THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 383/23

In the matter between:

T N OBO B N	**APPELLANT**
and	
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH OF THE EASTERN CAPE GOVERNMENT	**RESPONDENT**
THE SOUTH AFRICAN MEDICAL MALPRACTICE LAWYERS ASSOCIATION	***AMICUS CURIAE***
THE MINISTER OF HEALTH	**FIRST *AMICUS CURIAE***
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH AND WELLNESS, WESTERN CAPE GOVERNMENT	**SECOND *AMICUS CURIAE***
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, FREE STATE GOVERNMENT	**THIRD *AMICUS CURIAE***
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG GOVERNMENT	**FOURTH *AMICUS CURIAE***
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, KWAZULU-NATAL GOVERNMENT	**FIFTH *AMICUS CURIAE***
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, LIMPOPO GOVERNMENT	**SIXTH *AMICUS CURIAE***
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, MPUMALANGA GOVERNMENT	**SEVENTH *AMICUS CURIAE***

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTHWEST GOVERNMENT **EIGHTH *AMICUS CURIAE***

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTHERN CAPE GOVERNMENT **NINTH *AMICUS CURIAE***

Neutral citation: *T N obo B N v The Member of the Executive Council for Health of the Eastern Cape Government and Others* (Case no: 383/23) [2026] ZASCA 14 (11 February 2026)

Coram: MAKGOKA, SCHIPPERS and WEINER JJA and DOLAMO and NAIDOO AJJA

Heard: 9 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 11 February 2026.

Summary: Delict – measure of damages – child sustaining quadriplegic cerebral palsy as a result of hospital staff's negligence – common law once-and-for-all rule – all damages must be claimed in a single action and expressed as a lump sum – whether development of the rule in terms of s 39(2) and s 173 of the Constitution appropriate – trial court developing common law to provide for so-called public healthcare and undertaking to pay remedies – order that respondent provide medical services and supplies at State hospitals in lieu of lump sum payment of future medical expenses set aside – fundamental principles of law of damages should be changed by the legislature.

ORDER

On appeal from: Eastern Cape Division of the High Court, Bhisho (Griffiths J, sitting as court of first instance):

1 The appeal succeeds with costs, including the costs of two counsel.

2 The High Court's order is set aside and replaced with the following:

'1. The plaintiff is entitled to payment of the agreed costs of future hospital, medical and related care and supplies, set out in items 1 to 15 of Annexure 'A' to the minute of the pre-trial conference held on 10 November 2021, as adjusted on the basis of consensus subsequently reached, including interest thereon as agreed and recorded in the said minute.

2. The caregiving requirements of the child and the costs thereof comprise the following:

2.1 He shall be entitled to attend the Canaan Care Centre, East London (the Centre), daily from Mondays to Fridays, except on public holidays and school holidays (when the Centre cannot accommodate him) for as long as the Centre can accommodate him until the age of 16 years.

2.2 During the remaining hours and days when the child is not accommodated in the Centre, he shall be entitled to permanent and full-time care (24 hours per day) by trained caregivers for the remainder of his agreed lifetime ("the caregiving hours").

2.3 The costs of accommodation at the Centre amounted to R2 000 per month in November 2021. The costs of caregiving from November 2021 shall be determined at the base rate of

R450 per hour (the applicable rate in November 2021) on an annual basis, which costs shall be actuarially calculated and computed.

2.4 Every four years, the plaintiff shall be entitled to purchase a new Madiba 2 Go wheelchair at a cost of R19 000 (2020 values). The plaintiff shall also be entitled to acquire a Madiba Lightweight Transporter at a cost of R15 000 (2020 values). These costs shall be actuarially calculated and computed.

2.5 The child will be entitled to receive physiotherapy (for the treatment of neurological, respiratory and other purposes) for the remainder of his agreed lifetime, as follows: from 12-17 years of age, 40 hours hourly sessions per annum and thereafter 30 hourly sessions per annum, costed at the rate of R750 per hour (2020 values), as well as four annual home visits by a physiotherapist, each to be costed as a half-day fee at the rate of R350 per hour. These costs shall be actuarially calculated and computed.

2.6 The child is entitled to receive 12 hourly sessions of occupational therapy (including fitting and checking of equipment) per annum for the remainder of his agreed lifetime, calculated at the rate of R750 per hour (2020 values), the costs of which shall be actuarially calculated and computed.

