordance with those values."[36] The development of the two common law rules discussed earlier would reflect an awareness of the effect that the State's widening liability may have on its ability to fulfil its mandate and to provide socio-economic goods. It may result in a successful plaintiff being provided with quality health care on an ongoing basis, or payments of expenses as they arise, as opposed to providing them with a multi-million Rand damages award. In the process, the individual's interest may be properly balanced against that of the greater collective, and sufficient attention may be given to the impact on collective interests when adjudicating a private law dispute.

5 3 Access to Justice and Wasted State Resources

A significant number of people in South Africa live in "deplorable conditions and in great poverty."[37] Since obstetric services "are bifurcated by race/class inequalities stemming from historical legacies of apartheid, colonialism and racial discrimination," those who utilise public health care facilities from which e CP claims arise, are seldom well-resourced.[38] This affects their ability to access legal services and institute costly and time-consuming legal claims.[39] Contingency fee arrangements,[40] which have rendered CP claims extremely lucrative for legal practitioners and thus incentivised them to offer their legal assistance, have played a significant

29 *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* 2020 2 SA 567 (GJ) para 66.

30 This is not an attempt at excusing some of the gross negligence that so often occurs in public healthcare facilities, or to undermine the obstetric violence experienced by many birthing people. It is merely a recognition of the burden on hospitals, resulting in a heightened risk of mistakes.

31 Sean Frachet's Supporting Affidavit para 10.

32 *MSM* para 64.

33 *Ibid*.

34 *Ibid.* para 46.8.

35 *DZ* para 45.

36 *Ibid.* para 41.

37 *Soobramoney* para 8.

38 Chadwick "Ambiguous Subjects: Obstetric Violence, Assemblage and South African Birth Narratives" 2017 27 *Feminism & Psychology* 489, 495.

39 Nyenti "Access to Justice in the South African Social Security System: Towards a Conceptual Approach" 2013 *De Jure Law Journal* 901, 913.

40 For a basic summary of contingency fee arrangements that allow for this situation, see fn 40 above.

role in increasing potential plaintiffs' access to courts and redress for their constitutional rights violations.[41] Since these arrangements are reliant on the legal practitioners receiving a portion of the awarded lump sum of money, the existing common law rules benefit both potential plaintiffs and legal practitioners instituting CP claims on their behalf.[42]

While enhanced access to justice for potential CP plaintiffs is facilitated by the existing common law rules, which is arguably an advantage,[43] the cost to public hospitals, and thus to the quality of public health care in South Africa, is extremely high. Pursuant to a successful CP claim, the responsible hospital[44] pays out tens of millions of Rands, much of which is retained (and commonly misappropriated or mismanaged)[45] by legal practitioners, diverting funds from other programmes that seek to benefit the rest of the community, in fulfilment of "everyone's" right to access healthcare services.[46] It is questionable whether the appropriate source of funds for increasing access to courts should be the State hospitals' limited resources, and arguable whether the funds ultimately paid to legal practitioners constitute wasted public resources. Further, the large sums of money to be made through CP claims have led to aggressive, unethical and illegal tactics by legal practitioners in pursuing potential clients, including touting for clients at hospitals and bribing hospital staff for patient files.[47] The use of public health care funds to incentivise legal practitioners to assist potential CP plaintiffs on contingency is difficult to justify when the broader consequences are considered. In any event, as Griffiths J held in TN, substantial partial lump sums may still be awarded when the "public healthcare" and "undertaking to pay" defences are allowed.[48] In that case, over R2 million was awarded for loss of earnings, and adaptations to the plaintiff's home and vehicle.[49] Any reduced interest of legal practitioners in taking up CP plaintiffs' cases would be a great indictment of the legal profession.[50]

The rule requiring that compensation be paid as one lump sum of money also gives rise to concerns about equity. Successful CP claims are only enjoyed by a limited handful of individuals who are able to access legal services, and the evidence necessary to prove delictual liability. At best, these successful litigants receive the care they need, albeit at great cost to the public healthcare facility responsible. At worst, since the lump sums (typically around R20–30 million) awarded are not accompanied by any legal obligation to actually spend the money on the private healthcare services for which they are intended,[51] they may not actually be used to fund private healthcare services for the child with CP. In many cases up to a quarter of these large sums may go to legal practitioners acting on contingency.[52] Further, successful plaintiffs remain entitled to continue using public healthcare facilities, and could therefore simply pocket the sums awarded. Mukheibir explains that there is "ample evidence of plaintiffs who have regarded their lump-sum payment as a lottery payout and who have spent the money in such a

41 Sections 34 and 28 of the Constitution.

42 SALRC Issue Paper para 5.12.

43 Whittaker, *Medical Malpractice in the South African Public Sector* (2021), Actuarial Society of South Africa, Cape Town 128.

44 SALRC Issue Paper para 2.21.

45 *TN obo BN v Member of the Executive Council for Health, Eastern Cape* [2023] ZAECBHC ("*TN*") para 164.

46 See Sean Frachet's Supporting Affidavit paras 19–22.

47 SALRC Issue Paper para 5.13.

48 *TN* para 164.

49 *Ibid.* Annexure "D".

50 *Ibid.* para 164.

