

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 20/17

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG Applicant

and

DZ obo WZ Respondent

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, EASTERN CAPE First Amicus Curiae

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, WESTERN CAPE Second Amicus Curiae

Neutral Citation: *MEC, Health and Social Development, Gauteng v DZ* [2017] ZACC 37

Coram: Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgments: Froneman J (majority): [1] to [60]
Jafta J (concurring): [61] to [98]

Heard on: 17 August 2017

Decided on: 31 October 2017

Summary: Delictual damages — "once and for all" rule — future medical expenses — lump sum award

Section 39(2) of the Constitution — Section 173 of the Constitution — factual basis for development of the common law

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ORDER

On appeal from the Supreme Court of Appeal, the following order is made:

1. No person shall publish a report of the proceedings in this Court in this matter which reveals, or may reveal, the identity of the respondent or the respondent's child.
2. Leave to appeal is granted.
3. The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

FRONEMAN J (Zondo DCJ, Cameron J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concurring):

Introduction

[1] On 19 November 2009 the respondent, DZ,[1] gave birth to WZ at the Chris Hani Baragwanath Hospital, Johannesburg. WZ was born by vaginal delivery, following prolonged labour, and was subsequently diagnosed with cerebral palsy due to asphyxia

[1] Like the applicant in *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (2) BCLR 127 (CC), the minor victim in this case ought to be anonymous. This is in the best interests of the child, not merely in light of the child's right to privacy, but because when the child "becomes an adult the many physical disabilities suffered by the [child] will result in vulnerability. If the sums of money at the [child's] disposal as a result of this [judgment] are readily to be found out on the internet, there will be a risk of the [child] losing that money to inappropriate friends, fortune hunters or even thieves": *Re A (A Child) (Publication of Report of Proceedings: Restrictions)* [2011] EMLR 18 at para 17. The child's parent, the respondent, must also be anonymous in order to ensure the effectiveness of the order.

during delivery. DZ instituted action in the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court) on behalf of WZ for damages arising from the allegedly negligent conduct of the employees of the applicant, the Member of the Executive Council for Health and Social Development in the Gauteng Province (Gauteng MEC), during his birth. The Gauteng MEC conceded negligence on the part of hospital staff and thus accepted vicarious liability on the merits of the claim. All that remained for determination by the High Court was the extent of the compensation to which WZ was entitled.

[2] That too was agreed, in the total sum of R23 272 303, of which R19 970 631 was in respect of future medical expenses. But it was an agreement with a wrinkle. The wrinkle was contained in the Gauteng MEC's amended plea, in which she contended that she did not have to pay future medical expenses in a lump sum. Her alternative was 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. She contended that the common law allowed her to do this, and that, if it did not, the Court should develop it.

[3] The High Court dismissed the amended plea, as did the Supreme Court of Appeal. The Supreme Court of Appeal held that the "once and for all" rule at common law precludes payment of future medical expenses in the form sought by the Gauteng MEC and that, if intervention is necessary to correct this alleged defect, it would best be left to the legislature. In addition, it held that the Gauteng MEC failed to present any evidence why her preferred method would enhance access to healthcare.

[4] In this Court, the Gauteng MEC seeks leave to appeal against the order of the Supreme Court of Appeal.

[5] The MEC for the Department of Health in the Eastern Cape Province (Eastern Cape MEC) and the MEC for the Department of Health in the Western Cape

Province (Western Cape MEC) sought, and were granted, admission as *amici curiae* (friends of the court).

[6] The Eastern Cape MEC sought to ensure that the decision in this matter does not prevent her from raising two defences in pending trials in the High Court of South Africa, Eastern Cape Local Division, Mthatha. The first is a "public healthcare defence", according to which claims for future medical expenses against public healthcare authorities may be satisfied through the provision of medical services in the public healthcare sector. The second is an "undertaking to pay defence", according to which medical services or supplies that cannot be provided in the public healthcare sector are paid for when they arise in the future. She contends that the first defence requires, at most, a limited development of the common law, while the second requires a more extensive development of the common law.

[7] The Western Cape MEC similarly seeks to ensure that our decision in this matter does not pre-empt consideration of the ambit of the "once and for all" rule in relation to certain mechanisms that she is devising to deal with claims against public healthcare providers for alleged negligence. She presented statistical evidence indicating pressure on public healthcare resources arising from claims in cerebral palsy-related cases. Her proposal is to make each damages award conditional on the establishment of a ring-fenced trust administered by a case manager and a trustee who can ensure that the award is used only for its intended purpose: meeting the child's future medical expenses. The deed constituting each trust would include provisions providing for the "topping-up" of the fund if it becomes depleted as well as the reversion of the balance in the fund to the state upon the child's death. The High Court of South Africa, Western Cape Division, Cape Town, recently sanctioned the adoption of this model by settlement, but expressed the view that it was unnecessary to decide on the development of the common law in view of the agreement of the parties.[2] The Western Cape MEC contends that, in a future case where there is no agreement, it may well be that the

[2] *AD v MEC, Health and Social Development, Western Cape* [2016] ZAWCHC 116 at para 54.

imposition of these mechanisms will require a development of the "once and for all" rule.

Leave to appeal

[8] The development of the common law, and the potential impact of damages awards in medical negligence claims against public healthcare authorities on their ability to discharge their constitutional obligation to provide access to healthcare to everyone, raise constitutional issues that attract this Court's jurisdiction.[3] As will be seen, there are some factual difficulties for the Gauteng MEC on the merits of the appeal, but the legal issues are important at a wider level. It is thus in the interests of justice to grant leave to appeal.

The appeal

Factual background

[9] The factual background is brief and needs no repetition.[4]

[10] In the High Court, the Gauteng MEC elected not to lead any evidence on the damages issue. The High Court granted judgment in the agreed sum and the Supreme Court of Appeal subsequently confirmed this.

Various defences

[11] The bare bones of the Gauteng MEC's amended plea were used in argument to advance a number of different legal propositions, veering off in different directions and sometimes only tenuously connected, if at all, with the wording of the amended plea. It

[3] Personal injury claims involve the fundamental right to freedom from all forms of violence and security of the person and bodily integrity (section 12(1)(c) and (2) of the Constitution); when applying a provision of the Bill of Rights to a natural or juristic person a court may develop the rules of the common law to limit the right in accordance with the limitations clause (section 8(3)(b)); when developing the common law every court must promote the spirit, purport and objects of the Bill of Rights (section 39(2)); and everyone has the right to have access to healthcare services, which the state must take reasonable legislative and other measures, within its available resources, progressively to achieve (section 27(1) and (2)).

[4] See [1] to [3].

is necessary to attempt to distil the essence of these propositions, and those advanced as future defences by the *amici*, in order to assess the present state of the common law and whether it needs further development.

[12] Two of the propositions advanced by the Gauteng MEC and the *amici* concern first principles of our law of delict. The first is that delictual compensation need not necessarily sound in money, but may also be paid in kind. The second is that the "once and for all" rule applies only to the determination of liability on the merits of a delictual claim, and not to the quantification of damages, which (it is said) lies within the trial judge's discretion. The third proposition, which is perhaps based on these general assertions, is less ambitiously formulated. This is that it is open to a defendant to challenge an amount claimed as damages on the basis that the sum is not reasonable because the plaintiff is likely to use public healthcare rather than private healthcare, the former being as good as, and cheaper than, the latter. Allied to this is the argument that claims for future medical loss may sometimes best be satisfied by the provision of actual medical services, rather than the payment of money.

[13] The Eastern Cape MEC's "public healthcare" defence may fall within the third proposition since it is based on an assertion that public healthcare provides as good, and cheaper, medical services as private healthcare. But it may also go outside this proposition if it is based on the contention that damages awards in medical negligence claims against public healthcare authorities must also be assessed against the impact they may have on healthcare budgets and the adverse effect they may have on the provision of access to public healthcare for everyone. Her alternative "undertaking to pay" defence and the "top-up/claw-back" mechanism of the Western Cape MEC may also be difficult to fit into the third category.