2.7 The plaintiff shall be entitled to employ the services of a case manager for the remainder of the child's life, to render case management services as follows:

2.7.1 First year – 50 hours to review living arrangements, source equipment and therapies, and attend

appointments with other role-players such as trustees, architects and builders;

2.7.2 First year – one home visit per month (ie 12 visits) and thereafter one home visit per annum for life;

2.7.3 After the first year, 24 hours per year for case management for the following three years;

2.7.4 From the fifth year onwards, 12 hours of case management per annum until the child is 21 years old and thereafter six hours per annum for the remainder of his life, at a cost of R750 per hour and R1 200 per home visit respectively, which costs shall be actuarially calculated and computed.

2.8 The plaintiff is entitled to the costs of the creation and administration of a trust in favour of the child, to protect the award, which costs shall be actuarially determined by downward adjustment of a figure equivalent to 8.5% of the sum awarded, in accordance with the child's limited life expectancy as agreed between the parties.'

3. The defendant shall pay the plaintiff's costs of suit in the High Court, including, but not limited to, the costs consequent upon the employment of two counsel, and the qualifying and/or preparation and/or reservation fees of the plaintiff's expert witnesses who testified and/or produced expert reports.

4. The matter is remitted to the High Court to:

4.1 determine the quantum of the plaintiff's claim in respect of the issues dealt with in sub-paragraphs 2.1 to 2.8 supra in accordance with this order, but subject to consideration of the fact that the judgment and order of the court have remained in

operation, and by taking account of the extent to which effect has been given thereto;

4.2 make an order in respect of the creation of a trust for the sole benefit of the child, on such terms and conditions as it considers appropriate, which shall include the costs of administration of the trust;

4.3 make an order as to the costs of the issues remitted to the court in accordance with this order.

JUDGMENT

Schippers JA (Makgoka and Weiner JJA and Dolamo and Naidoo AJJA concurring)

Introduction

[1] In *Custom Credit Corporation*[1] the Appellate Division affirmed the common law once-and-for-all rule (the rule), as follows:

'The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. This is the *ratio* underlying the rule that, if a cause of action has previously been finally litigated between parties, then a subsequent attempt by the one to proceed against the other on the same cause for the same relief can be met by an *exceptio rei judicatae vel litis finitae*. The reason for this rule is given by *Voet*, 44.2.1, (*Gane's* translation, vol 6, p. 553) as being

"to prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different judicial proceedings".'

[2] The rule has two components: the first is that all damages, present and future, must be claimed in a single action; and the second, that damages are

[1] *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) (*Custom Credit Corporation*) at 472A-B.

claimed as a lump sum.[2] The Court in *Custom Credit Corporation* went on to say that the rule 'is part of the very foundation of our law'.[3] The judiciary is bound to apply the rules of common law found in the precedents, unless the common law requires development to align it with the spirit, purport and objects of the Bill of Rights in terms of s 39(2) of the Constitution; or it is in the interests of justice to do so, as envisaged in s 173.

[3] In this case, the Eastern Cape Division of the High Court, Bhisho (the High Court), developed the common law by abolishing the rule. In a claim for damages for personal injury, the court (Griffiths J) issued an order in terms of which it recognised the so-called public healthcare and undertaking to pay remedies (the remedies) in a claim arising from harm negligently caused by a public healthcare practitioner, provider or institution. The court held that 'the once-and-for-all rule and the rule that damages must sound in money, are neither the exclusive nor the primary rules for the determination of a just and equitable remedy in terms of sections 38 and 172(1)*(b)* of the Constitution'.

[4] The issue on this appeal is whether the development of the rule is appropriate. The appeal is with the leave of the High Court.

[5] At the outset, it is necessary to address the delay in finalising this appeal. The matter was assigned to a colleague and, due to unforeseen circumstances, could not be finalised within the required timeframe. This Court acknowledges that the delay in handing down the judgment is inconsistent with the constitutional imperative that a child's best interests are of paramount importance.[4] The delay should not have occurred, and steps have been taken to

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[2] *MEC for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC) (*DZ*) para 16.
[3] *Custom Credit Corporation* at 472B.
[4] Section 28(2) of the Constitution.

ensure that matters concerning children are prioritised and managed expeditiously in the future.

The applications to be admitted as amici curiae

[6] At the inception of the hearing in this Court, the national Minister of Health (the Minister) on behalf of the national Department of Health; the Member of the Executive Council (MEC) for Health of the Western Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, North-West and Northern Cape Provinces, applied to be admitted as *amici curiae* in the appeal.

