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The Bill of Rights and State Liability for Medical Negligence: A Case for Judicial Development of the Common Law (Part 1)

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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 indeed 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 is published in two inseparable parts, 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 seek to remedy the harm done by State hospitals to individuals, but also serve to vindicate constitutional rights. As such, they are important. Nevertheless, considering their broader societal impact, alternative measures should be investigated. While courts should ensure that the individual victim's harm is most appropriately remedied, the impact of these remedies on the State's capacity to fulfil its healthcare 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 the resources needed to address the causes of negligent medical services.

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

1 BACKGROUND

The achievement of socio-economic rights, including the right to healthcare, relies on the availability of resources.[1] The Constitution of the Republic of South Africa, 1996 ("the Constitution") itself tells us so: section 27(2) provides that the State is obliged to take reasonable measures, "within its available resources", towards the progressive realisation of socio-economic rights.[2] The Constitutional Court has indicated that these measures include financial and budgetary measures.[3] Among the socio-economic rights are those that relate to healthcare: everyone has the right to access "health care services, including reproductive health care",[4] and every child has the right to "basic health care services".[5] Notably, more than 80 per cent of South Africans, that is more than 45 million people, are reliant on public healthcare.[6] However, public healthcare in South Africa is notoriously "poorly distributed, underfunded and

1 Liebenberg "Austerity in the Midst of a Pandemic: Pursuing Accountability Through the Socio-Economic Rights Doctrine of Non-Retrogression" 2021 *SAJHR* 30. See also South African Law Reform Commission *Medico-legal Claims* Project 141 (2017) ("SALRC Issue Paper") para 2.20, which explains that for progressive realisation of the right of access to healthcare, higher spending on healthcare is a positive sign.

2 In full, s 27(2) of the Constitution of the Republic of South Africa, 1996 ("Constitution") provides that:
"The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

3 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 74. On an international front, it may be noted that similar wording to s 27(2) is used in Art 2(1) of the International Covenant on Economic, Social and Cultural Rights (GA Res 2200 UN GAOR 21st Session Supp 16 49 UN Doc. A/6316 (entered into force on 03-01-1976)). It states as follows:
"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."
On the basis of this obligation, the United Nations Committee on Economic, Social and Cultural Rights requires that any financial or other policies that result in reduced enjoyment of socio-economic rights must be reasonable and proportionate, and must ensure that vulnerable groups are not disproportionately affected. According to Liebenberg, this is known as the doctrine of non-retrogression. See Liebenberg 2021 *SAJHR* 12. Interestingly, with regard to the South African context, Liebenberg has argued that a reduction in resources allocated to any socio-economic right, which may reduce its enjoyment, would require substantial justification under international law. See Liebenberg 2021 *SAJHR* 33.

4 Section 27(1)(a) of the Constitution.

5 Section 28(1)(c) of the Constitution.

6 Statistics South Africa "Public Healthcare: How Much Per Person?" (02-10-2017) *Stats SA* http://www.statssa.gov.za/?p=10548 (accessed 08-02-2023).

fragmented",[7] with backlogged, current and future needs far exceeding the allocated resources.[8] The COVID-19 pandemic presented significant challenges to the healthcare sector. Not only did it pose budgetary challenges to the sector, but it also resulted in the sector's already limited resources being diverted from crucial services (including HIV and AIDS and TB programmes), to assist in dealing with the COVID-19 pandemic.[9] To add insult to injury, planned spending on public healthcare is set to decrease by 4,3 per cent each year for the next three years, when accounting for inflation.[10] This may further entrench the legacy of poverty and inequality,[11] disproportionately affecting those who cannot access private healthcare.

All of this means that it is very difficult for the State to meet its constitutional obligations in providing access to healthcare. The situation is further exacerbated by the State's enormous and constantly expanding liability for medical malpractice in the public healthcare sector.[12] While the malpractice manifests in various forms, the bulk of this liability has arisen from claims brought on behalf of children suffering from cerebral palsy ("CP")[13] alleged to have been wrongfully caused by the negligent conduct of public healthcare staff during the child's birth ("CP claims").[14] Children who suffer from CP tend to suffer from various other ailments, may be difficult to employ, and require lifetime care and treatment.[15] As a result, damages awards in these types of cases, which include future costs, tend to run into the millions[16] — often in excess of R20 million,[17] and sometimes R30 million.[18] The size of these claims is largely linked to the

7 World Health Organisation *The World Health Report 2000: Health Systems: Improving Performance* (2000) 126.

8 See Mkhize "Minister Zweli Mkhize: Health Dept Budget Vote 2021/22" (13-05-2021) *South African Government* https://www.gov.za/speeches/minister-zweli-mkhize-health-dept-budget-vote-202122-13-may-2021-0000 (accessed 16-01-2023).

9 Liebenberg 2021 *SAJHR* 9.

10 National Treasury "Budget Review 2022" (23-02-2022) *South African Government* https://www.treasury.gov.za/documents/national%20budget/2022/review/FullBR.pdf (accessed 20-02-2023). See also Lencoasa *et al.* "Opinion: Health Needed a Recovery Budget, We Got the Opposite" (18-03-2022) *Spotlight* https://www.spotlightnsp.co.za/2022/03/18/opinion-health-needed-a-recovery-budget-we-got-the-opposite/#:~:text=When%20the%20projected%20growth%20in,constant%202022%2F23%20Rands (accessed 16-01-2023). As noted above, Liebenberg 2021 *SAJHR* 32 has argued that this austerity measure potentially violates South Africa's obligation to avoid unnecessary retrogression in the achievement of the right to healthcare.

11 Liebenberg 2021 *SAJHR* 33.

12 Although the National Department of Health is responsible for public healthcare, it is provincial health departments that provide and manage health services, and assume liability for harm caused by the negligent conduct of healthcare staff. See SALRC Issue Paper para 1.14.

13 Cerebral Palsy ("CP") is a motor disability resulting from abnormal brain development. See Centers for Disease Control and Prevention ("CDC") "What is Cerebral Palsy?" (02-05-2022) *CDC* https://www.cdc.gov/ncbddd/cp/facts.html (accessed 16-01-2023).

14 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 12.

15 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") 3.

16 SALRC Issue Report para 2.21.

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

18 *PN* para 28.

child's life expectancy,[19] which involves a degree of speculation.[20]

Until approximately 2010, large CP claims of this nature were virtually non-existent.[21] Since then, the number of these CP claims has been sharply increasing. For example, in the Eastern Cape, settled malpractice claims — the majority of which are CP claims — grew from R75.6 million in 2014/2015 to R797.1 million in 2018/2019.[22] As of March 2020, the province noted that its contingent liabilities for claims amounted to approximately R36.6 billion, almost R4 billion more than the previous year.[23] This exceeds the annual allocation of resources to the Eastern Cape's Department of Health.[24] In KwaZulu-Natal, payments for successful CP claims increased from approximately R73 million in 2015/2016 to approximately R400 million in 2018/2019.[25] The Western Cape has also reported that the number of CP claims has "mushroomed" in the past five years, although the claims are for injuries spanning decades.[26] The position is similar in other provinces, and the dramatic increase in claims is therefore a national crisis for which an urgent solution is required.[27]

The significant increase in CP claims has occurred notwithstanding the practical and evidentiary challenges and difficulties associated with proving these claims.[28] There are various possible reasons for the increase, including a better understanding of the patient's rights, increased access to information, potentially declining standards of healthcare, and legal practitioners' advertising and practice of pursuing patients with possible claims.[29] The challenges in proving CP claims, and the reasons for the systemic and widespread medical malpractice in the public healthcare sector will, however, not form the focus of this article. Instead, this article will concentrate on the potential development of certain common law rules, in an attempt to deal with the debilitating effect of medical malpractice litigation, and particularly CP claims, on provincial health departments.