The current common law

[14] In *Standard Chartered Bank* Harms JA, "conscious of stating the obvious", pointed out that—

> "The purpose of an Aquilian claim is to compensate the victim in money terms for his loss. Bell J pointed out as long ago as 1863 that when damages are due by law they are to be awarded in money because money is the measure of all things[5] . . . . This rule still stands."[6]

There is little reason to doubt that the rule still stands today.[7]

[15] Another rule that still forms part of our law is the "once and for all" rule.[8] In *Evins* Corbett JA explained its import:

> "Expressed in relation to delictual claims, the rule is to the effect that in general a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action. This rule appears to have been introduced into our practice from English law. . . . Its introduction and the manner of its application by our Courts have been subjected to criticism . . . but it is a well-entrenched rule. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.
>
> Closely allied to the 'once and for all' rule is the principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible

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[5] With reference to *Wynberg Valley Railway Company v Eksteen* 1 Roscoe 70 at 74. Harms JA added that Bell J "qualified the general proposition but his qualification is not in the present context germane". Bell J's full statement reads:

> "It is no doubt true, as an abstract proposition, that when damages are due by law they are to be awarded in money, as, to use the language of the commentators, 'money is the measure of all things' . . . but that proposition may fail in its application according to the particular circumstances of the case to which its application is directed."

In an application to make an arbitration award final the Court declined to do so because the award of compensation was made partly in money and partly in kind, something that the applicable legislation (section 18 of the Wynberg Railway Company's Act) did not allow. It appears at 76 to 80 that, had it not been for the specifics of the legislation, the court considered the payment of compensation partly in money and partly in kind as being fair and reasonable.

[6] *Standard Chartered Bank of Canada v Nedperm Bank Ltd* [1994] ZASCA 146; 1994 (4) SA 747 (A) (*Standard Chartered Bank*) at 782D-F. Harms JA referred to *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) at 150A-C; *Southern Insurance Association Ltd v Bailey N.O.* 1984 (1) SA 98 (A) (*Southern Insurance Association*) at 111D-F; and Erasmus and Gauntlett "Damages" in *LAWSA* (1979) vol 7 at paras 1 and 17.

[7] See Midgley "Delict" in *LAWSA* 3 ed (2016) vol 15 at para 201 and *Van der Merwe v Road Accident Fund* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 37-8.

[8] See Midgley id and Visser and Potgieter *Law of Damages* 3 ed (Juta & Co Ltd, Cape Town 2012) at 153-4.

> and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions . . . . The claimant must sue for all his damages, accrued and prospective, arising from one cause of action, in one action and, once that action has been pursued to final judgment, that is the end of the matter."[9]

[16] What can be drawn from these authorities is that, in relation to delictual claims, the "once and for all" rule is to the effect that a plaintiff must generally claim in one action all past and prospective damages flowing from one cause of action. The corollary is that the court is obliged to award these damages in a lump sum, the object of which is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions. It is buttressed by the *res judicata* principle, the purpose of which is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.

[17] The Gauteng MEC's first two general and bold propositions – that delictual compensation need not sound in money and that the "once and for all" rule does not relate to the quantification of damages, but only to the determination of liability on the merits – are thus not borne out by an analysis of our current law.

[18] The third proposition – that it is open to counter the method and measure of the claim for damages on the basis that the amount claimed is not reasonable because a plaintiff is more likely to use public healthcare, which is as good as, and cheaper than, private healthcare – appears to be on a surer footing.

[19] In *Ngubane* the appellant claimed future medical expenses on the premise that he would be treated by private medical practitioners and, when necessary, in a private hospital.[10] The respondent contended, however, that these medical services could be

[9] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835C-H.

[10] *Ngubane v South African Transport Services* [1990] ZASCA 148; 1991 (1) SA 756 (A).

provided at state or provincial hospitals, free of charge, or at no more than a nominal fee, and that it was therefore reasonable to expect the appellant to make use of these facilities.[11] It was argued that there was no general authority that entitled the plaintiff to the costs of private medical treatment, and that, whenever the possibility of cheaper treatment arose, a claimant had a general onus to deal with these possibilities.[12]

[20] Kumleben JA rejected this:

> "Though the onus of proving damages is correctly placed upon the plaintiff, this submission, which is really concerned with the duty to adduce evidence, is to my mind unsound. By making use of private medical services and hospital facilities, a plaintiff, who has suffered personal injuries, will in the normal course (as a result of enquiries and exercising a right of selection) receive skilled medical attention and, where the need arises, be admitted to a well-run and properly equipped hospital. To accord him such benefits, all would agree, is both reasonable and deserving. For this reason it is a legitimate – and as far as I am aware the customary – basis on which a claim for future medical expenses is determined."[13]

But he then continued:

> "Such evidence will thus discharge the onus of proving the cost of such expenses unless, having regard to all the evidence, including that adduced in support of an alternative and cheaper source of medical services, it can be said that the plaintiff has failed to prove on a preponderance of probabilities that the medical services envisaged are reasonable and hence that the amounts claimed are not excessive."[14]

On the facts on record it was held that the respondent had led insufficient evidence to substantiate the assertion that medical services of the same or higher standard would have been available to the appellant.[15]

[11] Id at 783H-I.

[12] Id at 784B-C.

[13] Id at C-F.

[14] Id at E-G.

[15] Id at 785C-E.

[21] *Ngubane* is authority for allowing a defendant to produce evidence that medical services of the same or higher standard, at no or lesser cost than private medical care, will be available to a plaintiff in future. If that evidence is of a sufficiently cogent nature to disturb the presumption that private future healthcare is reasonable, the plaintiff will not succeed in the claim for the higher future medical expenses. This approach is in accordance with general principles in relation to the proving of damages.[16]

[22] This approach does not offend the "once and for all" rule. It is a "once and for all" factual assessment on the evidence adduced that, although the claimant will need medical care in future, it has not been proved on a balance of probabilities that this entails a loss in the sense that the claimant's patrimony after the delict is less than it would have been had the delict never occurred.[17] It is not the mere injury and its future consequences that justify an award of damages, but the actual diminution in the claimant's patrimony.[18]

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[16] See id at 784G-85C. See also Midgley above n 7 at para 215. That this is so is underscored by the fact that a similar approach has been endorsed by the courts of England and Wales. For example, the Court of Appeal held that a tetraplegic plaintiff who was not utilising any services available under the Chronically Sick and Disabled Persons Act 1970 could not recover the full amount claimed in respect of future medical expenses based on the cost of running a fully-equipped private home with private nursing staff in *Cunningham v Harrison* [1973] 3 All ER 463 (CA). Orr LJ considered, at 471, that a reduction had to be made in view of—

> "the strong probability that there will be long periods when the plaintiff will be unable to obtain nursing and housekeeping help and will be obliged to go into a National Health hospital or a home provided by some benevolent organisation and . . . that he will benefit in the years to come from the provisions of the [1970 Act]."

He also explained that—

> "[t]o make such a reduction does not, in my view, conflict in any way with the provisions of section 2(4) of the Law Reform (Personal Injuries) Act 1948, since . . . that section does not provide that a plaintiff shall be entitled to recover expenses which he will not in fact incur."

At the time that *Cunningham* was decided, the Law Reform (Personal Injuries) Act 1948 governed the relationship between tort damages and social-security benefits; the current legislation is the Social Security (Recovery of Benefits) Act 1997: see Peel and Goudkamp (eds) *Winfield and Jolowicz on Tort* 19 ed (Sweet & Maxwell Ltd, London 2014) at para 23-091.

[17] See *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* [2004] ZASCA 24; 2005 (1) SA 299 (SCA) (*Sechaba Photoscan*) at para 15.

[18] Compare *Rudman v Road Accident Fund* [2002] ZASCA 129; 2003 (2) SA 234 (SCA) at para 11.

[23] In the recent case of *Kiewitz,* the Supreme Court of Appeal rejected a "mitigation of damages" defence similar to the one raised in *Ngubane* because it "offends against both the 'once and for all' rule and the rule that compensation, in personal injury matters, must comprise a monetary award".[19] On the basis of that holding, the Court found it "unnecessary to deal with the evidence relating to the adequacy of medical care offered at provincial hospitals".[20] It appears that the Court was not referred to *Ngubane*.[21] For the reasons given, its conclusion – that a mitigation defence of the kind raised in *Ngubane* offends both the "once and for all" rule and the rule that delictual compensation must sound in money – cannot be sustained. Only after assessing the evidence proffered on the adequacy of alternative future medical care can a court assess, "once and for all", whether the damages claimed have been proven reasonable. If so, a lump sum assessment must be made of the future loss.[22]

[24] If not, it appears that at least four possibilities exist. The first is that no damages for future medical expenses should be awarded if the evidence shows that the claimant is likely not to suffer *any* loss in the future.[23] The second is that, if the evidence establishes only a *lesser* loss, then that sum must be awarded as the monetary damages. The third is that the assessed loss may be ordered to be paid in instalments. The fourth is that the defendant be ordered to ensure the actual rendering of the medical services that it claims obviates or reduces the claimant's monetary loss. The first two possibilities fall comfortably within the current law of monetary compensation that must be paid "once and for all". The latter two may not.