[7] The Minister's application was based on systemic and fiscal grounds, namely the explosive growth of medico-legal contingent liabilities in all provinces and their impact on national service delivery. The Minister supported the High Court's approach and sought to place before this Court, budgetary data, evidence on the capacity of the national health system, and treasury coordination mechanisms. In short, the Minister applied to be admitted as an *amicus curia* to protect the fiscus and the sustainability of the public health system; and to support the remedies.

[8] The provincial MECs for Health sought admission as *amici curiae* to place before the Court budgetary data, historical legal expenditure and operational constraints. Their concern was that if the High Court's order stood without clarification, provinces could be exposed to unmanageable dual obligations: the payment of damages and the separate funding of lifelong public care, without uniform national rules. They were concerned that the public healthcare and undertaking to pay remedies must be applied nationally and uniformly. Their application was said to be aimed at avoiding fiscal chaos, ensuring uniformity across provinces, and protecting provincial healthcare budgets from total collapse under escalating litigation.

[9] The applications for admission by the Minister and the MECs as *amici curiae* were opposed on behalf of the plaintiff. Her counsel submitted that those applications should have been made one month after the record had been filed in August 2023; that this was litigation by ambush; that the *amici* were seeking to admit evidence not included in the record; that no case was made out in the affidavits for the admission of evidence; and that the plaintiff would be prejudiced.

[10] In the result, the parties concluded a settlement agreement in terms of which the late filing of the applications by the *amici* was condoned, and the Minister and the MECs were granted leave to intervene as *amici curiae* in the appeal. The *amici* were granted leave to make submissions, which were confined to the record of the evidence before the High Court; the development of the common law; and the standard of care applicable to the public healthcare remedy. The application to admit evidence on appeal was not proceeded with and no costs order was made.

Factual background

[11] On 22 December 2011 the appellant, Ms N (the plaintiff), gave birth to her son, B N (the child), at Cecilia Makiwane Hospital (CMH), a provincial hospital in East London. The staff of the Eastern Cape Department of Health (the Department) were negligent in the management of the plaintiff's labour and the birth of the child. Consequently, the child sustained spastic quadriplegic cerebral palsy, which rendered him severely disabled and reduced his life expectancy. He is unable to stand, walk, or sit, and is incontinent. He is totally dependent on a caregiver for positioning, mobility and all activities for daily living, including undressing, bathing, dressing, toileting, eating and drinking. He is virtually blind, but capable of hearing. He will require extensive medical care and treatment for the rest of his life. His life expectancy is estimated to be 22.8 years. As is typical

in cases of this kind, the claim for the cost of care is by far the largest head of damage.

[12] In 2017 the plaintiff sued the respondent, the Member of the Executive Council for Health, Eastern Cape (the MEC or 'the defendant'), in the High Court for damages in the sum of R23 million arising from the negligence of the hospital staff. She claimed the following amounts as damages: special and general damages in her personal capacity (R1 million); general damages (R5 million); future hospital care, medical and related expenses for the child (R7 million); and loss of earning capacity (R10 million).

[13] The MEC conceded that the hospital staff were negligent. Accordingly, the High Court made an order in terms of which the MEC was held liable for all damages as the plaintiff may prove, arising from that negligence.

[14] The parties agreed on the amounts payable by the MEC for general damages, future loss of earning capacity and the costs of an adapted motor vehicle. In addition to the general damages, the High Court ordered the MEC to pay the plaintiff an amount of R1.1 million in a lump sum for the adaptation of the child's accommodation, which was paid. The parties also agreed on most of the items comprising the claim for future hospital, medical and related expenses.

[15] The South African Medical Malpractice Lawyers Association (SAMMLA), which represents lawyers who act for vulnerable victims of medical negligence by the State (mainly on a contingency basis), was admitted as an *amicus curia*, because the appeal directly affects the core structure of medico-legal damages in South Africa. SAMMLA sought to defend the rule and to oppose any move toward in-kind State care, which it said, is unsustainable on the evidence. SAMMLA was concerned that the High Court's development of the common law would shift the financial risks relating to care away from the

wrongdoer (the State), on to poor and injured claimants and their families. It sought to assist the Court on three issues, namely the standard of care for future medical treatment; whether the public healthcare system could realistically meet this standard; and whether a public healthcare remedy could replace the primacy of a monetary award.

The plea

[16] The relevant allegations in the amended plea can be summarised as follows:

(a) The MEC denies that the plaintiff or the child will suffer damages, because future medical care and supplies are available in the public healthcare sector. Alternatively, the MEC tenders to provide the medical services and supplies to the child at CMH or another appropriate public institution. Further alternatively, and in the event that future medical care is not available in the public healthcare sector, the MEC tenders to (i) procure those medical services or supplies required in the private healthcare sector; or (ii) reimburse the plaintiff or a trust established for the benefit of the child, for expenses reasonably incurred in the private healthcare sector in respect of future medical care.