In other words, the article attempts to respond to the core consequence of the malpractice crisis, namely the threat that it poses to the financial viability of the respective provincial departments of health and their ability and constitutional duty to provide healthcare services in the future. Successfully dealing with the crisis requires a response to this core issue. Arguably the best response to the crisis would be to deal with the decline in service delivery within the healthcare sector, and the most effective way to do so would possibly be through political and regulatory

19 *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 82.

20 *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* 2018 1 SA 335 (CC) ("*DZ*") para 51.

21 *TN obo BN v Member of the Executive Council for Health, Eastern Cape* [2023] ZAECBHC ("*TN*") para 147.

22 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 27.

23 *Ibid* para 29.3.

24 *Ibid*.

25 *PH obo SH v MEC for Health for the Province of KwaZulu Natal* 2021 1 SA 530 (KZD) ("*PH*") para 13.

26 WC MEC's Letter 3.

27 See generally the SALRC Issue Paper.

28 These claims are generally difficult both to prove and defend, and take years to resolve, in part due to inadequate or missing hospital records. See Sean Frachet's Supporting Affidavit paras 14 and 2.32. In particular, the plaintiff may face evidentiary obstacles in proving some of the delictual requirements for liability, notably factual causation and negligence. See Wessels "The Expansion of the State's Liability for Harm Arising from Medical Malpractice: Underlying Reasons, Deleterious Consequences and Potential Reform" 2019 *TSAR* 2–3.

29 SALRC Issue Paper paras 2.7 and 2.14. For a summary of further possible reasons, see Wessels 2019 *TSAR* 13–14.

interventions. Nevertheless, this does not mean that the medical malpractice crisis should not also be investigated by legal practitioners and academics. Indeed, one may justifiably ask: what, if anything, can the law do to assist in improving the situation? This is not only because past practice and practical experience have suggested that effective political and regulatory interventions may not be forthcoming in the immediate future. It is trite that there is a continued failure on the part of politicians and regulators to successfully intervene to improve the standard of service delivery in the public healthcare sector as well as in other public sectors such as policing and education. Faith in political and regulatory intervention could well be misplaced, and if the crisis is left to continue without intervention, the healthcare system may implode. That is why the South African Law Reform Commission (SALRC) was requested to investigate the growing medical malpractice crisis and to table potential reform suggestions, and also why the State has sought to develop certain common law rules in this context.

In section 2 below, we will explain how these common law rules operate, and their implications for provincial health departments. Section 3 will summarise some recent case law dealing with the potential development of these common law rules, including two Constitutional Court judgments. Thereafter, in section 4, it will set out the current legal position in light of those judgments. Finally, in the second part of this article, which will be published in the next edition of the *Speculum Juris,* we will evaluate some of the arguments for and against judicial development of the two common law rules at issue. That article will ultimately argue in favour of incremental judicial development as an interim measure, pending legislative intervention, to promote "everyone's" right to access healthcare, and courts' remedial flexibility to determine the most appropriate relief for violations of rights in the Bill of Rights.

2 COMMON LAW RULES THAT ARE RELEVANT IN THE MEDICAL MALPRACTICE CONTEXT AND WHICH REQUIRE RECONSIDERATION

The common law dictates that damages awarded for Aquilian claims must sound in money.[30] This precludes compensation in kind.[31] Provincial health departments have sought to develop this rule to allow compensation for future medical expenses through the provision of medical services and items in the public sector.[32] The exception to this common law rule has become known as the "public health care defence".[33]

The second common law rule that is relevant in this context is the "once and for all" ("OAFA") rule, which requires a plaintiff to "claim in one action all past and prospective damages flowing from one cause of action".[34] Importantly, in *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* ("*DZ*"),[35] the Constitutional Court confirmed that the corollary of this rule is that courts are obliged to award damages in a lump sum.[36] It may be

30 *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) ("*Standard Chartered Bank of Canada*") 782D–F; *DZ* para 14.

31 *DZ* para 12.

32 *Ibid* para 6.

33 *Ibid*. It may be noted that referring to the position adopted by the departments as a defence may be a misnomer, since what is denoted is not a defence in the delictual sense of the word. Put differently, it is not an argument made to escape liability, but to manage the impact and scope of liability.

34 *DZ* para 16; *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) ("*Evins*") 835C–H.

35 *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* 2018 1 SA 335 (CC).

36 *DZ* para 16. 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 argues that the minority judgment of Jafta J was correct, and that the lump sum rule is not the corollary of the OAFA rule. This is because the OAFA rule deals only with liability. As a result, once the extent of liability has been determined, the OAFA rule does not require that the full amount be paid in one lump sum.

said that the OAFA rule really comprises two sub-rules: the one-action rule and the lump-sum rule.[37] Provincial health departments have attempted to have the OAFA rule developed to allow them to pay future medical expenses as and when they arise.[38] This has become known as the "undertaking to pay" defence,[39] which will allow health departments to make periodic payments rather than making one lump-sum payment.

The upshot of these two common law rules is that provincial health departments that have been held vicariously liable are required to pay, in one lump sum, the total past and speculative future medical costs of a child born with CP for the entire predicted duration of their life. These amounts are generally calculated on the basis of medical costs in private health facilities.[40] In turn, this has rendered these claims, if successful, extremely lucrative for legal practitioners working on contingency, who are able to claim up to 25 per cent of the lump sum awarded under the Contingency Fees Act.[41] These enormous, often unbudgeted, payments also require money to be redistributed from important health programmes, including emergency medical services, and from the budgets for training, goods, services, and capital assets for hospitals.[42] This perpetuates what the SALRC terms a "vicious circle" — with less money available for service delivery, the quality of service declines, creating a greater risk of future negligence and error, and thereby increasing the likelihood of more claims being instituted against the health departments.[43]

An urgent solution to this crisis is required, which must balance the need to provide compensation and the long-term ability of the State to provide public healthcare services. In its investigation of these matters, the SALRC has identified various potential alternatives that may be considered to deal with this crisis. Initially, and as an interim measure, it recommended that the State Liability Act[44] be amended, to allow structured settlements, including periodic payments, in State medical negligence cases.[45] The legislature took notice of this and drafted a State Liability Amendment Bill.[46] However, following publication of the Bill, and consulting with interested parties on its implications, there has been no apparent progress since May 2018. At this stage, it is uncertain whether this Bill will indeed be passed.[47] In any event, this article does not focus on the series of alternative solutions identified by the SALRC, or on the State Liability Amendment Bill. Instead, it will focus on the judicial developments in this context. More particularly, it will

37 See the Western Cape High Court in *AD* para 52, which described the OAFA rule as having two components: the "one-action" and the "lump-sum" rules.