51 See *PH obo SH v MEC for Health for the Province of KwaZulu Natal* 2021 1 SA 530 (KZD) para 23.

52 EC MEC's Founding Affidavit para 14. For a basic summary of contingency fee arrangements that allow for this situation, see fn 40 above.

way that it does not last the full period for which compensation was awarded."[53] Additionally, when children die prematurely, the excess funds do not revert to the State. The Department of Health, in its parliamentary submissions regarding the State Liability Amendment Bill, has claimed that almost 80 per cent of its contingent liability is for future medical expenses, and that the majority of these plaintiffs die within five years, leaving the balance of lump sums in their estates.[54]

These concerns are obviously true for all delictual claims, where damages awarded may also be squandered, shared with legal practitioners, or used for purposes other than actually repairing the injury or harm in question. Nevertheless, they carry real weight in the context of public hospitals' medical malpractice. There is thus tension between individual plaintiffs' interests in a lump sum of monetary compensation, and communal interests in improving government-funded hospitals, as acknowledged by the Constitutional Court in PN.[55] CP claims are continuously increasing in number, posing a systemic threat to the public healthcare system, and the right of "everyone" to access healthcare, without necessarily ensuring that the harm caused by the State to the child is properly remedied.[56] As such, the common law rules that facilitate this potentially wasteful resource allocation, and which limit the courts' flexibility to make an appropriate damages order in the circumstances, therefore require greater justification in the context of medical malpractice claims.

Liebenberg argues that inadequate access to socio-economic rights "can often not be remedied by a once-and-for-all court order sounding in money", and that innovative responses to socio-economic needs are instead needed.[57] As discussed in further detail below, there are alternative and more innovative methods of compensation that may reduce inequity and wasted resources[58] without undermining the individual's right to compensation for the harm suffered. The failure to develop the law in this context is arguably unjustifiable given the particular consequences of continued expansion of State delictual liability. Indeed, it is necessary and worthwhile to give due consideration to the possibility and desirability of the development of the common law rules that damages must sound in money and paid in one lump sum.

5 4 Development of the Common Law Rule that Damages Must Sound in Money

The rule that damages for patrimonial harm must sound in money is premised on money "being the measure of all things."[59] This, held by the Appellate Division in *Standard Chartered Bank of Canada v Nedperm Bank Ltd*,[60] is because the "purpose of an Aquilian claim is to compensate the victim in money terms for his loss."[61] However, in one of the earliest judgments setting out this rule, Bell J held that the proposition that money is the measure of all things may fail based

53 Mukheibir "(Mis)understanding the once-and-for-all rule – *Member of The Executive Council for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC)" 2019 *Obiter* 252, 262.

54 Portfolio Committee of Justice and Correctional Services Meeting Summary "SAHRC vacancies; State Liability Amendment Bill: briefing" (26 January 2021) *Parliamentary Monitoring Group*, https://pmg.org.za/committee-meeting/31763/ (accessed 20-01-2023) ("Portfolio Committee Meeting Summary").

55 SALRC Issue Report para 28.

56 Founding Affidavit of the MEC for Health, Eastern Cape ("EC MEC's Founding Affidavit") in its application for admission as *amicus curiae* in *Member of the Executive Council for Health, Gauteng Provincial Government v PN* 2021 6 BCLR 584 (CC) para 46.

57 Liebenberg "Austerity in the Midst of a Pandemic: Pursuing Accountability Through the Socio-Economic Rights Doctrine of Non-Retrogression" 2021 *SAJHR* 30, 379.

58 The Constitutional Court has reiterated the importance of avoiding the imposition of financial liability on the State where there are adequate alternative remedies. See *Residents of Industry House* para 120.

59 *Wynberg Valley Railway Company v Eksteen* 1 Roscoe 70 ("*Wynberg*") 74.

60 *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A).

61 *Ibid.* 782D–F.

on the circumstances of the case.[62] Although the court in that matter considered payment partly in kind as being fair and reasonable, it was precluded from making such an order by certain legislation in place at the time.[63]

Arguably, the historical roots of this rule do not point to a requirement of monetary compensation being anything but a practical (and less violent) means to redress injury. Under Roman law, a victim's right to vengeance (to inflict a graver injury on the wrongdoer than what had been inflicted on them) could be "bought" by the wrongdoer, by offering a sum of money.[64] It is conceivable that monetary damages was not necessarily seen as the most appropriate remedy for the harm caused, but, rather, as something potentially more valuable to a victim than the right to exact vengeance. Zimmerman explains that, "[a]t this stage, liability for delict began to be seen increasingly in financial rather than retaliatory terms."[65] Later, under the *lex Aquilia*, damages served to "make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed."[66] Again, at this stage, money seems to have been a practical measure, but did not, and could not, *itself* seek to remedy the harm caused. Against this background, it may be suggested that the rule that damages must sound in money is not originally based on any significant philosophical or moral underpinning that would be undermined if compensation in kind were allowed in appropriate cases. It appears to have been practical and circumstantial.