[25] I am only aware of a single instance in our law where the assessed loss was ordered to be paid in instalments. In *Wade*, the defendant was ordered to pay the claimant's lost earnings by way of indexed instalments until the latter's death or

[19] *The Premier, Western Cape N.O. v Kiewitz* [2017] ZASCA 41; 2017 (4) SA 202 (SCA) (*Kiewitz*) at para 13.

[20] Id.

[21] The Court did rely on its judgment in the present case: *The MEC for Health and Social Development of the Gauteng Provincial Government v* [*DZ*] [2016] ZASCA 185 (SCA judgment).

[22] Compare *Southern Insurance Association* above n 6 at 113G.

[23] Compare *Rudman* above n 18.

remarriage.[24] That case has apparently not been followed, and doubt has been expressed as to whether the Court had the inherent jurisdiction to make the order.[25] In *Roxa*, the Appellate Division considered it advisable to make provision for the proper care and administration of a minor's assessed damages. With the consent of the parties, it therefore ordered that its award be paid to a building society and made provision for both periodic payments and recourse to the Court in the event of disputes.[26] It is said that courts have no power to order periodic payments,[27] but this issue may not yet have been squarely addressed. And, in any case, *Wade* may now be more persuasive in view of section 173 of the Constitution.[28] Although my brother Jafta J considers that the existing law already allows damages to be ordered by way of periodic payments,[29] I adopt the somewhat more cautious approach that this has not yet been definitively decided for the reasons set out at the end of this judgment.[30]

[26] Our law currently requires evidence to substantiate a defence that a claimant has suffered no damages, or less than is claimed, for reasonable future medical expenses. The Gauteng MEC chose not to present any evidence to show that DZ's claim for future medical expenses was unreasonable. The plea therefore has to fail on the state of our existing law. Can development of the law save the day for her?

Development of the common law

[27] To start the enquiry one must be clear on (1) what development of the common law means; (2) what the general approach to such development is; (3) what material

[24] *Wade v Santam Insurance Company Ltd* 1985 1 PH J3 (C).

[25] Neethling, Potgieter and Visser *Law of Delict* 7 ed (LexisNexis Butterworths, Durban 2014) at 245 fn 223.

[26] *Roxa v Mtshayi* 1975 (3) SA 761 (A) at 770.

[27] Erasmus and Gauntlett above n 6 at para 25.

[28] Section 173 of the Constitution provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[29] See [87].

[30] See [59].

must be available to a court to enable the development; and (4) the limits of curial, rather than legislative, development of the common law.

[28] As O'Regan J explained in *K*, the common law develops incrementally through the rules of precedent, which ensure that like cases are treated alike.[31] Development occurs not only when a common law rule is changed altogether or a new rule is introduced, but also when a court needs to determine whether a new set of facts falls within or beyond the scope of an existing rule.[32] Thus development of the common law cannot take place in a factual vacuum.

[29] Whether a new set of facts falls within or beyond the scope of an existing rule may, in appropriate circumstances, be decided on exception, a procedure whereby the facts are assumed to be those pleaded for the purpose of determining whether they legally sustain a cause of action or a plea.[33] But where a common law rule is to be changed altogether, or a new rule is to be introduced, it will usually be better to make a decision only "after hearing all the evidence" so that "the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors".[34]

[30] Section 39(2) of the Constitution requires the courts to promote the spirit, purport and objects of the Bill of Rights when developing the common law.[35] This requires the courts to be alert to the normative framework of the Constitution, "not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue".[36]

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[31] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 16.

[32] Id.

[33] *H* above n 1 at para 14.

[34] Id (citing *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 80).

[35] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[36] *K* above n 31 at para 17.

[31] The general approach to development of the common law under section 39(2) is that a court must: (1) determine what the existing common law position is; (2) consider its underlying rationale; (3) enquire whether the rule offends section 39(2) of the Constitution; (4) if it does so offend, consider how development in accordance with section 39(2) ought to take place; and (5) consider the wider consequences of the proposed change on the relevant area of the law.[37]

[32] In *Mokone*, this Court held that there are instances in which the common law may suffer from a deficiency that is not at odds with the Bill of Rights. If this deficiency necessitates the development of the common law, this cannot be done in terms of section 39(2). However, development may be possible in terms of section 173 of the Constitution,[38] which stipulates that the Constitutional Court, the Supreme Court of Appeal and the High Court have the inherent power to develop the common law, taking into account the interests of justice.[39] In these cases, the general approach to the development of the law will be similar, except that the enquiry into the common law will not be restricted to whether it offends the normative framework of the Constitution. The enquiry will be whether, even if the common law is constitutionally compliant, there are wider interests of justice considerations that necessitate its development.[40]

[33] The common law may also be developed when applying a provision of the Bill of Rights to a natural or juristic person,[41] in order to give effect to the right to the

[37] *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) (*Mighty Solutions*) at para 39. Compare *Carmichele* above n 34 at para 40 and *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 41.

[38] *Mokone v Tassos Properties CC* [2017] ZACC 25 at para 40.

[39] Id at para 41.

[40] Id.

[41] In terms of section 8(2) of the Constitution, which provides for the so-called "horizontal" application of the Bill of Rights.

extent that legislation does not do so, and to limit a right, provided that the limitation is in accordance with section 36(1) of the Constitution.[42]

[34] When exercising their authority to develop the common law, courts should be mindful that, in accordance with the principle of the separation of powers, the major engine for law reform should be the legislature.[43] Relevant factors here include whether the common law rule is a judge-made rule,[44] the extent of the development required[45] and the legislature's ability to amend or abolish the common law.[46]

[35] To return, then, to the sequential steps in the general approach to the development of the common law under section 39(2): the first two – identification of the existing common law and its rationale – have been dealt with.[47] In relation to compensation in money, a defendant in a delictual claim is allowed to adduce evidence that medical services of the same or higher standard, at no or lesser cost than private medical care expenses claimed, will be available to the plaintiff in future. If that evidence is of a sufficiently cogent nature to disturb the presumption that private

[42] Section 8(3) of the Constitution.

[43] *Carmichele* above n 34 at para 36; *Mighty Solutions* above n 37 at para 40. In this connection, it is important to note the "major role" that the South African Law Reform Commission plays in the "development and reform of the law" by preparing draft Bills "after doing research and publishing a report on a particular topic" that frequently forms "the core of subsequent legislation tabled in Parliament": Heaton "South Africa: Changing the Contours of Child and Family Law" in Sutherland (ed) *The Future of Child and Family Law: International Predictions* (CUP, Cambridge 2012) at 400.

[44] Innes CJ said this of the law made by judges and jurists in *O'Callaghan N.O. v Chaplin* 1927 AD 310 at 327:

> "It is the duty of a court – especially of an appellate tribunal – so to administer a living system of law as to ensure – without the sacrifice of fundamental principles – that it shall adapt itself to the changing conditions of the time. And it may be necessary sometimes to modify or even to discard doctrines which have become outworn."

Compare *R v Jogee*; *Ruddock v The Queen* [2017] AC 387 at para 85, where Lord Hughes JSC and Lord Toulson JSC considered that—

> "[a]s to the argument that even if the court is satisfied that the law took a wrong turn, any correction should now be left to Parliament, the doctrine of secondary liability is a common law doctrine . . . and, if it has been unduly widened by the courts, it is proper for the courts to correct the error."

[45] See for example *Mighty Solutions* above n 37 at paras 44 and 45.

[46] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 115. Compare Hoffmann "*Fairchild* and After" in Burrows, Johnston and Zimmermann *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (OUP, Oxford 2013) at 68-70.