38 It may be said that there is a difference between agreeing to pay on a periodic basis and an undertaking to pay when the need arises. Nevertheless, these appear to be two types of periodic payments, both prevented by the same OAFA rule.

39 *DZ* para 6. The same comment that was made in footnote 32 in respect of the so-called "public health care" defence also applies here.

40 *Ngubane v South African Transport Services* 1991 1 SA 756 (A) ("*Ngubane*") 784C–F.

41 Contingency Fees Act 66 of 1997. In essence, a contingency arrangement is an agreement between a legal practitioner and their client that no fees will be payable for services rendered in respect of the client's legal proceedings, unless the client is successful in those proceedings. If successful, the legal practitioner is entitled to their usual or higher fees, at an agreed rate (see s 2 of the Contingency Fees Act).

42 Sean Frachet's Supporting Affidavit paras 19–22.

43 SALRC Issue Paper para 2.21. See also Wessels *Developing the South African Law of Delict: The Creation of a Statutory Compensation Fund for Crime Victims* (LLD-thesis, SU, 2018) 17–18, for a discussion of a similar problem in the context of the State's liability for harm arising from crime.

44 State Liability Act 20 of 1957.

45 SALRC Issue Paper para 6.5. See also the alternatives proposed in its 2021 Discussion Paper.

46 State Liability Amendment Bill B16-2018.

47 Parliamentary Monitoring Group ("PMG") "State Liability Amendment Bill (B16-2018)" *PMG* https://pmg.org.za/bill/797/ (accessed 17-01-2023).

deal with recent judgments which considered the two abovementioned common law rules,[48] as well as the so-called top-up/claw-back provisions, as an attempted alternative solution.[49] It will then describe the current legal position, in light of these judgments. Finally, it will evaluate some of the arguments for and against the judicial development of the common law rules.

3 RECENT JUDGMENTS THAT CONSIDERED COMMON LAW RULES IN THE MEDICAL MALPRACTICE CONTEXT

In this section the reasoning of courts in recent relevant judgments will be summarised, to provide a background against which the judicial development of the common law in the context of medical malpractice in the public healthcare sector may be described and evaluated.

3 1 *MEC for Health and Social Development, Gauteng v DZ obo WZ*

The Constitutional Court first considered the development of the common law in the context of CP claims in DZ. The MEC for Health of Gauteng had accepted its vicarious liability on the merits, but argued for the development of the common law, effectively allowing for the "undertaking to pay" defence.[50] By virtue of the arguments of the *amici*, the court also briefly considered two other solutions. The first, raised by the MEC for Health of the Eastern Cape, was the possible development of the common law to allow for the "public health care" defence.[51] The second, raised by the MEC for Health of the Western Cape, was the possibility of establishing a ring-fenced trust to meet the child's future medical expenses, which would include "top-up/claw-back" provisions. The effect of these types of provisions is that should the fund be depleted, the provincial health department will top it up, and if the child dies while funds remain in the trust, any excess funds will revert to the State.[52]

Froneman J, writing for the majority, accepted that the common law requires that damages sound in money, and be paid as one lump sum.[53] As a result, the common law would need to be developed to allow for the "undertaking to pay" or "public health care" defences. However, neither rule, in its current form, precludes the "mitigation of damages" defence, as established in *Ngubane v South African Transport Services* ("*Ngubane*").[54] The "mitigation of damages" defence allows health departments to rebut the presumption that compensation for private healthcare is reasonable by producing evidence that cheaper public medical services of the same or higher standard will be available to the plaintiff.[55] If successful, the plaintiff's claim for medical expenses may either be rejected on this basis (if there is no cost to the plaintiff in accessing the services from the public health care sector), or an award of a lesser amount will be ordered (in the event that there is still a cost to the plaintiff in sourcing public healthcare services, which is less than it would be in the private sector).[56]

In discussing the potential development of the common law, the court reiterated that there are two constitutional provisions under which it may develop the common law: section 39(2) of the

48 *DZ*; *MSM*; *PH*; *TN* and *PN*.

49 See the discussion of *AD* below. Essentially, the effect of these types of provisions is that, should the fund be depleted, the provincial health department will top it up, and if the child dies while funds remain in the trust, those excess funds will revert to the State.

50 *DZ* para 2.

51 *Ibid* para 6.

52 *Ibid* para 7.

53 *Ibid* paras 14–16.

54 *Ngubane v South African Transport Services* 1991 1 SA 756 (A) 784E–G.

55 *DZ* para 2.

56 *MSM* para 27.

Constitution enjoins courts to develop the common law to the extent that it does not promote the Bill of Rights; and section 173 allows courts to develop the common law in other instances, where the interests of justice demand it.[57] However, the court also noted the well-settled notion that "the major engine for law reform should be the legislature".[58] Relevant factors for courts deciding whether to develop the common law include whether the rule is judge-made, the extent of the proposed development, and the ability of the Legislature to amend or abolish the rule.[59]

Regarding the OAFA rule, the court held that both the lump sum rule (which requires a great deal of speculation in determining the quantum)[60] and the periodic payment system (which may involve administrative difficulties of enforcement, variations, and problems with inflation and taxation adjustments)[61] are open to criticism. An accommodation of the two systems — which need not necessarily be left to the Legislature — is required.[62] The solution, the court held, may lie in deciding each individual case based on the most appropriate form of payment in those circumstances.[63] In this context, Froneman J also suggested that periodic payments subject to "top-up/claw-back" would reduce speculation.[64]

In assessing the need for the development of the common law, the court examined whether the rules in question offend the Bill of Rights or the interests of justice. It acknowledged that the OAFA rule prevents a repetition of lawsuits, a multiplicity of actions, and potentially conflicting decisions.[65] However, it warned against letting old rules bind us based on their historical underpinnings, as that history is largely "Western".[66] Froneman J encouraged the Africanisation of the common law, which may require consideration of different cultural and legal traditions in respect of redressing wrongs.[67]

Further, in contemplating whether the law ought to be developed to allow for the "public health care" defence, the court held that "[i]n principle, the actual rendering of [medical] services would fulfil the two-fold purpose of redressing damage and compensating the victim", particularly where the victim does not actually intend to spend the damages awarded on medical treatment. However, Froneman J expressed doubt that the rule that damages must sound in money necessarily offends the Constitution.[68] Nevertheless, the court commented that it is arguable that the right of access to health care services, and the State's constitutional obligation to provide access to such services, may indicate that a shift from individual to collective loss-bearing would be justifiable within this context.[69]

In the final instance, the court emphasised that any development of the common law must be based on factual material, which was absent in the case before the court.[70] For this reason, the court declined to develop the common law. However, it emphasised that the door to development

57 *DZ* paras 30–32. Regarding the development under s 39(2) of the Constitution, the court states that this requires "courts to be alert to the normative framework of the Constitution" (para 30).

58 *Ibid* para 34.

59 *Ibid*.

60 *Ibid* para 51.

61 *Ibid* para 52.

62 *Ibid* paras 54–55.

63 *Ibid* para 55.

64 *Ibid* para 56.

65 *Ibid* para 16.

66 *Ibid* para 39.

67 *Ibid* para 40.