(b) To the extent that the allegations in (a) and (b) are inconsistent with the rule that a delictual claim must sound in money, and its corollary that payment must be made in a lump sum, the MEC pleads that the common law must be developed in terms of s 39(2); alternatively, s 173 of the Constitution.

(c) The basic reasons for the development of the common law are these. Everyone living in the Eastern Cape Province (the Province) has a right of access to healthcare in terms of s 27(1) of the Constitution; and the MEC has the corresponding obligation in terms of s 27(2) to progressively give effect to that right. Children living in the Province have the right to basic healthcare services, in terms of s 28(1)(c) of the Constitution; and the

interests of children are of paramount importance as stated in s 28(2). The MEC is obliged under s 7(2) of the Constitution to respect, protect and fulfil the right of access of all children in the Province to basic healthcare services. The payment of damages in a lump sum to the plaintiff and in similar finalised and pending claims in the Province (and other provinces) has had, and will continue to have, adverse impacts on the MEC, the Department and its budget. It has impeded the MEC's fulfilment of her constitutional obligations under s 7(2) and s 27 of the Constitution. It will prejudice the best interests of children living in the Province. The payment of damages in a lump sum is in conflict with the principles and obligations governing public administration in s 195 of the Constitution; the provisions of the Public Finance Management Act 1 of 1999; and the right to equality in s 9(1) of the Constitution, of persons dependent on the healthcare system.

(d) The development of the common law promotes the spirit, purport and objects of the Bill of Rights, and is in the interests of justice, for the following reasons. South Africa is a developmental state that has limited resources and multiple demands on its budget. The obligations under ss 26(2), 27(2) and 29(1)*(b)* of the Constitution require the optimal, reasonable and prudent allocation of funds at all levels of government. The expenditure of scarce public funding on damages awards is neither optimal nor reasonable. The public healthcare sector can provide future medical care to the child and those similarly situated at substantially lower costs than the private sector. The rule requiring damages to be paid in money, unreasonably and unconstitutionally prevents the State from providing future medical care in the public healthcare sector; and obliges the State to allocate scarce public funds to future medical care.

(e) To the extent that the proposed development constitutes a limitation of any right, it is justified under s 36 of the Constitution.

[17] The trial in the High Court ran for seven weeks. The plaintiff adduced the evidence of three expert witnesses, namely a physiotherapist, an occupational therapist and an architect. Thereafter, the defendant presented evidence by, amongst others, Dr Rolene Wagner, the Head of the Department; Dr Gillian Saloojee, a cerebral palsy expert; Mr Godfrey Howes of the Eastern Cape Provincial Treasury; Mr Andrew Donaldson, an economist; Mr Sean Frachet, of the Department's Integrated Budget Planning Unit; and Ms Kabi Krige, an occupational therapist.

[18] After the MEC had closed her case, the plaintiff called the following witnesses in rebuttal of the MEC's case: Prof Alexander Van den Heever, an economist; Ms Busisiwe Moni-Tsawu, a physiotherapist; the plaintiff; and Ms Thabisa Caga, an occupational therapist.

The evidence in outline

[19] The evidence of Mr Donaldson, who has held senior positions in the National Treasury and the Department of Finance, in short, is this. State resources are limited and must be used efficiently and effectively. The costs of claims against an organ of state are made from the baseline of expenditure allocations by the national and provincial treasuries. The contingent liability for medical negligence claims in the Province increased from R3.5 billion in 2013/2014 to R38.8 billion by 31 March 2020, which constitutes more than 40% of the 2018/2019 public health spending nationally. Claims are increasing faster than available resources: between 2018 and 2019, they increased by 24%, whilst resources to provincial health departments increased by 7-8% per year. The increase in claims and their payment as a lump sum threatens the State's capacity to provide and improve health services. The actual payments made in respect of court cases amounted to 3-4% of the Department's budget and are a drain on its resources, which could be used for other purposes.

[20] Mr Frachet testified that the Department had settled claims totalling R 3.462 billion between 1 April 2014 and 31 March 2021. These funds are not budgeted for, and the Department had to utilise budgeted funds under its various programmes to comply with court orders and settlements, which results in such payments being categorised as 'unauthorised expenditure'. This affects the delivery of healthcare services, as reduced funds are available. The contingent liability for medical negligence claims as of 31 March 2021 was some R 38.8 billion, which was more than the annual appropriation to the Department. If it is required to pay such claims upfront, it would not be able to meet its health service delivery obligations.