[47] See [14] to [16].

healthcare is reasonable, the plaintiff will not succeed in the claim for the higher future medical expenses.[48]

[36] The third step is to enquire whether these common law rules offend the normative structure of the Constitution and, if not, whether there are wider interests of justice considerations that require their further development. Context is important here. We are dealing with a child suffering from, *inter alia*, cerebral palsy occasioned by medical negligence in a public healthcare institution. It is within that context that it is argued that the law should allow either an order to ensure the actual rendering of the necessary medical care or periodic payments of the assessed loss.

[37] The common law rule that damages must sound in money has, as we have seen, an ancient ancestry.[49] But that ancestry has its own quirks. The law of delict originated in private vengeance: a victim originally had the right to kill a wrongdoer, although this eventually became a right to merely exact the same kind of harm that he or she had suffered and then to demand the payment of money to cover any patrimonial loss caused by the wrong.[50] This development of the Aquilian action to cover purely patrimonial loss happened "rather surreptitiously" and with "[n]o specific precedent for this development . . . available in the Roman sources".[51] It found its theoretical foundation in the natural law expounded by (among others) Hugo Grotius.[52]

[38] Even in its origin in this jurisdiction – the *Wynberg Valley Railway Company* case to which Harms JA referred in *Standard Chartered Bank* – the proposition that when damages are due by law they are to be awarded in money because "money is the measure of all things" was said to be an abstract one "that . . . may fail in its application according to the particular circumstances of the case to which its application is

[48] See [21].

[49] See [14].

[50] Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta & Co Ltd, Cape Town 1990) at 914.

[51] Id at 1022.

[52] Id at 1032.

directed".[53] And it appears that the three judges in that case would have easily accepted the fairness of a partial award of compensation in kind had it not been for the specific wording of the applicable legislation.[54]

[39] There is a further reason for caution in letting the past bind us. Whose past? Professor Zimmermann's magisterial work on the law of obligations was, in his own words, an attempted "comparison of legal solutions against the background of a common 'Western' civilisation".[55] In a later work he wrote:

> "The three Graces of the South African legal system are civil law, common law and customary law. The free spirit of the third Grace makes it difficult for her to join in the circle. To enable her to do so may be one of the great challenges of the new South African legal order. Someone may then, perhaps, be able to tell the story of the Africanisation of Roman-Dutch law in twenty-first century South Africa."[56]

As a great friend of this country, Professor Zimmermann undoubtedly understands that Western legal systems form only part of our heritage, and that one of the great challenges of our new legal order is indeed to bring about the Africanisation of the common law.

[40] In *Mhlongo,* an argument that, because a contract of loan was made in cash, and cash was earlier unknown in Africa, the common law and not customary law applied was rejected as "illogical since money is in itself only a token and . . . other articles served as tokens before contact was made with Europeans".[57] Although the decision is couched in the unacceptable language of the past, and was in any case made in the context of determining whether customary or common law should apply to the

[53] *Wynberg Valley Railway Company* above n 5 at 74.

[54] See n 5.

[55] Zimmermann above n 50 at xi.

[56] Zimmermann and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Juta & Co Ltd, Cape Town 1996) at 15.

[57] *Mhlongo v Mhlongo* 1937 NAC (N & T) 124 at 125-6.

transaction, it represents a glimmer of recognition that different cultural and legal traditions may offer valuable insights on the kind of compensation that may be sufficient to redress wrongs.

[41] The free spirit of our third Grace has an important role to play in giving content to the normative value system of our Constitution and thereby shaping the development of our common law. Of course, customary law will also continue to play its independent role under the Constitution as a pluralist choice of law to govern aspects of legal life.[58] It is, however, also 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.[59]

[42] In order to determine the appropriateness of monetary compensation for delictual wrongs, one must look at whether that form of compensation is the only one that properly redresses damage to a victim's patrimony. In *Sechaba Photoscan*, Howie P stated:

> "It is now beyond question that damages in delict (and contract) are assessed according to the comparative method. . . . The award of delictual damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there been no delict. That surely says enough to define the measure."[60]

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[58] Customary law is one of many "elements of traditional African society" of "noteworthy and continuing cultural relevance"; this is reflected in the fact that our constitutional order recognises "cultural pluralism with legal . . . consequences" and guarantees "the survival of an evolving customary law" alongside the common law (including Roman-Dutch law): *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paras 195, 197 and 200. See Kerr "The Constitution and Customary Law" (2009) 126 *SALJ* 39 at 42-3 and Himonga and Bosch "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?" (2000) 117 *SALJ* 306 at 309 and 312-3.

[59] Like the determination of the common law, the determination of customary law is a question of law – albeit one that must be answered cautiously in view of the nature of customary law: *MM v MN* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) at paras 44 and 47. However, what is immediately necessary is to articulate, and pay heed to, the African philosophical values underlying customary law in order to ensure that the content of our constitutional values take cognisance of them.

[60] *Sechaba Photoscan* above n 17 at para 15. See also Erasmus and Gauntlett above n 6 at para 21.

[43] Future medical expenses are awarded in respect of medical services that the victim may need in the future, which would have been unnecessary had there been no delict. In principle, the actual rendering of these services would fulfil the two-fold purpose of redressing damage and compensating the victim. This method may be even more appropriate where the victim does not intend to put any money that he or she might receive towards medical treatment. Comparativists have pointed out that "[i]n German law medical expenses cannot be claimed if they have not actually been incurred or, at the very least, it can be shown that the plaintiff does not intend to use the money for medical treatment".[61]

[44] In logic and principle compensation in a form other than money does not appear to be incompatible with the aim of making good "the difference between the actual position that obtains as a result of the delict, and the hypothetical position that would have obtained had there been no delict".[62] To require compensation in money as the "measure of all things" therefore appears to be an evaluative normative choice. Does the common law's choice in this regard offend the normative underpinnings of our legal order?

[45] In general terms, this seems doubtful. Neither the Constitution nor the realities of modern life oblige us to find that money cannot be the measure of things. But 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. Aligned to this is "the ever-increasing shift from the classical model of individual loss-bearing towards a collectivisation of losses" that is reflected in the "gradual

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[61] Markesinis and Unberath *The German Law of Torts: A Comparative Treatise* 4 ed (Hart Publishing, Oxford 2002) at 908 (citing (1986) BGHZ at 142).

[62] In Widmer *Unification of Tort Law: Fault* (Kluwer Law International, The Hague 2005) at 376, this is said:

> "Instead of damages, restoration in kind can be claimed by the injured party as far as it is possible and not too burdensome to the other party."

This is one of many "principles" formulated by the European Group of Tort Law; these have no official standing but represent an attempt to set out the principles of European tort law in a manner akin to the American Restatement.

absorption of [delict] law, or at least large parts of it, into the modern social-security system".[63]

[46] The "once and for all" rule is derived from English law[64] and is said to be so entrenched in our law that it is not possible to oppose it on historical grounds.[65] But, as in the case of the entrenched rule that compensation must always be paid in money, the Constitution does not absolve us from interrogating our history and whether the legal norms of the past still fit in with those of the Constitution.

[47] In the rule's place of origin, the legislature has intervened in order to provide for what was first called "structured settlements" and is now called reviewable periodic payments.[66] On the recommendation of the Law Commission of England and Wales,[67] section 2(1) of the Damages Act 1996 was enacted to allow the courts to make an order for the whole or part of a damages award to take the form of periodic payments, provided the parties agree. The Law Commission recommended that in the absence of agreement there should be no judicial power to impose a structured settlement. This incurred the displeasure of Lord Steyn in the *Wells* case:

> "[T]he lump sum system causes acute problems in cases of serious injuries with consequences enduring after the assessment of damages. In such cases, the judge must often resort to guesswork about the future. Inevitably, judges will strain to ensure that a seriously injured plaintiff is properly cared for whatever the future may have in store for him. It is a wasteful system since the courts are sometimes compelled to award large sums that turn out not to be needed. It is true, of course, that there is statutory provision for periodic payments: see section 2 of the Damages Act 1996. But the Court only has this power if both parties agree. Such agreement is never, or virtually never, forthcoming. The present power to order periodic payments is a dead letter. The

[63] Zimmermann above n 50 at 904. See also Markesinis and Unberath above n 61 at 903.

[64] See [15]. See also *Cape Town Council v Jacobs* 1917 AD 615 at 620.