68 *Ibid* para 45.

69 *Ibid*.

70 *Ibid* para 57.

is not shut and that a carefully pleaded and factually substantiated development is possible.[71]

3 2 *MSM obo KBM v MEC for Health, Gauteng*

While *DZ* focused primarily on the potential development of the OAFA rule, *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* ("*MSM*"),[72] is largely concerned with the "public health care" defence.[73] At the outset, the Johannesburg High Court[74] acknowledged the dilemma at the heart of CP claims, explaining that "[n]ot only are the disabled child and her family deeply and irreversibly affected, but so is the public healthcare system".[75]

The MEC for Health for Gauteng led a substantial amount of evidence that the child afflicted with CP, K, could receive certain required medical services at Charlotte Maxeke Johannesburg Academic Hospital ("Charlotte Maxeke Hospital") at the same or better level, at no or less cost to her, than that available in the private sector.[76] This evidence also sought to rebut the presumption that the cost of private healthcare was reasonable in respect of these identified services (the "mitigation of damages" defence), and also to serve as a factual basis for the development of the common law to allow for the "public health care" defence.[77]

Although Charlotte Maxeke Hospital was not responsible for K's injuries, it is a public hospital, and thus accepted that it has an obligation to assist K.[78] The witnesses from the hospital explained that K would be treated as a special patient, and that any required treatment or equipment would be arranged for K by the hospital at no cost to her.[79] Therapies and treatments would cost nothing for the hospital, as staff in the public sector are not paid per hour.[80] Further, medical items can be budgeted for, unlike medical malpractice claims.[81] The hospital's capacity to assist K and similarly placed plaintiffs was demonstrated to the court by witnesses and through an on-site visit.[82] The court found both to be impressive,[83] and concluded that the medical and therapeutic care available to K at Charlotte Maxeke Hospital is at least as good as that available in the private sector.[84] In fact, the court held that there were tangible advantages for K, who would have all her needs met in one multi-disciplinary setting, thus reducing travelling and

71 *Ibid* para 58

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

73 More specifically, the MEC did not raise the "undertaking to pay" defence, and the judgment does not deal with it. See *MSM* para 19. However, the MEC did argue for the development of the lump sum rule to allow for periodic payments (para 39). While the High Court did note that there was no reason in principle why this development should not be allowed (para 204), it held that there was insufficient factual evidence for a development of the lump sum rule in that case. It may be noted that this judgment appears to draw a clear distinction between the "undertaking to pay" defence and periodic payments. Such distinction may be upheld on the basis that there may indeed be a difference between agreeing to pay on a periodic basis and an undertaking to pay when the need arises. Nevertheless, both ultimately appear to be two types of periodic payments, and both are prevented by the OAFA rule. As such, this judgment, in part, also impacts on the OAFA rule.

74 High Court of South Africa, Gauteng Local Division, Johannesburg.

75 *MSM* para 2.

76 *Ibid* para 42.1.

77 *Ibid*.

78 *Ibid* para 72.

79 *Ibid* para 55.

80 *Ibid* para 56.

81 *Ibid* para 63.

82 *Ibid* para 51.

83 *Ibid* paras 80 and 159.

84 *Ibid* para 170.

ensuring communication between the experts treating her.[85] Against this background, the court recognised the MEC's "mitigation of costs" defence.

In relation to the MEC's plea for the development of the common law to allow for the "public health care" defence, the court held that, if the door remains closed to the State seeking alternative forms of compensation, the inevitable result will be a continued drain on its financial resources that are critical in meeting its constitutional obligations.[86] The court thus held that there is "a clear constitutional imperative for the state to consider, and to pursue alternative means of making reparations in cases like the present".[87] Development of the common law requires the balancing of individual rights and collective interests: K's *individual* right to compensation for the infringement of her constitutional rights, and the *collective* interests of the public in access to healthcare services.[88] The court held that development of the common law to allow compensation in kind would achieve this balance:

> [I]f reparation in kind achieves the purpose of making good the harm that has been inflicted, while at the same time acting as a measure to guard against a reduction in the state's resources, and hence its ability to meet its obligations under s27(2), this would seem to me to be a reasonable and compelling basis on which to consider developing the common law.[89]

Where the resources to render the required medical services already exist in the public health care system, and where there will be no detriment to the plaintiff in receiving those services in that system, it would be contrary to the broader interests of justice for courts to continue to be bound to order the State to pay for the cost of those services in the private sector.[90] The court thus found there to be a "reasonable and compelling basis on which to consider developing the common law".[91]

The court emphasised that its development of the common law would be limited to cases involving a child born with CP caused by medical negligence at a public hospital.[92] Further, it is important to note that the development does not require or permit compensation in kind in every such case, or in other delictual cases. It merely permits flexibility, so that, if supported by evidence of feasibility, quality of medical services and items and costing, a court *may* order compensation through the public health care system in appropriate cases.[93] Accordingly, while the primary obligation for legal development in this area thus remains with the Legislature, courts are not obliged to wait for Parliament to adopt legislation[94] when the interests of justice demand development of a judge-made common law rule.[95]

On the basis of the evidence led by the MEC and Charlotte Maxeke Hospital staff and managers, the Johannesburg High Court held that this was an appropriate case for an award of compensation

85 *Ibid* para 170.

86 *Ibid* para 194. See also para 187, where the court explains that there was less cost to the State in using its budgeted, existing resources to render services to a litigant like K than to pay for the cost to K of sourcing those goods in the private sector.

87 *Ibid* para 179.

88 *Ibid* para 180.

89 *Ibid* para 179.

90 *Ibid* para 194.

91 *Id* at para 179.

92 *Ibid* para 182. This judgment and its development of the common law does not apply to all medical negligence cases in the public sector, or to those in the private sector (para 196). No top-up provision was agreed to (para 20).

93 *Ibid* para 187.

94 Such as the State Liability Amendment Bill of 2018, which proposes amendments to the State Liability Act 20 of 1957.

95 *MSM* para 188.

in kind, in respect of certain identified services.[96] Monetary compensation for the remaining services was ordered to be paid to a specialised trust in a lump sum, subject to an agreed claw-back provision.[97] This arrangement had been agreed upon by the parties, and the court endorsed the claw-back as a reasonable provision for the plaintiff to have conceded.[98]

3 3 *PH obo SH v MEC for Health, KwaZulu-Natal*

The Durban High Court[99] in *PH obo SH v MEC for Health for the Province of KwaZulu-Natal* ("*PH*")[100] dealt with an attempt by the MEC for Health of KwaZulu-Natal to amend her plea to include arguments for the development of the common law to allow for both the "public health care" defence and periodic payments.[101] The MEC also suggested that any damages awarded as a lump sum should be paid into a trust with top-up/claw-back provisions.[102] The plaintiff, being the parent of the child born with CP on their behalf, argued that the wording of a previous order conceding the merits precluded compensation through the provision of medical services and items.[103] The court agreed with the plaintiff, on the basis of the Supreme Court of Appeal's judgment in *PN v Member of the Executive Council for Health of the Gauteng Division Government*,[104] which had been handed down after *MSM,* and dealt with a similar order.[105]

Contrary to the Johannesburg High Court in *MSM*, the Durban High Court held that there was no evidence that the "public health care" defence would have any bearing on the State's ability to fulfil its section 27(2) obligations under the Constitution.[106] State resources, the court held, are allocated at a national level, and the national government had not indicated that CP claims are straining its ability to provide public health care.[107] Additionally, there was no evidence explaining why CP claims could be decreased by increasing the quality of care in public healthcare facilities.[108] The court further held that the "public health care" defence would require a drastic development of the common law and would affect "the fundamentals of the law of delict",[109] in terms of which a successful litigant currently may decide what to do with their compensation, while the defendant does not have a choice but to pay monetary compensation.[110] The court

96 *Ibid* para 198.