Developing this rule to permit the "public healthcare" defence would likely have a positive impact on the right to healthcare. First, as the court explained in MSM "there is less cost to the State in using its budgeted, existing resources to render services" to CP plaintiffs, than to pay for those services in the private sector.[67] This would allow funds to be expended on the health programmes for which they were budgeted, rather than being reallocated to pay CP claims. Improved programmes and services may even have the result of reducing negligence in child delivery, and thus reduce the number of CP claims altogether. Secondly, and very significantly, as stated in *MSM*, this defence would not be allowed in all cases — only those in which the public healthcare available to a plaintiff is of an equal or higher standard than that in the private sector.[68] This would, in theory at least, incentivise public hospitals to improve their facilities and services available to children and adults afflicted with CP, which is for the communal good.[69]

The inflexibility of the rule that damages must sound in money may also result in courts being forced to make illogical, wasteful damages orders. Consider, for example, the pending *SJ Louw obo Jayden v MEC for Health, Northern Cape* ("*Louw*")[70] matter in the Northern Cape High Court. According to the MEC for Health, Northern Cape's submissions to the Constitutional Court in the *PN* matter, the plaintiff is currently receiving multi-disciplinary specialist treatment for his CP at a public hospital in Kimberley. There are apparently no such specialists or practices in the private medical sector. In fact, private therapists in the area have referred private patients

62 *Wynberg* 75.

63 *Wynberg* 70–74. See also *DZ* para 38.

64 Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 2.

65 *Ibid*.

66 *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) 917B, as cited in *Standard Chartered Bank of Canada* 81.

67 *MSM* para 187.

68 *Ibid.* para 207.1.2.

69 This counters the argument of the Durban High Court in *PH* para 27, that the "public healthcare" defence will disincentivise improvements to public health facilities and discriminate against public healthcare users.

70 *SJ Louw obo Jayden v MEC for Health, Northern Cape* case number 249/2014.

with CP to the local State hospital, due to the quality of services on offer at the latter.[71] The MEC for Health of the Northern Cape is thus seeking a development of the common law to allow the "public healthcare" defence. He argues that payment of *any* monetary compensation for private medical services would be fruitless and wasteful, as the plaintiff cannot be treated anywhere other than the public hospital.[72]

This example points us to a further consideration, alluded to above, which is that public hospitals are obliged to treat all members of the public (most, for free).[73] This means that successful litigants who received damages for their future medical treatment may deplete the funds awarded sooner than anticipated, or spend some of the money on services and items unrelated to healthcare,[74] and instead make use of medical services in a public healthcare facility.[75] This seems to amount to some form of double or punitive compensation. In the context of delictual matters, courts have consistently maintained that there are convincing policy considerations militating against such double compensation.[76] Double compensation undermines what has been seen traditionally as the function of delictual damages for patrimonial harm (i.e., repairing the victim's harm by placing them in a position they would have been in had the delict not occurred), and also effectively punishes the defendant and requires them to do more than what is otherwise expected.[77] These concerns are unlikely to arise in litigation between private parties, or against many other organs of State, and undermines the finality sought by the OAFA rule. Indeed, these policy reasons seem to amplify the argument in favour of the development of the common law rule.

There are strong arguments in favour of developing the common law to permit the "public healthcare" defence in appropriate cases. This would strike the balance between individual and communal elements of rights in the Bill of Rights. Individuals whose rights have been violated by the State would receive monetary compensation where public healthcare facilities in the area offer a lower standard of services than private facilities. Conversely, where public services are of an equal or better standard — which would need to be proved by the State, as in *MSM* — compensation in kind will be in the best interests of both the patient and the community at large. After all, the aim of compensation for patrimonial harm is to repair the harm in question and to try and put the plaintiff in a position that they would have been in if there had been no delict. In the context of CP claims, the harm to the child must ultimately be dealt with through medical treatment and not simply an award of money. Therefore, as long as a successful plaintiff receives full, effective, quality medical treatment, their harm should be repaired. That is the end-goal. The route to that destination can change, depending on circumstances: either through treatment or through damages to fund private treatment. However, there is nothing about money — presently or historically — that renders it better suited to remedying the harm than the provision of medical services and items. Money merely affords access to private services and

71 MEC for Health, Northern Cape's founding affidavit in his application for admission as *amicus curiae* in *PN* para 21.

72 *Ibid.* para 23.

73 Section 27(1) of the Constitution obliges the State to facilitate "everyone's" access to healthcare. Section 4 of the National Health Act 61 of 2003 provides that "the State and clinics and community health centres funded by the State must provide all persons, except members of medical aid schemes and their dependents and persons receiving compensation for compensable occupational diseases, with free primary health care services."

74 Mukheibir 2019 *Obiter* 262.

75 *TN* para 143.

76 For example, see *Fose* para 72; *TN* para 143.

77 Damages exceeding what is necessary to compensate the claimant for their loss are considered punitive, and are impermissible under South African law. See *Fose* para 70; *Residents of Industry House* para 94; *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 (8) BCLR 985 (CC) para 44.

items, which may be of a higher standard than what the State can provide. Where they are not of a higher standard,[78] or public services and items are of a "reasonable standard",[79] this access is unnecessary.