[65] Visser and Potgieter above n 8 at 153.

[66] See Jones, Dugdale and Simpson (eds) *Clerk and Lindsell on Torts* 21 ed (Sweet & Maxwell Ltd, London 2014) at paras 28-72-28-76.

[67] Law Commission of England and Wales *Structured Settlements and Interim and Provisional Damages* (report 224, September 1994).

> solution is relatively straightforward. *The Court ought to be given the power of its own motion to make an award for periodic payments rather than a lump sum in appropriate cases. Such a power is perfectly consistent with the principle of full compensation for pecuniary loss.* Except perhaps for the distaste of personal injury lawyers for change to a familiar system, I can think of no substantial argument to the contrary. But the judges cannot make the change. Only Parliament can solve the problem."[68] (Emphasis added.)

[48] It is not clear if Lord Steyn's deference to the legislature was occasioned merely by the fact that the existing legislation forbade court approval in the absence of agreement between the parties. He may well have considered that the courts could have developed the law had it not been for this fact. But in other common law jurisdictions the prevailing view appears to be that it is not within the courts' remit to order periodic payments because of the "once and for all" rule. For example, the Supreme Court of Canada declined to make an order for periodic payments in the absence of enabling legislation or the consent of all parties in *Watkins*.[69] The Court acknowledged the argument for law reform in order for the common law to evolve to meet the realities of contemporary society, but considered that to accede to it would be to go beyond the "limits on the power of the judiciary to change the law":

> "There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to 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. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it

[68] *Wells v Wells*; *Thomas v Brighton Health Authority*; *Page v Sheerness Steel Co plc* [1998] 3 All ER 481 (HL) at 502.

[69] *Watkins v Olafson* [1989] 2 SCR 750 (SCC).

> is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.
>
> Considerations such as these suggest that major revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution.
>
> The change in the law which we are asked to endorse in this case would constitute a major revision of the long-standing principles governing the assessment of damages for personal injury in particular, the principle that judgment is to be rendered once-and-for-all at the conclusion of a trial, and the correlative entitlement of the plaintiff to immediate execution on the entire award. Permitting courts to award periodic damages for personal injuries does not involve the extension of an existing rule, but the adoption of a new principle."[70]

[49] For those schooled in the common law tradition it might come as a surprise that "[t]he comparative law of personal injuries offers few divergences as striking as that between systems which award [delictual] compensation in the form of a capital sum or periodic payments".[71] There are four legal possibilities of what form payments for future expenses may take. On the outer limits lie, on the one side, the common law systems with lump sum awards not payable periodically and, on the other, some socialist systems, which allowed only periodic payments or annuities; in between these extremes are those systems that neutrally accept either lump sums or periodic payments (such as those of France and Switzerland) and systems like Germany's, which accepts that awards can take either form but prefers periodic payments.[72]

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[70] Id at 760-2.

[71] Fleming "Damages: Capital or Rent?" (1969) 19 *U Toronto LJ* 295 at 295.

[72] Markesinis and Unberath above n 61 at 911-2; Fleming id at 298-9:

> "Moreover, it is necessary at the outset to dispel the possible delusion as if there were but one model of the rent system. Variations are marked and intimately affect their competitive attractions. In the first place, there is actually little support outside the socialist bloc for making rent the only authorized form of tort-compensation for continuing disability. All other legal systems countenance capital awards as an alternative: some (like Germany and Sweden) only as an exceptional expedient, most, however, without such a pronounced bias. Many but by no means all countries permit subsequent variation of awards, though some (like Switzerland) only if authorized in the original award. France permits modification only for changes in the physical condition of the victim, while many others following the German pattern impose no restriction

[50] Professor Fleming considers that the "doctrinal rationale of the two basic systems offers rather little for informed choice" in that the usual argument for the periodic payment (or rent) system is based on the natural law theory of restitution while the arguments in favour of capital awards "ten[d] to be wholly pragmatic".[73] At the highest level of legal policy, however, "capital and rent confront each other, the one as a manifestation of free enterprise and individualism, the other as representing a social philosophy of paternalism".[74]

[51] The "once and for all" rule has been cogently criticised.[75] As Nicholas JA pointed out in *Southern Insurance Association*, the enquiry into damages for future loss is "of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss".[76] Professor Fleming calls these shortcomings "lamentable beyond imagination":

> whatever. Most entertain reduction as well as increase, but France and Sweden only increase. Finally, in some countries, the periodical pattern is considered mandatory for settlements as well as judicial awards; while in others, most notably in Germany, lump-sum settlements have like termites reduced the rent system to but a hollow shell."

[73] Fleming above n 71 at 299.

[74] Id at 299-300:

> "A capital sum obviously offers the recipient a much wider range of choice of how to fashion his future. Quite often, by being furnished with a fund he could never have hoped to amass ordinarily, he is put within reach of economic opportunities that would otherwise have been foreclosed. By the same token, he may dissipate his chances by failings either of temperament, requisite knowledge, or luck. Either event, however, falls within that calculus of economic opportunity which is widely regarded as a mainstay of our capitalist-oriented way of life. By all indications it is also far and away the most favoured choice among injury victims, apparently for precisely the same reason.
>
> Periodical payments, on the other hand, find spokesmen among both doctrinaire socialists and people endowed with a more pessimistic view of human capacity to rise to new challenges. Not without significance, it was the German jurists of nearly a century ago who supported their advocacy of the rent-system with the argument that the hapless victims of accident were typically too ill-educated to be entrusted with large sums of money. The state, it is argued, cannot afford to remain indifferent to this plight because, for one, it owes a duty to protect these victims of misfortune against their own folly and, for another, it is concerned in its own fiscal interest against their becoming a charge on public funds."

[75] Visser and Potgieter above n 8 at 154-5. See also Spandau "Inflation and the Law" (1975) 92 *SALJ* 31.

[76] See [22].

> "It would be bad enough if the choice were between guessing either right *or* wrong: but our methods virtually assure that the choice *must* turn out wrong. For the accredited approach is to compromise, that is, neither to award the whole amount nor yet to refuse all, but instead to assess and *award the value of the chance*."[77]

[52] Similarly, however, the periodic payment or rent system is open to criticism. It may involve piecemeal consideration of the effect of injuries, administrative difficulties of enforcement, variations up and down, problems with adjustment for inflation and taxation, and the like.[78]

[53] What to make of all of this?

[54] Although the "once and for all" rule, with its bias towards individualism and the free market, cannot be said to be in conflict with our constitutional value system, it can also not be said that the periodic payment or rent system is out of sync with the high value the Constitution ascribes to socio-economic rights. There is no obvious choice at this highest level of justification. What appears to be called for is an accommodation between the two. Is that possible? At an abstract level it might be more difficult, as Professor Fleming observes:

> "André Tunc recently described both capital and rent solutions as frankly 'catastrophic'. This is especially true if a categorical choice between them, one way or the other, is demanded in the abstract as one of overriding general policy. What makes it so invidious is that comparison falters really at two levels. At one level there is the uncertainty about goals: we are torn between the paternalistic and the individualistic social philosophy, and yet cannot have both; one or the other must be sacrificed. On a second level, the difficulty is that each system has a different advantage over the other in meeting policy objectives which themselves are incontrovertible: for example, rent is better able to cope with the problem of death or other aggravation in the victim's

[77] Fleming above n 71 at 302.

[78] Id at 302-23. See also Markesinis and Unberath above n 61 at 912-5.

> physical condition, while capital conceivably provides a better hedge against inflation."[79]

[55] If the only choice open to us was at this level then it would probably be better to leave reform to the legislature. But this may not be so. Resolution of the dilemma may lie in leaving the choice at the level of each individual case, depending on which form of payment will best meet its particular circumstances:

> "Reducing the decision from the abstract or general to the concrete or particular will frequently allow us to minimize the dilemma of subordinating one advantage to another. For example, in cases of greatly reduced life-expectancy, the spectre of inflation becomes negligible compared with the advantages of a periodical award in coping with the problems associated with the uncertain date of death and the desirability of making provisions for the victim's family thereafter. Even on what I called the first-level problem, the pressure may well be greatly reduced when there is concrete evidence that the particular plaintiff is either incapable of being entrusted with a large sum of money or has, to the contrary, an attractive plan for employing it in founding a new career."[80]

[56] We must remind ourselves again of the context in which the argument for development of the common law is made here. We are not called upon to decide the fate of the "once and for all" rule in all personal injury cases arising from medical negligence. The most important future imponderable is the ultimate one: death. Periodic payments subject to a "top-up/claw-back" will give less speculative expression to the general principle of compensation for loss. And the likelihood of a dependant's claim, which might present problems in other cases,[81] is less, if not entirely absent, here.