97 *Ibid* para 200. The claw-back provision provides that, should K pass away before her agreed life expectancy, whatever funds remain in the trust will revert to her.

98 *Ibid*.

99 High Court of South Africa, KwaZulu-Natal Local Division, Durban.

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

101 *Ibid* para 10.

102 *Ibid* para 11.

103 *Ibid* para 19.

104 *PN v Member of the Executive Council for Health of the Gauteng Division Government* (217/2019) [2020] ZASCA 66 (17 June 2020) SAFLII http://www.saflii.org/za/cases/ZASCA/2020/66.html (accessed 17-01-2023).

105 The order, handed down by the High Court, separated liability and quantum. It then provided that the defendant – being the MEC for Health, Gauteng, is obliged to "pay to the plaintiff 100%" of her agreed or proven damages. The SCA interpreted this order, and particularly the word "pay", to have disposed not only of the extent of liability, but also of the manner of compensation (ie, a payment in money and in a lump sum, in the ordinary course). As a result, the court held, the defendant was precluded from seeking the development of the common law to permit compensation in kind, or in instalments. This judgment of the SCA will not be analysed further here, because the order of the court in that instance was set aside on appeal to the CC (see part 3.4 below), a judgment which will be dealt with in further detail below.

106 *PH* para 22.

107 *Ibid*.

108 *Ibid*.

109 *Ibid* para 23.

110 *Ibid*.

further added that the "damage might be of such a nature that it is irreparable but compensation is still paid."[111] Because the court commented on such a fundamental issue, it seems prudent to make the following remark. The court's statement seems at odds with the primary function of compensation in the context of the Aquilian action, namely repairing harm by paying damages. If harm cannot be repaired because it is "irreparable", then the payment of compensation would be nullified. The court further takes the view that a successful litigant can do whatever they like with the money received. Although this may be current practice, it should at least be questioned on the basis of the current crisis experienced in the public healthcare sector.

Mngadi J, writing for the Durban High Court, also explained that, in his view, the essence of the "public health care" defence "is to put the cerebral palsy claimants who suffered damages [sic] as a result of the negligence of the employees of the State in the same category as those that could not attribute their injuries to any negligence on the part of the employees of the State."[112] In other words, regardless of whether someone who has CP can prove that the State caused it and should be held liable, the outcome is the same: those whose CP is just "bad luck" and those who can prove State liability are in the same position because they would both have to use public healthcare that is available to them all. Again, it is worth responding to this point at this stage of the article. If the idea is to compensate plaintiffs for their future loss, and compensation can be better provided through services and items, that should be the end of the matter. Any suggestion that the law should put those whose CP was wrongfully and culpably caused by the State in a "better" position than those whose CP was otherwise caused seems to ascribe to compensation a function that it has not ordinarily been seen to have. Further, according to the court, such development may disincentivise the State from avoiding CP injuries in future, and it therefore discriminates against those who rely on public healthcare.[113] The implication of this reasoning appears to be that, without the potential for litigation, the State will not be incentivised to avoid causing harm to patients, and healthcare services will deteriorate further. Of course, such reasoning should be resisted for obvious reasons. The court, therefore, held that the "public health care" defence is not *demanded* by the Bill of Rights, but rather *infringes* constitutional rights.[114]

Finally, the Durban High Court held that the Constitutional Court did not sufficiently consider the constitutional implications of the "public health care" defence, and that the Johannesburg High Court's decision to develop the common law in *MSM* entrenches inequality and discrimination.[115]

3 4 *MEC for Health, Gauteng v PN obo EN*

The Constitutional Court again considered a matter affecting the possible development of the common law in relation to damages for CP claims in *PN*. This judgment dealt with the interpretation of a court order similar to that in *PH*, and to many other orders in CP claims throughout the country.[116] The court order in question ("Moshidi J order"), which separated the issue of liability from *quantum*, provided that the MEC was liable to pay 100 per cent of the plaintiff's agreed or proven damages.[117] The Supreme Court of Appeal held that this order was intended to deal not only with liability, but also with the manner of payment, being monetary

111 *Ibid*.

112 *Ibid* para 25.

113 *Ibid*.

114 The court held that ss 9(1), 9(3), 10, 12(1) and 25(1) of the Constitution would be infringed (*PH* id at para 27). Our response to this argument is set out in footnote 244 below.

115 *PH* para 28.

116 *PN* para 20.

117 *Ibid* para 3.

damages paid in one lump sum.[118] In the Supreme Court of Appeal's view, the Moshidi J order precluded an amended plea for compensation in kind or periodic payments, i.e., it precluded the development of the common law to allow for the "public health care" or "undertaking to pay" defences.[119] The effect of the Supreme Court of Appeal's ruling was therefore, essentially, that the court was not allowed to consider developing the common law, and that damages in that matter (and matters with similar orders) must be awarded as one lump sum of money.

The Constitutional Court held that the Supreme Court of Appeal had stretched the order's ordinary meaning in finding that the *method* of payment had been disposed of.[120] Additionally, the interpretation proposed by the Supreme Court of Appeal limits the power of courts to consider the development of the common law to allow the "public health care" and "undertaking to pay" defences, contrary to sections 39(2) and 173 of the Constitution, which grant courts that power. It further undermines the discretion of courts deciding constitutional matters to grant "any" just and equitable remedy.[121] The MEC's right to seek assistance from courts, in section 34 of the Constitution, would also be limited by such an interpretation.[122]

Significantly, the Constitutional Court held that the Supreme Court of Appeal's interpretation, by preventing provincial health departments from arguing for the "public health care" and "undertaking to pay" defences, is at odds with the right of "everyone" to access healthcare services, and of "every child" to basic healthcare services.[123] This is because these CP claims for large lump sums, which are constantly increasing, reduce the department's budget for healthcare programmes and facilities.[124] The court emphasised its statement from *DZ* that the lump sum rule "may be reflective of a pre-constitutional era where individual loss-bearing was prioritised, and the right of access to health care services did not exist".[125] This, Madlanga J explained, does not mean that the individual interests of CP plaintiffs should become insignificant, but simply that provincial health departments should be entitled to lead evidence on how best to balance these competing interests.[126]

3 5 *TN obo BN v MEC for Health, Eastern Cape*

The most substantial development of the common law to date, which has allowed both the "public health care" and "undertaking to pay" defences, was recently handed down by the Bhisho High Court[127] in *TN obo BN v MEC for Health, Eastern Cape*. The MEC for Health for the Eastern Cape conceded liability for medical negligence during childbirth, which resulted in the plaintiff's affliction with CP and other impairments that have rendered him dependent on caregivers for the rest of his life.[128] The MEC pleaded for a development of the common law, to allow both the "public health care" and "undertaking to pay" defences. The MEC argued that the public healthcare system is being drained by massive lump-sum awards for potential future care that may not ultimately be used by the injured person, and that the department should