5 5 Development of the Rule that Payment of Damages be Made in a Lump Sum

The purpose of the OAFA rule, which incorporates the lump sum rule, is to "prevent a multiplicity of actions based on a single cause of action and to ensure that there is an end to litigation."[80] When considering the potential development of the lump sum rule, the following should be borne in mind. First, one could promote the goal to prevent a multiplicity of actions and simultaneously strive to achieve a more effective way to make payment. Secondly, the detrimental effect of lump sum payments on provincial health departments' ability to provide healthcare services must be emphasised. When State departments and hospitals pay damages, the loss in question is borne by the rest of the community, because taxpayer money is used to foot the bill. In the process, resources for hospitals and public healthcare facilities are reduced. Additionally, and related to the argument above, regarding double compensation and punitive damages, it would appear as though the lump sum rule has a disproportionate effect on health departments in CP claims, as compared to most other litigants and causes of action. This was explained by the MEC for Health of the Western Cape in his application for admission as *amicus curiae* in *DZ*:

> In other situations, if the amount paid in compensation turns out to have been insufficient, the defendant can invoke the 'once and for all rule' and avoid any further liability once the damages claim has been concluded. [The provincial health department], as provider of public health services in the Province, is not in that position. It can be required in some circumstances to provide medical services, even though it has already paid out millions of [Rands] in damages, and the delictual claim has been concluded. This scenario has arisen in the past. [The provincial health department] has in those circumstances accepted (as it must) that its constitutional obligations to the child are ongoing notwithstanding the resolution of the delictual claim.[81]

As a result, one could argue that for provincial health departments, the purpose of the OAFA rule appears not to be served by requiring a lump sum payment — it does not bring finality to its obligations to the child who suffers from CP. Conversely, its ability to provide healthcare services to the rest of the community in fulfilment of section 27(2) of the Constitution is undermined by these large payments. Liebenberg argues that inadequate access to socio-economic rights "can often not be remedied by a once-and-for-all court order sounding in money", and that innovative responses to socio-economic needs are instead needed.[82]

As discussed, since the standard of healthcare for the majority of South Africans is detrimentally affected by these enormous payments, which are not necessarily expended on private healthcare services, greater justification for this expenditure should be required than in private litigation.[83] In other words, it becomes of paramount importance to ensure that these funds are actually used to remedy the harm caused.

There are two alternative methods of compensation that could achieve this purpose. The first is

78 *MSM* order 1.2.

79 *TN* para 133.

80 *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 835C–H.

81 MEC for Health, Western Cape's letter requesting admission as an *amicus curiae* in *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* 2018 1 SA 335 (CC) ("WC MEC's Letter") para 5.

82 Liebenberg 2021 *SAJHR* 379.

83 Section 36(1) of the Constitution.

periodic payments for future medical services and items, subject to top-up/claw-back provisions (through a trust or without one, depending on the circumstances). As held by Froneman J in *DZ*, this kind of arrangement "will give less speculative expression to the general principle of compensation for loss."[84] The State would not continue to pay for medical expenses of a child who has died earlier than expected,[85] or who is using public healthcare facilities, and top-up provisions would ensure that the child is not under-compensated. The court in *AD* expressed doubt that top-up/claw-back provisions would result in net financial savings for the State, as top-up obligations may offset savings achieved by claw-backs.[86] However, even if this is the net result, it is preferable that the funds expended by liable health departments and hospitals are properly used for healthcare services, and that there is not over- or under-compensation. Further, pre-determined periodic payments would allow provincial health departments to properly budget for their liabilities arising from CP claims.

Since the periodic payments are not dependent on an increased or decreased need for medical expenses, and the amounts owing for each instalment could be pre-determined at the beginning of each financial year, the State would arguably be better able to budget under the first proposed arrangement. However, without these consistent instalments being linked to actual expenses, the concerns of under- or over-compensation (although substantially diminished, since periodic payments may stop if a child dies earlier than expected) may remain.

An alternative arrangement, the "undertaking to pay" defence, would achieve a similar purpose, provided it generally operates in the manner suggested by the MEC for Health of Gauteng in *DZ*. She suggested that this arrangement would constitute "an undertaking to pay service providers directly, within 30 days of presentation of a written quotation, for future medical expenses as and when they might arise."[87] Provided successful litigants are not *required* to expend their own funds on health services and wait for reimbursement, this may be a fair alternative. However, it may allow for less predictability for provincial health departments than regular periodic payments, which may negatively affect their ability to budget for these expenses. The Bhisho High Court's order in *TN*, which accompanies its orders regarding the MEC's undertaking to pay, requires the plaintiff's case managers to submit an annual care and management to the Eastern Cape provincial health department.[88] These kinds of requirements may offer greater predictability with an "undertaking to pay" arrangement.

While there are advantages and disadvantages of the two suggested alternative compensation arrangements discussed in this section, both reduce the probability of wasted public resources, increase the probability of delictual damages actually being used for healthcare services, and ensure that successful plaintiffs are properly compensated. They are thus better able to balance individual and communal interests in access to public funds earmarked for healthcare. At minimum, the common law should be developed to allow courts the remedial flexibility to shape remedies that are appropriate in a given case, as supported by evidence from the parties.

5 6 Some Concerns with Developing the Common Law

It is worth to address briefly, some of the concerns that courts have raised with the development of the common law rules that determine that damages must be paid in one lump sum of money.

84 *DZ* para 56.

85 *Ibid*.

86 *AD v MEC for Health And Social Development, Western Cape Provincial Government* (27428/10) [2016] ZAWCHC 116 (7 September 2016) SAFLII, http://www.saflii.org/za/cases/ZAWCHC/2016/116.html (accessed 17-01-2022) ("*AD*") para 66.

87 *DZ* para 2.

88 *TN* order 10.