[57] We have seen, in this regard, that any development of the common law requires factual material upon which the assessment whether to develop the law must be made.[82]

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[79] Fleming above n 71 at 323.

[80] Id at 323-4.

[81] See, for example, id at 310-1.

[82] See [29] to [30].

Here that factual material is absent. The only possible factual foundation for an argument that the common law must be developed is the mere fact that WZ was born in a public healthcare institution and that is where the medical negligence occurred. This is woefully inadequate to ground development of the common law in the manner sought by the Gauteng MEC. The appeal must fail, for that reason.

[58] But the failure of the appeal does not mean that the door to further development of the common law is shut. We have seen that possibilities for further development are arguable. Factual evidence to substantiate a carefully pleaded argument for the development of the common law must be properly adduced for assessment. If it is sufficiently cogent, it might well carry the day.

[59] As indicated earlier, I differ from Jafta J's view that the common law already provides for the payment of damages in instalments. Apart from the case of *Wade*, which has not been followed, the only instances of periodic payments as part of the damages award have been where the parties agreed to it, or where execution followed upon an award already made. If an order for periodic payments were to be made under section 173 of the Constitution – or even section 172(1)(b), on which counsel for the applicant did not seek to rely at the hearing – that would constitute incremental development of the common law insofar as the court would need to determine whether a new set of facts falls within or beyond the scope of an existing rule, as explained by O'Regan J in *K*.[83]

Order

[60] The following order is made:

1. No person shall publish a report of the proceedings in this Court in this matter which reveals, or may reveal, the identity of the respondent or the respondent's child.
2. Leave to appeal is granted.

[83] *K* above n 32 at para 16.

3. The appeal is dismissed with costs, including the costs of two counsel.

JAFTA J:

[61] I have had the benefit of reading the judgment prepared by my brother Froneman J (first judgment). I agree that leave must be granted and that the appeal should be dismissed with costs. However my reasons differ from those contained in the first judgment.

[62] DZ initiated an action in the High Court against the Gauteng MEC, for payment of damages arising from the negligence of the Gauteng MEC's staff. The damages related to harm suffered by DZ's son at birth at a state hospital in Gauteng. The child suffered brain damage as a result of the negligent conduct of the Gauteng MEC's employees. DZ sought to hold the MEC vicariously liable for the damage caused by those employees.

[63] In her amended plea, the Gauteng MEC admitted liability but, with regard to future medical expenses, she asked for an order directing her "to pay directly to the persons who will provide services to [the child] within 30 days of the presentation of a written quotation to [her] accounting officer". The plea was formulated in these terms:

> "QUANTUM
>
> 12.1 The defendant admits that this Honourable Court found that she was liable for the admitted and/or proved damages sustained by the plaintiff as a result of the negligence of the employees.
>
> 12.2 The defendant however pleads that she should be directed that instead of the monetary compensation sought in respect of medical expenses as set out in paragraph 9 of the plaintiff's amended particulars of claim, to pay directly to the person/s who will provide services to him within 30 days of presentation of a written quotation to its accounting officer.

12.3 In the event that it is found that the South African Law does not make provision for such relief and, only in that event, the defendant avers that the South African Law must be developed to make such provision.

. . .

15 In the event that the Court were to find that the amounts claimed by the plaintiff are both reasonable and are payable upon its order, the defendant pleads that:

15.1 The plaintiff has entered into a contingency fee agreement with its attorneys of record;

15.2 Such contingency fee agreement is in terms of the Contingency Fee Act and such contingency fee agreement will reduce the amount that is due to the minor for his future medical care;

15.3 Furthermore the defendant avers that the reduction of such future medical expense will put the child out of pocket and that it will not be in the best interest of the child;

15.4 In the circumstances the amount awarded for future medical expenses should not be part of the amount taken into consideration for the calculation, determination and payment of money in terms of the contingency fee agreement.

WHEREFORE the defendant prays that:

(1) She should be directed that instead of the monetary compensation sought in respect of medical expenses as set out in paragraph 9.1 of the plaintiff's amended particulars of claim, to pay directly to the person/s who will provide services to the minor child within 30 days of presentation of a written quotation to its accounting officer.

(2) Alternatively that the amount awarded for future medical expenses should not be part of the amount taken into consideration for the calculation, determination and payment of money in terms of the contingency fee agreement(s)."

[64] It is apparent that three issues arise from this plea and that two of them are main issues. The third issue is an alternative to the first. The first issue is whether the High Court could order that compensation for future medical expenses be paid directly to service providers, within 30 days of the presentation of a written quotation to the

accounting officer of the provincial department. Alternatively, if the law did not permit direct payment, a development of the law was requested.

[65] Evidently, the Gauteng MEC thought that the order she prayed for was permissible. But in the event that the Court were to find that the law did not allow the granting of such order, she asked that the law be developed to cater for that kind of order. Not surprisingly, the Gauteng MEC did not identify any particular legal rule that required development.

[66] The second issue raised was whether the amount awarded for future medical expenses should be part of an amount considered when determining the contingency fee payable to DZ's attorneys in terms of the agreement between her and those attorneys.

[67] On the third day of the trial, the Gauteng MEC agreed to pay a sum of R23 272 303 to DZ. This figure included an amount of R19 970 631 that represented future medical costs. This turn of events meant that the only issues that remained for the trial court to decide were those raised in the amended plea. It is significant to note that the original plea did not raise an issue of payment of damages in kind or in any form other than money. Therefore, payment of damages in any form other than money was not an issue in the High Court and the Supreme Court of Appeal.

[68] With regard to the first issue, the High Court rejected the request for an order directing that payment be made to service providers upon submission of a written quotation. The Court followed earlier decisions where the same request was declined. In rejecting the request the High Court held:

> "It is disconcerting that the defendant persists with the issue about a certificate of undertaking when four eminent judges of this Court have rejected the arguments without fail in four separate judgments. I align myself with the said judgments. It is unclear why the defendant is persisting with this issue which is completely without any substance. The defendant gives the impression that it is concerned about the well-being of [WZ] and has his interests at heart. This is further from the truth. The defendant

> cannot decide what form of compensation should be awarded to the plaintiff. She is not seeking restitution but monetary compensation. As stated earlier this matter has nothing to do with indigenous law. [WZ] is what he is today due to the negligence of employees of the defendant. To add insult to the injury the defendant now wishes him to submit vouchers for future medical treatment from a defendant that has a poor track record when it comes to health care. His interest would be best served by the Trust that has been established.
>
> The defendant has not made out a proper case why the defendant should be ordered to issue a certificate of undertaking which is akin to a certificate issued in road accident matters. The defendant is seeking to avoid the applicable legislation and regulations governing payments to be made by the State, which it clearly cannot do in this case. The common law deals adequately with the relief that the plaintiff is seeking and no case has been made out by the defendant why the common law should be developed further. The point raised is bad in law and stands to be dismissed."[84]

[69] The High Court also refused to develop the common law as an alternative to finding in the Gauteng MEC's favour on the first issue. That Court concluded that no proper case had been made out for the development of the common law as no deficiency in the common law had been established.

[70] Regarding the second issue, the High Court refused to interfere with the terms of the contingency fee agreement at the instance of someone who was not a party to that agreement. Since the conclusion of the agreement had complied with the Contingency Fees Act,[85] the High Court held that the Gauteng MEC had failed to raise valid grounds for making the proposed order.

Supreme Court of Appeal

[71] The Supreme Court of Appeal granted the Gauteng MEC leave to appeal to it. But the appeal was dismissed with costs. With reference to section 2(2) of the

[84] *MEC for Health and Social Development, Gauteng v* [*DZ*] *obo* [*WZ*], unreported judgment of the Gauteng Local Division, Johannesburg, Case No J2013/9204 (26 June 2015) at paras 27-8.

[85] 66 of 1997.