118 *Ibid* para 7.
119 *Ibid*.
120 *Ibid* para 23.
121 *Ibid* para 26.
122 *Ibid* para 27.
123 *Ibid* paras 28 and 30.
124 *Ibid*.
125 *Ibid* para 29.
126 *Ibid*.
127 High Court of South Africa, Eastern Cape Division: Bhisho.
128 *TN* paras 2–4.

rather pay for healthcare actually used, if it cannot provide that care itself.[129]

The court accepted evidence tendered by the MEC's expert witnesses, much of which detailed the misappropriation or improper administration of funds by successful CP plaintiffs' attorneys. Some attorneys have unlawfully retained entire sums received from the provincial health department on their clients' behalf; some retain approximately 76 per cent of the sums received; and on average, 40 per cent of the sums received are retained by attorneys (generally based on inflated administration fees).[130] As a result, the capacity of these monetary awards to provide fully for the plaintiff is severely undermined.[131] However, the court noted, even when 25 per cent is retained by attorneys, in compliance with contingency fees legislation, only 75 per cent of the award could be used to provide for the medical needs of the plaintiff.[132] In contrast, future medical services and items paid for as and when they are needed, or provided directly by the healthcare department, would ensure that all of the CP victim's medical needs are fulfilled — even if they live longer than anticipated.[133]

The court held that developing the common law to allow the "public health care" defence is an incremental development, and not a radical departure. The "mitigation of damages" defence already allows courts to reduce damages awards if public healthcare of an acceptable standard is available to the plaintiff.[134] The court emphasised that the "mitigation of damages" defence does not require public healthcare to be of the same *or a higher* standard than that in the private sector; rather, it requires the former to be of the same standard as that in the private sector, or an "acceptably high" standard.[135] Griffiths J interpreted this to introduce a reasonableness standard, akin to that in section 27(2) of the Constitution. Such a standard ensures greater remedial flexibility for courts, which are ultimately guided by the constitutional requirement that the child's best interests be the paramount consideration in every decision.[136] The court held that the same standard should be applied with the "public health care" defence. Private healthcare facilities need not offer the benchmark standard, and courts should instead be guided by the requirement that future medical services and supplies available in the public sector be of a "reasonable standard".[137]

In deciding to develop the common law, the court held that the Johannesburg High Court's reasoning in *MSM* is of equal application in this case.[138] It held that the requirement that damages be paid in one lump sum of money threatens the health department's ability to carry out its obligations to provide access to healthcare under sections 27(2) and 28(1)(c); and infringes everyone's right to equal protection and benefit of the law under section 9(1).[139] The enormous sums retained by legal practitioners represent a "further assault" on the section 27(1) healthcare rights of individual complainants.[140] The court thus held that it is in the interests of justice, under section 173 of the Constitution, to develop the common law to allow courts to adjudicate medical negligence claims with "a broader remedial framework", including the "public health

129 *Ibid* para 3.

130 *Ibid* paras 78–80 and 161.

131 *Ibid* para 161.

132 *Ibid* para 141.

133 *Ibid* para 141.

134 *Ibid* para 114.

135 *Ibid* para 129.

136 *Ibid* paras 131–132. Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child."

137 *Ibid* para 133.

138 *TN* para 158.

139 *Ibid* para 165.

140 *Ibid* para 162.

care" and "undertaking to pay" defences.[141]

The court held that the two defences operate in tandem and must be developed together. Since the public sector cannot always provide many of the services and items required, monetary compensation for future expenses will still often be required. Allowing one defence without the other would thus greatly reduce its efficacy.[142] The court accordingly developed the common law to allow both defences in cases where harm has been "negligently caused by a public healthcare practitioner, provider or institution". It held that "no claim shall lie in respect of [a] lump sum of money damages" to the extent that (1) the court orders the defendant to provide medical services and supplies at a reasonable standard, or (2) the defendant undertakes to procure medical services and supplies in the private sector or reimburse the plaintiff within 30 days for doing so.[143]

3 6 *AD v MEC for Health and Social Development, Western Cape*

Before moving on to summarise the current legal position and to evaluate the arguments in these various judgments, attention should also be drawn to *AD v MEC for Health and Social Development, Western Cape Provincial Government* ("*AD*"),[144] a judgment handed down in 2016, before any of the judgments mentioned above. In this case the Western Cape High Court[145] considered a possible development of the lump sum rule to allow for damages to be paid into a trust subject to top-up/claw-back provisions.[146] The provincial MEC sought a development of the common law that would apply to a narrow category of cases. The MEC pleaded for the development of common law rules as they apply to delictual damages awarded against the provincial health department[147] arising from medical negligence, which are calculated based on life expectancy. The MEC did not plead for a development of common law rules pertaining to all litigation against public healthcare departments. To be clear, a calculation based on life expectancy carries with it a risk that the damages will not be used for their intended purpose if a plaintiff dies earlier than expected.[148] The MEC's plea was not for the Western Cape High Court to establish new rules or mechanisms, but merely to allow courts the flexibility to fashion fair and reasonable solutions in appropriate circumstances.[149]

The court found it unnecessary to develop the common law, as the parties had already agreed to the top-up/claw-back provisions and mechanism, and the MEC's offer was beneficial for the child.[150] As a result, the facts of the case did not require the court to develop the common law to allow top-up/claw-back provisions to be imposed on *unwilling* parties.[151] However, the court

141 *Ibid* para 166.

142 *Ibid* para 167.

143 *Ibid* order 19.

144 *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).

145 High Court of South Africa, Western Cape Division, Cape Town.

146 For an explanation of top-up/claw-back provisions, see fn 48. A discussion of the legal status of such arrangements is set out under heading 4.4 below.

147 Specifically, the MEC referred to claims "against the Western Cape Department of Health, alternatively against an organ of state which has the constitutional duty to provide access to health services, alternatively against any defendant". See *AD* para 53.

148 *Ibid* para 53.

149 *Ibid* para 55.

150 *Ibid* para 75.

151 *Ibid*.

nonetheless commented on the main points raised by the MEC.

The court noted that the development sought would only marginally engage the lump sum rule, as a lump sum would still be paid by the MEC into a trust. The top-up/claw-back provisions[152] would only become operative if certain future events reveal that the lump sum awarded is greater or less than what is required.[153] As a result, held by the court, there was no indication that this solution would promote healthcare rights and duties. If anything, it may be counter-intuitive, for a number of reasons. First, private and public resources would still be expended on a *quantum* trial to determine a lump sum that would be subject to change based on the top-up/claw-back provisions, and which would thus be somewhat futile to determine. Second, the lump sum paid into the trust would in any event not be available for healthcare for the general population. Third, the clawback would likely only occur many years in the future, if at all. Finally, there would be an equal likelihood of top-up requirements, which may neutralise the financial benefit of clawbacks.[154]

The court noted that the first two issues would not arise if the common law were to allow the "undertaking to pay" defence.[155] However, it held, a radical development of that nature should be left to the Legislature. It pointed out that there are both advantages and disadvantages of the OAFA rule and its possible revision is a policy decision.[156] Courts may also not be aware of all possible implications, including tax and inflation difficulties and legislative bars. For example, section 66(1) of the Public Finance Management Act ("PFMA")[157] and its Treasury Regulations[158] only permit organs of State to be bound to future financial commitments with specific approvals.[159] If nothing else, this provision points to a need for judicial caution.[160] The court further suggested that it was not attracted to the option of flexibility, as that would undermine the predictability of the law.[161]

4 A SUMMARY OF THE CURRENT LEGAL POSITION

Before proceeding to evaluate the above judgments and related issues, it is worth summarising the current legal position. Where do these judgments leave us?