5 6 1 The Public Finance Management Act

Section 66 of the Public Finance Management Act (PFMA) provides that organs of State (including provincial health departments) may not enter into a transaction that binds it to any future financial commitment without authorisation from the provincial MEC for Finance. Treasury Regulation 8.2.1 of the Public Finance Management Act, 1999: Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities ("Treasury Regulations")[89] provides that an official[90] of an institution[91] may not commit public money without approval from a properly delegated or authorised officer. And in terms of Regulation 8.2.3, all payments due to creditors must be settled within 30 days from the date of settlement or court judgment.

These provisions could be relied upon to oppose the development of the common law to allow for periodic payments or compensation in the form of medical services or items, because these methods of compensation will bind health departments to a future financial commitment. The argument that these provisions preclude development of the common law to allow periodic payments was, however, rejected by the High Court in *PN obo EN v MEC for Health for the Gauteng Provincial Government*.[92] Van der Linde J held that section 66 deals with "transactions", which court orders are not — the former being consensual, while the latter are not.[93] He also explained that the relevant Treasury Regulations do not limit courts' powers in fashioning appropriate orders and remedies. Regulation 8.2.3 should apply only when a court order is silent as to when payment must be made.[94] These provisions seek to impose financial constraints on government, and not to impose constraints on the types of orders that courts may make.[95] The High Court in *AD* was less certain. Without reference to the word "transaction," Rogers J held that section 66 "may present difficulty"[96] developing the common law, as an undertaking by the provincial health department to pay future medical expenses would bind it to a future financial commitment. The High Court found that these provisions are not an absolute bar, but held that they provide reason for judicial caution when intruding into the realm of public finance.[97] The court therefore took the view that the lump sum rule should be considered and amended by the Legislature.[98]

In short, section 66 of the PFMA and the related Treasury Regulations are not an insurmountable hurdle to the development of the common law. Such a development would not undermine the purpose of the PFMA. Indeed, Van der Linde J's interpretation of section 66 is persuasive and aligned with both the statute's purpose and the wording of the provision. In this regard, the Constitutional Court in *Road Traffic Management Corporation v Waymark (Pty) Ltd*[99] explained that the purpose of the PFMA is to "balance financial discipline and oversight (on

89 Public Finance Management Act, 1999: Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities GN R 225 in *GG* 27388 of 15-03-2005 ("Treasury Regulations").

90 According to the Treasury Regulations, an "official" means an employee contemplated in s 1 of the Public Service Act, 1994, read with s 1 of the Public Service Amendment Act (Act No. 13 of 1996); and includes a magistrate contemplated in s 1 of the Magistrates Act, 1993 (Act No. 90 of 1993) and employees of constitutional institutions.

91 Under the Treasury Regulations, an "institution" refers to a department or a constitutional institution.

92 *PN obo EN v MEC for Health for the Gauteng Provincial Government* (unreported case no. 22473/2012 (GNP) 7 February 2019).

93 *Ibid.* para 27.

94 *Ibid*.

95 *Ibid.* para 28.

96 *AD* para 72.

97 *Ibid*.

98 *Ibid.* para 69.

99 *Road Traffic Management Corporation v Waymark (Pty) Ltd* 2019 5 SA 29 (CC).

the one hand) with efficient government spending and resource allocation (on the other). Just because a provision can be read to impose harsher restrictions on government spending does not necessarily mean that that reading accords with the purpose of the PFMA."[100] This statement indicates that an expansive interpretation of PFMA provisions, rendering its obligations onerous and broadly applicable, would achieve only one of its objectives. The PFMA should not be used to limit measures seeking to promote efficient government spending and resource allocation (which, it has been argued, development of the common law would do). In addition, a development of the common law would be rationally connected with another government goal, which is to ensure the viability of the public healthcare system and its future ability to fulfil the State's section 27(2) obligations under the Constitution.

5 6 2 Flexibility vs Legal Certainty When Awarding Remedies

In *AD* Rogers J held that he was not attracted to the argument that courts should have a wide, flexible jurisdiction in fashioning orders to address issues with the lump sum rule.[101] This is because flexibility undermines predictability of the law.[102] Concerns regarding the impact of remedial flexibility on legal certainty were also captured in Mhlantla J's majority judgment in Residents of Industry House, where she held that to allow a particular remedy merely because it "meets the threshold of appropriate relief would create considerable uncertainty in our law and inequality in the sense that claimants who seek to vindicate the same right would be treated differently."[103] In other words, if more than one remedy is "appropriate" and courts were allowed the flexibility to choose *any* of these appropriate remedies, litigants would be left to the whims of the judge deciding their matter, and there would be uncertainty about what type of relief a litigant could reasonably seek and anticipate. As the Constitutional Court in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd*[104] held: "legal certainty is essential for the rule of law – a constitutional value."[105] To prevent uncertainty, Mhlantla J therefore suggested that the remedy granted must be the "*most appropriate remedy* available to vindicate constitutional rights with due weight attached to other alternative remedies available in the common law and statutes."[106]

Flexibility for courts to determine the most appropriate relief for CP plaintiffs need not undermine legal certainty. In fact, because the common law delictual remedies may also operate as "appropriate relief" under section 38 of the Constitution, it is preferable that courts be permitted to exercise some of the remedial flexibility accorded to them under section 38.[107] What is important is that courts exercising their section 38 powers are bound to order not *any* appropriate remedy, but the *most* appropriate remedy (accounting for the child's best interests, in terms of section 28(2) of the Constitution).[108] The same would also apply to courts deciding common law CP claims (which should also seek both to redress the harm caused to the individuals and to vindicate the Constitution as explained earlier). As a result, predictability and legal certainty would be furthered in that courts could only order payment in instalments, or compensation in kind, if that is the *most appropriate* remedy in the circumstances, and is in the child's best interests. This would be the case where, for example, the victim of CP would be

100 *Ibid.* para 50.