Contingency Fees Act, that Court held that no court has the power to alter the amount in respect of which a practitioner's fees are determined. This is because the provision stipulates that a fee is determined with reference to the "total amount" awarded.

[72] In so far as the other issue was concerned, the Supreme Court of Appeal held that the "once and for all" rule of the common law prohibited an order directing that future medical expenses be paid periodically, upon presentation of a written quotation to the accounting officer. The Court said:

> "The order sought by the appellant in substitution of the lump sum award made by the court a quo, is precluded by the common law rule that a person or his dependent, is only accorded a single, indivisible cause of action to recover damages for all the loss or damage suffered as a result of the wrongful act causing disablement or death."[86]

In this Court

[73] As noted in the first judgment, the Eastern Cape MEC and the Western Cape MEC were admitted as friends of the court and advanced submissions that sought to leave the door open for courts to authorise periodic payments of compensation for future medical expenses. This would be a departure from payment in a lump sum.

[74] The question that arises is whether here the Supreme Court of Appeal was right in holding that the "order sought by the appellant in substitution of the lump sum award made by the court a quo, is precluded by the common law rule that a person or his dependent, is only accorded a single, indivisible cause of action to recover damages for all the loss". It seems to me that that Court proceeded from the premise that what was sought was alteration of the amount awarded and not the method of payment of that amount. In my respectful view, this was incorrect. The request related to periodic payment of the amount of R19 970 631, which had been awarded in respect of future medical expenses.

[86] SCA judgment above n 21 at para 6.

[75] But more importantly, I do not agree that the "once and for all" rule prohibits periodic payments. This rule regulates judicial process and not execution of the payment of a judgment debt. The rule does not require that once the amount of compensation is determined it must be paid in a single payment. It may well be that in a particular case the judgment debtor does not have funds or assets which cover the entire debt. In that event the judgment creditor may exact payment of part of the debt, and if the debtor is later in possession of assets that could cover the balance, the creditor may enforce payment of the balance of the debt. The common law does not prohibit this.

[76] What is prohibited by the "once and for all" rule is a multiplicity of lawsuits based on a single cause of action or occurrence. In *Evins*, Corbett JA defined the content of the rule in these words:

> "Expressed in relation to delictual claims, the rule is to the effect that in general a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action."[87]

[77] The fact that in jurisdictions like Australia,[88] Canada,[89] and England and Wales[90] the "once and for all" rule includes the so-called lump-sum rule does not mean that this is also the position in our common law. The *Evins* definition of the rule does not say so, and I am not aware of a decision of our courts that says that our common law on this issue is identical with the common law in those jurisdictions. As is evident from *Evins*, what the rule requires in our context is that all damages arising from one cause of action be claimed in one action, and presumably determined in that same action, in order to avoid multiple actions.

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[87] *Evins* above n 9 at 835C-D. See also *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 330E-G.

[88] *Grey v Richards* [2014] HCA 40; (2014) 253 CLR 660 (HCA) and *Todorovic v Waller* [1981] HCA 72; (1981) 150 CLR 402 (HCA).

[89] *Krangle v Brisco* 2002 SCC 9; [2002] 1 SCR 205 and *Watkins* above n 69.

[90] *Simon v Helmot* [2012] UKPC 5 at paras 10-25 and *Wells* above n 68.

[78] To underscore the purpose of the rule, Corbett JA pointed out that its ally was the principle of *res judicata*. He said:

> "The principle of *res judicata*, taken together with the 'once and for all' rule, means that a claimant for Aquilian damages who has litigated finally is precluded from subsequently claiming from the same defendant upon the same cause of action additional damages in respect of further loss suffered by him (i.e. loss not taken into account in the award of damages in the original action), even though such further loss manifests itself or becomes capable of assessment only after the conclusion of the original action. . . . The claimant must sue for all his damages, accrued and prospective, arising from one cause of action, in one action and, once that action has been pursued to final judgment, that is the end of the matter."[91]

[79] Here the request by the Gauteng MEC was not that DZ should defer her claim for future medical expenses for determination in a future lawsuit. On the contrary, the Gauteng MEC agreed to pay a fixed amount for medical expenses which were yet to be incurred. This case complied with the "once and for all" rule. The request related to the manner of effecting payment of the amount claimed and awarded in one action. In other words, the Gauteng MEC sought an order which would regulate execution of the order for payment of the amount in respect of future medical expenses.

[80] Execution is a process that commences upon the finalisation of judicial process that culminates in a judgment. The relationship between a judicial process and execution was affirmed by this Court in *Chief Lesapo*, in which Mokgoro J stated:

> "Execution is a means of enforcing a judgment or order of a court and is incidental to the judicial process. It is regulated by statute and the Rules of Court and is subject to the supervision of the court which has an inherent jurisdiction to stay the execution if the interests of justice so require."[92]

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[91] *Evins* above n 9 at 835G-6A.

[92] *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 at para 13.

It is apparent from this statement that execution is not taken to be part of the judicial process. And judicial process here is used in the sense of adjudication which is a judicial function. Execution is not a judicial function but an administrative one. It is commenced by seeking authorisation of a writ of execution from an administrative functionary like the registrar or a clerk of the court.[93]

[81] With regard to Magistrates' Courts, section 66 of the Magistrates' Courts Act[94] empowers those courts to order periodic payments of a judgment debt.[95] It would indeed be odd to hold that the superior courts lack the power to order periodic payments only because there is no statute that empowers them to do so. These courts, unlike the lower courts, are not creatures of statute. They enjoy inherent powers to "regulate their own process, and to develop the common law, taking into account the interests of justice".[96]

[82] The scope of those inherent powers is not limited to ordering a stay of execution. It includes the manner in which execution may be carried out. Moreover, section 65M of the Magistrates' Courts Act authorises, in appropriate circumstances, execution of

[93] Rule 46 of the Uniform Rules of Court.

[94] 32 of 1944.

[95] Section 66(1) of the Magistrates' Courts Act provides:

> "(a) Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made.
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> (b) Upon such failure to pay any instalment in accordance with any court order, execution may be effected in respect of the whole of the judgment debt and of costs then still unpaid, unless the court, on the application of the party that is liable, orders otherwise."

[96] Section 173 of the Constitution provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

judgments of the High Court as if they were judgments of the Magistrates' Court.[97] In that event a Magistrates' Court would be empowered to direct that payment of delictual damages determined by the High Court be paid in instalments. In those circumstances it would be absurd to hold that the High Court lacks the power to order periodic payments.

[83] Indeed in *Schoeman* this Court affirmed the authority of a court to order payment of a judgment debt in instalments. Mokgoro J said:

> "However, the concept of paying off the debt in instalments is important and the practicability of making such an order must be ever present in the mind of the judicial officer when determining whether there is good cause to order the execution. The balancing should not be seen as an all or nothing process. It should not be that the execution is either granted or the creditor does not recover the money owed. Every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort."[98]

[84] Although this was stated in the context of a judgment by a Magistrates' Court, the Court intended to declare a general constitutional principle which requires judicial oversight over execution on a judgment debtor's home. That oversight is necessary even in respect of debts arising from monetary orders made by the High Court. This is plain from *Gundwana* where Froneman J held:

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[97] Section 65M provides:

> "If a judgment for the payment of any amount of money has been given by a division of the Supreme Court of South Africa, the judgment creditor may file with the clerk of the court from which the judgment creditor is required to issue a notice in terms of section 65A (1), a certified copy of such judgment and an affidavit or affirmation by the judgment creditor or a certificate by his attorney specifying the amount still owing under the judgment and how such amount is arrived at, and thereupon such judgment, whether or not the amount of such judgment would otherwise have exceeded the jurisdiction of the court, shall have all the effects of a judgment of such court and any proceedings may be taken thereon as if it were a judgment lawfully given in such court in favour of the judgment creditor for the amount mentioned in the affidavit or affirmation or the certificate as still owing under such judgment, subject however to the right of the judgment debtor to dispute the correctness of the amount specified in the said affidavit or affirmation or certificate."

[98] *Jaftha v Schoeman*; *Van Rooyen v Stoltz* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (*Schoeman*) at para 59.