4 1 The Common Law Rule that Damages must Sound in Money and the Status of the "Public Health Care" Defence

In *DZ* the Constitutional Court confirmed that damages in respect of Aquilian liability are generally to be awarded in money, and that "[t]here is little reason to doubt that the rule still stands today".[162] As a result, except to the extent that this rule has been developed since *DZ* was handed down, damages for patrimonial harm in CP claims must continue to sound in money.[163]

152 *Ibid* para 62. The court indicated that one would be unreasonable if not unaccompanied by the other.

153 *Ibid* para 61.

154 *Ibid* para 62.

155 *Ibid* para 63.

156 *Ibid* para 64.

157 Public Finance Management Act 1 of 1999.

158 See heading 5 6 1 below.

159 See also *AD* para 72.

160 *Ibid* para 73.

161 *Ibid* para 66.

162 *DZ* para 14.

163 No ruling or suggestion was made in connection to damages or satisfaction for non-patrimonial harm, and these fall outside the scope of this article.

To date, it seems that there have only been two such developments, in *MSM* and *TN*.

The effect of *MSM* appears to be that, where the MEC has been held vicariously liable in delict for the negligent conduct of public healthcare staff which wrongfully caused injury during or at birth in the form of CP, the Johannesburg High Court may, if appropriate in the circumstances, award compensation for CP claims in the form of public healthcare services and items. This will only be permissible if evidence convincingly demonstrates that the public healthcare that the child will receive will be of an equal or higher standard than private healthcare and that it will be provided at no cost or a cost that is lesser than the cost of the private medical care claimed.[164] This judgment binds only the Johannesburg High Court,[165] and merely has persuasive value for other High Courts.[166] That the Durban High Court in *PH* did not follow suit is indicative of this.

The effect of *TN* is that where "a claim arising from harm negligently caused by a public healthcare practitioner, provider or institution" succeeds, the plaintiff has no claim for monetary damages to the extent that "any of the future medical services and medical supplies required by the [plaintiff or injured party] as a result of the injury are provided, by order of court, at a reasonable standard at a public healthcare institution".[167] The primary distinction between this and the *MSM* order is that the standard of services and supplies available in the public sector must be "reasonable", without reference to the standard available in the private sector. Further, the Bhisho High Court's development of the common law applies to all medical negligence cases against the provincial health department, and not only CP claims.

While other High Courts (and, of course, the Supreme Court of Appeal and Constitutional Court) may still develop the rule that damages for patrimonial harm must sound in money, the "public health care" defence is currently only available (in appropriate cases) in the Johannesburg High Court and the Bhisho High Court at this stage.

4 2 The OAFA Rule, Periodic Payments, and the "Undertaking to Pay" Defence

At the outset, it is worth considering afresh whether the OAFA rule deals only with liability — requiring all claims for damages (past and future) arising from one cause of action to be brought at the same time[168] — or whether it also requires damages to be paid in a lump sum. Put differently: does it indeed comprise two sub-rules, i.e. the one action rule as well as the lump sum rule? This is significant because, if it indeed includes the lump sum rule, then it would actually preclude periodic payments, or the "undertaking to pay" defence. In this regard, the Constitutional Court confirmed that the lump sum rule is indeed the corollary of the OAFA rule in *DZ*,[169] and held that allowing periodic payments in CP claims would constitute a development of the common law.[170]

In his dissenting judgment in *DZ*, Jafta J argued that the OAFA rule deals only with liability, and does not require payment of damages to be in a lump sum.[171] Having considered *Evins v Shield Insurance Co Ltd* and the historical purpose of the rule, Mukheibir agrees with Jafta J.[172] Additionally, she argues that insistence on the payment of a lump sum undermines the

164 *MSM* order 1; para 207.

165 To the extent that there is only one Judge sitting. A Full Bench is not bound by this decision.

166 Du Bois "History, System and Sources" in Van der Merwe and Du Plessis (eds) *Introduction to the Law of South Africa* (2004) 46.

167 *TN* order 19.

168 *Evins* 835C-H.

169 *DZ* paras 16–17 and 59.

170 *Ibid* para 59.

171 *Ibid* para 85.

172 Mukheibir 2019 *Obiter* 257.

purpose of damages as a delictual remedy, which (at least in the context of Aquilian liability) is to compensate a plaintiff completely.[173] Of course, this means that courts must avoid under-compensation as well as over-compensation. While the former would unfairly prejudice a plaintiff, the latter (which is often the product of speculative awards) may effectively result in punishing the defendant.[174] While Mukheibir raises interesting points about the function of the Aquilian remedy and compensation, these arguments are currently of academic interest only. This is because South African courts are now bound by the majority judgment of the Constitutional Court in *DZ*,[175] and must treat the OAFA rule as incorporating the rule that damages must be paid in a lump sum. The judgment also indicates that the OAFA rule applies both to the determination of liability as well as the method of payment. Consequently, the lump sum component of the OAFA rule must be developed for periodic payments or the "undertaking to pay" defence to be allowed under the common law. The Constitutional Court has indicated some support for the development of the common law to allow periodic payments subject to a "top-up/claw-back" but has not yet so developed the law in this regard.[176]

Furthermore, and on a more practical note, it is worth emphasising the fact that, in the recent past, courts have consistently applied the OAFA rule on the basis that it incorporates the lump sum rule.[177] Even if this is a historically inaccurate reading of the OAFA rule (as Jafta J and Mukheibir contend), consistent application by courts of a common law rule in a new way would likely constitute a development of that rule. The Constitutional Court in *K v Minister of Safety and Security* ("*K*")[178] explained that "the common law develops incrementally through the rules of precedent", and that the precise ambit of common law rules is "clarified in relation to each new set of facts".[179] Extension of an established rule to new circumstances thus seems to constitute an incremental development of the common law, even if a court does not expressly formulate it in such language. Of course, the application of a rule to a new set of facts is not the same as consistent misinterpretation of a rule (if that is indeed what has happened with the lump sum rule). Regardless, the fact is that, in the absence of a codified system of law, the common law rules are those consistently applied, and developed, by courts. It could thus be argued that consistent interpretation of the OAFA rule to include the lump sum rule, and application by courts of the rule on that basis, may amount to the development of the rule.