101 *AD* para 66.

102 *Ibid*.

103 *Residents of Industry House* para 118.

104 *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 621 (CC).

105 *Ibid.* para 37.

106 *Ibid*.

107 *TN* order 19.2.

108 *Ibid.* para 142.

able to receive medical treatment that is equal to, or better than, treatment provided in a private healthcare context. Of course, where the child with CP would be better treated in a private healthcare facility, the public healthcare defence should always fail. And where a lump sum payment is most appropriate in the circumstances (perhaps because a trust with top-up/claw-back provisions has been established to manage the payments), then that must be ordered. But where the child's needs and the public interest would be most appropriately served by ordering compensation in kind, or in instalments, it is counter-intuitive (and contrary to the power of courts to fashion innovative remedies to vindicate the Constitution)[109] to preclude courts from making this kind of order.

It is also worth noting that, even in private law spheres, flexibility in determining appropriate relief is not novel. For example, when considering the division of assets and maintenance of parties to divorce proceedings, a court will consider relevant circumstances, and make an order that it considers "just."[110] It may then order periodic maintenance payments, potentially payable until the end of the recipient's life,[111] which may be varied if circumstances change.[112] This shows that court-ordered periodic payments are already permitted in some contexts;[113] that variation is possible and that flexibility and justice often go hand in hand.

Accordingly, there appears to be no constitutional or legal hurdle to courts' flexible powers to fashion nuanced orders, and no constitutional imperative to maintain one-size-fits-all rules. This is particularly important when those rules undermine the State's ability to fulfil its constitutional obligations to provide healthcare, and the rights of "everyone" to bodily integrity and healthcare.

5 7 Legislative or Judicial Reform?

Assuming that development of the common-law rules is indeed justifiable, it may be asked whether courts are indeed the appropriate *fora* for the development of this area of law. After all, as courts have remarked over the years, the primary "engine for law reform should be the Legislature,"[114] and courts should be conscious of this when confronted with the potential development of the common law.

Generally, this article supports the view that legislative reform of major legal issues is preferred.[115] Where the proposed changes are substantial in nature, the legislature is typically better suited to consider the development holistically. Indeed, because courts deal with unique cases, particular factual circumstances and ring-fenced legal questions that apply only to certain contexts, they may not be in the ideal position to assess completely the deficiencies of the entire applicable field of law.[116] As such, they are not always able to take a wider view of how the rule will operate in broad generality. Furthermore, where substantial legal development is at issue, a court is rarely in a position to appreciate the "economic and policy issues underlying the choice it is asked to make."[117] Also, as the Constitutional Court has noted, major reform of certain

109 *Fose* para 69.

110 Section 7(2) of the Divorce Act 70 of 1979.

111 *Ibid*.

112 Section 8(1) of the Divorce Act.

113 Wessels *Developing the South African Law of Delict: The Creation of a Statutory Compensation Fund for Crime Victims* (LLD-thesis, SU, 2018) 18.

114 *DZ* para 34. See also *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening*) 2001 4 SA 938 (CC) para 36.

115 See further Wessels *Developing the South African Law of Delict* 18.

116 *Ibid*.

117 *DZ* para 48.

areas within the law often involve "devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree."[118] Additionally, there is "the long-established principle that in a constitutional democracy it is the Legislature, as the elected branch of government, which should assume the major responsibility for law reform."[119]

Notwithstanding this general point of departure, Froneman J in *DZ* reiterated that the judicial development of the common-law is a familiar feature of our legal system and identified relevant factors to decide whether it would indeed be appropriate to develop the common law judicially, namely "whether the common law rule [in question] is a judge-made rule, the extent of the development required and the legislature's ability to amend or abolish the common law."[120] Applying these factors to the current scenario might assist in determining whether judicial development could be preferred in this context.

Insofar as the first factor is concerned, we may recall that the common law rules that damages must sound in money and be paid in a lump sum were decided by judgments.[121] As held by the High Courts in *MSM* and *TN*, it would therefore not be contrary to the separation of powers-principle for courts to develop those rules.[122]

Concerning the second factor, and based on the judgments in *MSM*, *PH*, *TN PN*, it now appears that the development of the relevant common law rules will indeed be limited, insofar as it will only apply to CP claims (or, as in *TN*, medical negligence claims) instituted against public healthcare institutions, and only to permit periodic payments or compensation in kind, where it is appropriate to do so.[123] Indeed, it is unlikely that judicial reform would be broader than this, because courts may only decide a matter before them, and cannot develop the common law beyond what is pleaded.[124] Again, it is worth emphasising that, should judicial development occur on this front, compensation in kind and periodic payments would not become the default position in delictual cases generally, or in all medical malpractice cases. Rather, courts would merely be permitted to make an order along those lines in CP cases if it would be supported by evidence that it is appropriate in the circumstances. This introduces greater flexibility but would not amount to an overhaul of the law of damages.