> "It is rather ironic that the effect of this judgment is to restore to the courts a function that they exercised for close on a century before the introduction of rule 31(5) in 1994. The change to the original position has been necessitated by constitutional considerations not in existence earlier, but these considerations do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. What it does is to caution courts that, in allowing execution against immovable property, due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, that alternative course should be judicially considered before granting execution orders."[99]

[85] I can think of no reason in logic or principle which warrants that the inherent power of the High Court to order payment of a judgment debt in instalments should be restricted to cases involving execution on one's home only. The guiding principle for the exercise of that power must always be the interests of justice. If justice would be served by ordering periodic payments of a judgment debt, a superior court must consider making such an order. The duty to find "creative alternatives which allow for debt recovery" in lieu of execution extends to all judgment debts, including orders for payment of damages.[100]

[86] In fact, on the authority of this Court, judicial oversight is constitutionally necessary whenever execution against property of the judgment debtor is contemplated. This would apply even where what falls to be the subject of execution is a sum of money. In *University of Stellenbosch Legal Aid Clinic* the majority stated:

> "There are two major differences with the first judgment. First, we differ on an issue of principle. The first judgment assumes, without affirming definitively, that the Constitution requires judicial supervision when orders issued from a court are executed and finds that this is how the contested provision ought to be properly interpreted. The High Court in striking down the contested provision went further. It pointed out that

[99] *Gundwana v Steko Development CC* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) at para 53.

[100] *Schoeman* above n 98 at para 59.

> this Court's judgments have repeatedly found that where an applicant seeks an order to execute against or seize control of the property of another person, there must be judicial oversight. To my mind, the High Court was right. This is not a principle that should merely be assumed in deciding this case. It has been established in the jurisprudence of this Court that execution of court orders is part of the judicial process. It requires judicial oversight. Though previous cases dealt with debtors' homes, *the principle underlying them was that judicial oversight of the execution process against all forms of property is constitutionally indispensable*."[101]

Consequently it would be incongruous to hold that the High Court has no power to order payment of damages by means of instalments, but has the power to do so when exercising oversight in relation to execution of the same order.

[87] For all these reasons, I conclude that in its present form the common law does not prohibit periodic payments of delictual damages. In fact, the High Court has an inherent power to determine whether such damages may be paid in instalments or as a lump sum. Ordinarily a lump sum payment applies unless specific facts warranting a departure from this rule are placed before a High Court for the exercise of the inherent power to order payment by instalments. Here the Gauteng MEC failed to lead evidence supporting the periodic payment of the damages in respect of future medical expenses.

[88] Therefore, there is no need to develop the common law. A development of the common law is necessary where there is a deficiency or a particular rule is inconsistent with the Constitution.[102] The purpose of the development must be to bring the common law in line with our supreme law. Absent this inconsistency, the need to develop the common law does not arise.

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[101] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services*; *Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic*; *Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* [2016] ZACC 32; 2016 (6) SA 596 (CC); 2016 (12) BCLR 1535 (CC) at para 129.

[102] *S v Thebus* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 28; *Carmichele* above n 34 at paras 39-40.

[89] But even if there was a common law rule that precluded payment of damages in instalments, this would not have meant that the granting of such order was not competent. This is because the authority of our courts to adjudicate disputes and issue orders does not derive from the common law but from the Constitution.[103] Furthermore, the Constitution empowers courts, when deciding a constitutional matter within their competence, to grant a just and equitable remedy.[104] This Court has already held that the exercise of the remedial power conferred by section 172(1)(b) does not depend on a declaration of invalidity.[105] It will be recalled that the damages we are concerned with here are for bodily injuries and that their purpose is to vindicate rights guaranteed by section 12 of the Constitution.[106]

[90] Therefore an approach that says a High Court may not order periodic payment of damages awarded by it misses the point. That approach conflates the High Court's competence, which derives from the Constitution, with what may not be permissible under the common law. It must be remembered, however, that the common law also draws its legal force from the same Constitution. It would be wrong to hold that the common law precludes the High Court from exercising its constitutional power. This illustrates that, even if there were a common law rule that prohibited periodic payment of damages, it would not have the effect of denying the High Court the authority to

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[103] Section 165(1) of the Constitution provides:

> "The judicial authority of the Republic is vested in the courts."

[104] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its powers, a court—
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
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> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[105] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 97.

[106] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at paras 60-1.

make such an order. To conclude otherwise would be tantamount to placing the common law above the Constitution.

[91] Indeed the first judgment cites two cases in which our courts have in the past ordered periodic payments of damages.[107] Both of them precede the Constitution. In both cases the courts did not view themselves as lacking the power to order periodic payments. Nor did they hold the opinion that the common law prohibited the making of such an order. The fact that these two decisions were not followed in subsequent cases does not, by itself alone, mean that our courts do not have jurisdiction to order periodic payments.

[92] That in both *Roxa*[108] and *AD*[109] the parties had consented to the order does not change anything. In our law parties cannot by agreement confer on a court jurisdiction or competence it does not have. The question whether a court has jurisdiction is a question of law. In other words, courts derive their jurisdiction or authority from the Constitution or, where appropriate, from legislation. Once that authority is conferred, it cannot be taken away by the operation of the common law.

[93] The Supreme Court of Appeal decision in *Kiewitz* erred when it concluded that periodic payment of damages is not permitted under the common law. The decision in that matter was based on the judgment of the Supreme Court of Appeal in the present case. In *Kiewitz* the Court held:

> "This court recently had occasion to deal with the proposed abolition of the 'once and for all' rule under the guise of developing the common law in *MEC for Health and Social Development, Gauteng Provincial Government v* [*DZ*]. In that matter an order was sought that future medical costs be paid as and when they arose, rather than as a lump sum award. It was argued that large lump sum payments have the effect of

[107] See [25].

[108] *Roxa* above n 26.

[109] *AD* above n 2.

> depriving others of much needed medical care thereby placing in jeopardy the constitutional right of access to health care services.
>
> The court rejected the notion that the abolition of the rule would promote the constitutional right of all individuals to health care as provided for in s 27 of the Constitution. The court went on to state that this was an issue more appropriately dealt with by legislative intervention"[110]

[94] The Gauteng MEC did not propose the abolition of the "once and for all" rule in this case, as the Supreme Court of Appeal held. On the contrary, she asked for the development of the common law only in the event that it did not permit payment for "future medical costs as and when they arose". She did not even identify the rule that required development. Instead it was that Court itself which mistakenly held that the "once and for all" rule prohibited the order sought by the Gauteng MEC and that the common law "would have to be developed by the abolition of the 'once and for all' rule and not its modification, where damages are claimed in respect of future medical expenses".[111] No reasons were advanced for why the rule had to be abolished instead of modifying it. It will be recalled that the request was limited to a method of payment of the agreed amount for future medical expenses.

[95] Furthermore, the facts do not support that Court's conclusion that to require submission of a quotation, and "not a statement or invoice", would suggest that the Gauteng MEC had "a discretion not only whether to approve the particular medical services, but also whether to make payment".[112] The facts were that the precondition for payment would be the submission of the quotation to the accounting officer and not the MEC. The mere submission of the quotation would trigger payment within 30 days. The accounting officer would have no discretion to approve the services. Nor would the accounting officer have any discretion to approve payment. Once the condition set out in the order was met, the accounting officer would be obliged to pay.

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[110] *Kiewitz* above n 19 at paras 9-10.

[111] SCA judgment above n 21 at para 9.

[112] Id at para 8.

Medical services in lieu of money

[96] In argument before us, the Gauteng MEC contended that the tender of medical services by her must replace payment of the monetary award in respect of future medical expenses. For a number of reasons we should decline to decide this issue. First, the issue was not pleaded and consequently was not determined by the trial court. Second, the Supreme Court of Appeal refused to entertain it on the ground that the point was not pleaded and did not form part of the case.[113] Third, the MEC herself had agreed to pay the sum of R19 970 631 in respect of future medical expenses. No reason was advanced for exempting the Gauteng MEC from her obligations under an agreement she voluntarily concluded.

[97] Although the point reveals interesting legal issues, we must resist the temptation of expressing an opinion on it one way or the other. This is more so in light of *Ngubane* which implicitly recognised the tender of medical services in lieu of payment of money in an appropriate case.[114] It appears that both here and in *Kiewitz*, this decision was not brought to the attention of the Supreme Court of Appeal.

[98] It is for these reasons that I support the order proposed in the first judgment.

[113] Id at para 14.

[114] *Ngubane* above n 10.

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