To date, there has only been one development of the lump sum rule, in *TN*. The Bhisho High Court permitted the "undertaking to pay" defence in cases where a public healthcare practitioner, provider, or institution has negligently caused harm. The defence will operate to allow the Eastern Cape provincial health department to undertake to procure medical services or supplies in the private healthcare sector timeously whenever required; or to reimburse the injured party (or entity established for their benefit) for reasonable expenses incurred procuring such services or supplies, within 30 days of presentation of an invoice for it.[180]

Outside of the jurisdiction of the Bhisho High Court, neither periodic payments nor the "undertaking to pay" defence are available under the common law at present.

173 *Ibid* 260.

174 See further *ibid* 257–260.

175 Du Bois "History, System and Sources" 45.

176 *DZ* para 56. For a discussion of the status of "top-up/claw-back" provisions, see heading 4.4 below.

177 See *AD* para 56; *MSM* para 47; *PH* para 21; *DZ* para 16; *PN* para 14; and *Coetzee v Guardian National Insurance Co Ltd* 1993 3 SA 388 (W) 393(1).

178 *K v Minister of Safety and Security* 2005 6 SA 419 (CC).

179 *Ibid* para 16.

180 *TN* order 19.3.2.

4 3 The "Mitigation of Damages" Defence

At this juncture, the "mitigation of damages" defence remains open to defendants in medical negligence matters. Upon succeeding with the merits of their claim, the plaintiff bears the onus to prove that the *quantum* claimed is reasonable. However, there is a rebuttable presumption that it is reasonable to claim the costs of healthcare services in the private sector. This is because private hospitals tend to be well-equipped and well-run, and patients in private facilities tend to receive skilled medical attention.[181] The defendant may rebut this presumption by providing evidence that the plaintiff has access to alternative and cheaper medical services, and that the amount claimed is thus unreasonable.[182] Accordingly, if a defendant can prove that public medical services of the same or higher standard are available to the plaintiff, and that those services will be cheaper than private medical care (or free), then it will no longer be presumed that private future healthcare costs are reasonable.[183] In *MSM* the court noted that, if the defendant is successful, the plaintiff's claim for medical expenses may be either rejected on this basis, or a claim for a lesser amount will be ordered.[184]

It should be noted that this does not amount to compensation in kind because the court will not order the provision of any medical services or items in addition to the reduced damages. Put differently, the "mitigation of damages" defence is not the same as the "public health care" defence. Considering that the "public health care" defence would likely require that the health department treats the plaintiff as a special patient in addition to paying reduced damages (as in *MSM*), it might be that health departments rather opt for the "mitigation of damages" defence. In other words, it may be more cost-effective for the health department to pursue the "mitigation of damages" defence.

The Constitutional Court in *DZ* has confirmed the availability of the "mitigation of damages" defence in our common law.[185]

4 4 Trusts and Top-up/Claw-back Mechanisms

Courts are obliged by section 28(2) of the Constitution to act in the best interests of a child.[186] Additionally, the High Court is the upper guardian of all children.[187] As a result, a court awarding damages to a child may order that payment thereof must be made to a trust that should be administered for the child's benefit, if that is in the child's best interests.[188] Although not unique to CP claims, this is a useful mechanism available to courts in these cases. It goes without saying that, because the basis for this rule is the child's best interests, payment to a trust may

181 *Ngubane* 784C–F.

182 *Ibid* 784E–G.

183 *DZ* para 21.

184 *MSM* para 27.

185 As a result, held the Constitutional Court (*DZ* para 23), the Supreme Court of Appeal's judgment in *The Premier, Western Cape N.O. v Kiewitz* 2017 4 SA 202 (SCA) ("*Kiewitz*"), which found this defence to offend both the OAFA rule and the rule that damages sound in money, was incorrect.

186 Section 28(2) of the Constitution provides that "[a] child's bests interests are of paramount importance in every matter concerning the child."

187 *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 64.

188 *AD* para 76.

not be ordered for the benefit of the relevant health department and to the detriment of the child.

Does this type of arrangement impact the OAFA rule, or its corollary, the lump sum rule?[189] Should a lump sum be paid into a trust (subject to top-up/claw-back provisions), it may undermine the purpose of the OAFA and lump sum rules, because the total amount that must ultimately be paid by the defendant is not established at the conclusion of legal proceedings, and may still increase or decrease based on the operation of top-up/claw-back provisions.[190] Regardless, the court in AD appeared to suggest that such a contractual arrangement between the parties is legally acceptable, because the court itself is not imposing these conditions, and would still quantify and grant a lump sum award in the usual manner. It thus does not create uncertainty itself. The OAFA rule does not require courts to strike down contractual provisions agreed to by the parties for topping up or reimbursing part of that lump sum at a later stage. As such, if the parties agree to such provisions, and they are in the best interests of the child, they are acceptable.[191]

However, the court noted that the imposition of this type of arrangement on unwilling parties would require the development of the lump sum rule (and thus the OAFA rule).[192] This is because the court *itself* would effectively be awarding an uncertain amount in damages,[193] contrary to the requirement that damages be awarded and paid as one lump sum, to bring finality to the matter. The High Court in *AD* has expressed doubt that this kind of development would be appropriate, arguing that it does not solve the problem of reduced public health resources (since a large lump sum is paid in any event), and results in wasted resources on an almost futile *quantum* trial.[194] In contrast, the Constitutional Court in *DZ* appeared in favour of development to allow top-up/claw-back provisions, as compensation would become less speculative.[195] However, the court was discussing the possibility of such provisions accompanying periodic payments, and not the payment of a lump sum.[196]

Neither court has ruled definitively on whether the common law may or should be developed to allow top-up/claw-back provisions to be imposed by a court without agreement between the relevant parties.

5 CONCLUSION TO PART 1

This article has been divided into two parts. Part 1 has described the "vicious cycle" faced by provincial health departments and those seeking access to healthcare in South Africa, in terms of which medical negligence – particularly that causing children to be born with cerebral palsy – results in enormous delictual claims, which enforce the rights of claimants, but also reduce the resources required to improve the standard of healthcare. It has explained the two common law rules that require damages to be paid in one lump sum of money. Further, it has summarised judgments of the Constitutional Court and various divisions of the High Court that consider the potential development of these two common law rules. Finally, it has set out the current status

189 Mukheibir 2019 *Obiter* 257, argues that the minority judgment of Jafta J in *DZ* was correct, and that the lump sum rule is not the corollary of the OAFA rule. This is because the OAFA rule deals only with liability. As a result, once the extent of liability has been determined, the OAFA rule does not require that the full amount be paid in one lump sum. On the other hand, the Western Cape High Court in *AD* para 52 described the OAFA rule as having two components: the "one-action" and the "lump-sum" rules.

190 *AD* para 61.

191 *Ibid* para 75.

192 *Ibid*.

193 It would be uncertain because the amount would be subject to court-mandated top-ups or reimbursements.

194 *AD* para 63.

195 *DZ* para 56.

196 *Ibid*. See heading 4 2 above for a discussion about the current position regarding periodic payments.

of these rules, in light of the judgments described.

Part 2 will evaluate some of the arguments made in the case law and argue in favour of judicial development of the two common law rules, pending legislative reform. It will rely primarily on the Bill of Rights and case law of the Constitutional Court, particularly that relating to the right of access to healthcare, and the relationship between delictual damages and constitutional remedies. It will argue in favour of greater remedial flexibility for courts deciding CP claims, to promote both individual and collective interests, and reduce wasted resources.