In respect of the third factor listed in *DZ*, it must first be said that the Legislature is indeed able to amend or abolish the common law rules relevant in this context. In this regard, it may be recalled that the State Liability Amendment Bill, tabled on 25 May 2018, was aimed at introducing legislative changes to the common law.[125] The Bill essentially proposes to amend the State Liability Act[126] to provide for structured settlements for the satisfaction of medical

118 *Ibid.*, where the court quotes approvingly from *Watkins v Olafson* [1989] 2 SCR 750 (SCC).

119 *Ibid.*

120 *Ibid.* para 34.

121 *MSM* para 188.

122 *Ibid*; *TN* para 114.

123 See Wessels *Developing the South African Law of Delict* 18, where the impact of *DZ* is discussed and the legislative development of the law in this proposed judicial context is favoured above judicial route. However, as pointed out above, subsequent cases have indicated that the development would indeed be limited.

124 *Wilkinson v Crawford N.O*. 2021 4 SA 323 (CC) paras 31–33; *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 204.

125 B16-2018. For a discussion of the State Liability Amendment Bill, see Wessels "The Expansion of the State's Liability for Harm Arising from Medical Malpractice: Underlying Reasons, Deleterious Consequences and Potential Reform" 2019 *TSAR* 19–23; Wessels and Wewege "The State Liability Amendment Bill – further evaluation and commentary" *TSAR* 2019 484–509.

126 State Liability Act 20 of 1957.

malpractice claims against the State.[127] Among other things, it captures the amendment of the OAFA rule and introduces periodic payments and the operation of the public healthcare defence. Public hearings on the Bill were held and the input of a wide variety of stakeholders were provided to the Legislature.[128] After the Bill lapsed in May 2019, it was revived by the National Assembly in November 2019. Thereafter, in 2021, at a meeting of the Portfolio Committee on Justice and Correctional Services, questions were raised about the suitability of the limited measures proposed in the Bill, since a more holistic response was being investigated by the SALRC. The Committee suggested that the Bill be referred back to the Executive for proper consultations with the Department of Health and National Treasury.[129]

The fact that the legislature has the ability to draft legislation does not mean that judicial development of the relevant common law rules should be precluded. Particularly not where, as appears to be the case in this instance, the proposed development of the rules is contained in scope and application. Such incremental judicial reform could balance competing interests and provide interim relief to both the victims of medical malpractice and the cash-strapped provincial departments of health.

It is worth mentioning that it is possible for the legislature to develop the law in a similar way, ie, to limit the development to the common law rules under discussion. However, that would take longer than the judicial path. It would be equally possible for the legislature to take a much broader view at the multiple problems and challenges connected to medical malpractice and then to draft legislation that is much wider in scope and application, and which could include various proposals. Considering the proposals made by the SALRC on this issue, it may be that the legislature wants to reconsider the current Bill, and to broaden its ambit and scope of application. A thorough synopsis of the SALRC's most recent proposals fall outside the scope of this article,[130] but they are indeed much more far-reaching in their scope than the proposed Bill, focusing on various measures to alleviate the financial burden of medico-legal claims against the State, and to provide for alternative procedures for the speedy resolution of these

127 The proposed new s 2A(1) of the State Liability Amendment Bill states that a court must, in a successful claim against the State that exceeds R1 million, order that compensation be paid to the creditor in terms of a structured settlement which may provide for past expenses and damages, necessary immediate expenses, the cost of assistive technology (or other aids or appliances), general damages for pain and suffering and loss of amenities in life as well as periodic payments for future costs referred to in s 2A(2). The suggested s 2A(2)(a) requires that, insofar as the cost of future care, future medical treatment and future loss of earnings are concerned, the court must order that compensation for those costs be paid by way of periodic payments, which may not occur less often than once a year and must happen during the injured person's lifetime. In accordance with proposed s 2A(4), the State (or creditor) may apply to the court to vary the amount or frequency of the periodic payments (or both), if a substantial change in the condition or circumstances of the injured person necessitates it. Amounts paid in this manner must also increase on an annual basis and in accordance with the consumer price index. The proposed ss 2(A)(2)(b) states that, as a substitute for the amount of compensation that would have been paid for future medical treatment (or a reduced amount), a court may order the State to provide such treatment to the injured person at a public health establishment. Where this occurs, the relevant establishment must comply with the norms and standards set out by the office of health standards compliance under s 77 of the National Health Act of 2003. Proposed s 2A(2)(d) states that "[i]n circumstances where future medical treatment has to be delivered in a private health establishment, the liability of the State shall be limited to the potential costs that would be incurred if such care was provided in a public health establishment."

128 See Wessels and Wewege *TSAR* 2019 484–509 for a discussion of the various submissions provided on the Bill.

129 Portfolio Committee Meeting Summary.

130 Discussion Paper 154 is the second document published by the SALRC during the course of its investigation into the medical malpractice crisis. It follows the publication of SALRC Issue Paper, which was published on 17 July 2017. See SALRC *Medico-legal Claims* Project 141 (2022) https://www.justice.gov.za/salrc/dpapers/dp154-prj141-Medico-Legal-Claims.pdf (accessed on 17-01-2023).

claims.[131]

The delay in legislative action within this context may have been partially due to the fact that the Legislature was waiting for the SALRC's proposals before continuing its process. Whatever the case may be, legislative reform is still possible. If it indeed were to be the case that the reform of the law should be more far-reaching and radical, then it would arguably be better for the Legislature to pursue this route, especially considering the fact that it may approach the problem holistically and attempt to tackle the various facets of the crisis in a specialist statute.

Finally, notwithstanding the fact that large-scale legislative reform may be preferable for various reasons, incremental judicial reform as an interim measure should still be supported, on the basis that it is preferable to doing nothing, while waiting for legislative reform to be finalised. The present trend of ever-increasing State liability for harm arising from medical malpractice seriously threatens the ability of health departments to provide healthcare services to members of the general public, and in particular, the more vulnerable members of society.[132] It is pressing for the law to respond to the crisis at hand. In this context, it must be remembered that courts are duty-bound to promote constitutional values and not simply to ensure conformity of the common law to the Constitution.[133] Section 39(2) of the Constitution is an important tool for legal transformation,[134] and judges should not abdicate their responsibility to use it as such.[135]

6 CONCLUSION

South African courts are required under the common law to order compensation for successful CP claims by means of one substantial lump sum of money. However, the Constitutional Court has confirmed that the common law rules stipulating that compensation for patrimonial harm must sound in money that it is payable in one lump sum, and may be developed by courts to allow for compensation in kind, or in periodic instalments.[136] The court has further suggested that such developments may promote the right of access to healthcare for everyone, as they may reduce the portion of the health budget allocated to medico-legal liabilities.[137] The Johannesburg High Court has since developed the common law to permit compensation by means of medical

131 By way of summary: the SALRC proposes the following: establishing national expert teams to oversee and assist the provinces to deal with identified problems and implement proposed solutions; improving the quality of public healthcare by implementing the identified solutions and corrective measures; implementing existing guidelines on record-keeping and patient safety incident reporting; introducing mediation as a first step to deal with disputes; to avoid frivolous, meritless, fraudulent or abandoned claims insisting that a certificate of merit affidavit by an accredited and suitably qualified medical practitioner should form part of the papers when action is instituted; barring a plaintiff from proceeding with a claim after a period of inaction following the issuance of summons, with the possibility of having the period extended by the court on good cause shown; adopting an administrative compensation system for smaller medical negligence claims; introducing a pre-action protocol for clinical disputes for larger medical negligence claims; amending civil procedures to improve pre-trial procedures and to expedite court case flow and management and the finalisation of claims; making use of joint expert witnesses; amending existing court rules to provide for the appointment of specialist assessors to assist judges in complex medical negligence matters; providing for compensation to be awarded in the form of a structured settlement — with part of the compensation paid in a lump sum, part of the compensation paid as periodic payments, and part of the compensation provided as payments in kind by means of the delivery of services — allowing a combination of these methods and determining the ratio of one aspect in comparison to another aspect by considering the circumstances of each particular case. See generally SALRC *Medico-legal Claims* Project 141 (2022) ch 9.

132 EC MEC's Founding Affidavit para 46; Wessels and Wewege *TSAR* 2019 487.

133 Section 39(2) of the Constitution. See Davis and Klare "Transformative Constitutionalism and the Common and Customary Law" 2010 *SAJHR* 410.

134 Davis and Klare 2010 *SAJHR* 410–412.

135 *Nkala v Harmony Gold Mining Company Limited* 2016 5 SA 240 (GJ) para 199.

136 *DZ* para 58.

137 *PN* para 28.

services and items, and the Bhisho High Court has developed the common law to permit both compensation in kind and in instalments, where appropriate. However, these developments are limited, applying only in those jurisdictions, and — in Johannesburg — not affecting the rule that any monetary compensation must be paid as one lump sum.

Development of these two common law rules is desirable, particularly because it would align the common law with the Bill of Rights. CP claims seek to redress the harm caused to the victim by the State, but also to vindicate the rights to freedom and security of the person, and access to healthcare. As a result, the common law remedies granted in CP claims may operate to vindicate these constitutional rights. However, as matters currently stand, the public is negatively affected by the substantial damages awarded against the State, as these payments drastically reduce the public resources available for the State to fulfil its constitutional obligations in the context of public healthcare. Insofar as the development of these common law rules are considered, an attempt must be made to balance the harmed individual's right to compensation, with communal interests in a functioning healthcare system, and to look wider than the interests of the litigating parties.

Compensation in kind (the "public healthcare" defence) in circumstances where public healthcare is of a high standard, may strike this balance: it would cost the State less, could be budgeted for by health departments, and may nevertheless properly address the harm caused to the child. Periodic payments may achieve the same balance, as they could prevent over- or under-compensation, while payment of expenses as and when they arise (the so-called "undertaking to pay" defence) could ensure that the diverted public funds are actually used for the child's healthcare services. Similarly, payment of a lump sum subject to top-up/claw-back provisions would prevent either over- or under-compensation, and could ensure proper use of the funds. Significantly, the developments sought by provincial health departments would not oblige courts to award compensation in kind or in instalments, but would merely allow courts the flexibility to make such awards if they are the *most appropriate relief*.[138] While legislative reform remains urgently needed, these developments may reduce the burden of CP claims on the public healthcare system in the interim, and increase the resources needed to address the causes of negligent medical services.

138 *Residents of Industry House* para 120.