[21] Dr Wagner, the HOD and its accounting officer, testified that lump sum payments impacted negatively on the Department's operating budget, resulting in funds being taken away from other services. In her view, the Department's liquidity problems threatened the liquidity of the Provincial Government.

[22] Mr Howes gave evidence about his investigation into allegations of misconduct by attorneys regarding medico-legal claims, particularly claims for children who sustained cerebral palsy. The investigation revealed that court-ordered trusts to administer damages awards were not established; payments of awards were not made from attorneys' trust accounts to the trusts; and attorneys made irregular and excessive draws from trusts and recovered excessive costs and fees. In one case, the Department paid a total amount of R480 million to a single firm between 2015 and 2021. Of this amount, only R115 million was paid to beneficiary trusts and some R163 million (approximately 74% of monies paid by the Department) is unaccounted for. In addition, there was a shortfall of some R74.6 million in the attorney's trust account.

[23] Prof Van den Heever, an expert on health, economics and public finance, testified that compensating victims of medical negligence, other than through

lump sum payments, would result in an unjustified transfer of risk and a departure from the principle of social solidarity that underpins private and public healthcare systems. He expressed strong doubts that the Department has the capacity to provide the healthcare that the child needs at a standard equivalent to that in the private sector.

[24] Prof Van den Heever relied on three indicators: maternity mortality ratio (MMR); findings of the Office of Health Standards Compliance (OHSC); and reports by the Auditor-General of South Africa (AGSA). South Africa's MMR was 138 in 2015. This, Prof Van den Heever said, is more than double the ratio in various developing countries with much lower per capita gross domestic products (GDPs) than South Africa, including Argentina, Brazil, Colombia, El Salvador and Ecuador. He said that the Province has the second-lowest OHSC score for public hospitals, which indicates poor managerial capability. He stated that AGSA's findings of 'clean audit results' are broadly consistent with the MMR and OHSC indicators; and concluded that the Province would not be able to implement the remedies, because of its repeated failures in financial management and compliance with legislation.

[25] Prof Van den Heever also used the indicators to determine the Department's performance in comparison to the Western Cape Department of Health (the Western Cape Department). He concluded that the Department is materially less capable than the Western Cape Department; that the performance weaknesses arising from the differences in capability are demonstrated in poor health outcomes and poor financial management; and that the Department does not have systems in place to ensure continuous improvements in performance. This shows that it is unable to carry out its constitutional obligations, in any event. The basic reason for this, according to Prof Van den Heever, is financial mismanagement, more specifically, high levels of irregular and unauthorised expenditure, which include the failure to budget for predictable liabilities such as

medico-legal claims. He emphasised that irregular and unauthorised expenditure has nothing to do with socio-economic conditions or resource constraints.

[26] The High Court concluded that the evidence disclosed that the rule is inconsistent with the Bill of Rights, essentially on two grounds. First, it impedes the Department's ability to 'carry out its obligation of realising access to health[care] for everyone in terms of section 27(2)' of the Constitution. Second, it does not 'provide fully for the complainant' because more than 40% of the damages awarded in some cases is taken up by lawyers' fees.

The High Court's judgment

[27] The following medical services and supplies were in dispute before the High Court: the child's caregiving requirements; the nature, frequency, duration and costs of occupational therapy and physiotherapy; home alteration costs; whether the child requires a transporter buggy in addition to a wheelchair; and the costs of protection and administration of the award.

[28] The central issue before the High Court was whether the common law should be developed to grant the remedies. Its judgment can be summarised as follows. The court decided the question of the burden of proof as a preliminary issue. It held that the remedies are not special defences as contemplated in *Pillay*,[5] since the MEC had admitted liability and undertook to make reparations for the negligent conduct of the staff at CMH. The court concluded that where a defendant pleads that the common law should be developed, she bears an evidentiary burden to rebut a prima facie case put up by the plaintiff. By reason of the conclusion to which I have come, it is unnecessary to decide this issue.

[5] *Pillay v Krishna and Another* 1946 AD 946 at 952-953.

[29] The High Court held that 'it is *DZ* which opened the door for the possible introduction of the constitutional defences pleaded in this case', that 'explored the scope for the development of the common law'; and which the court concluded, was 'powerful and persuasive':

(a) The majority in *DZ* had found, albeit *obiter*, that the remedies were available, but could not be considered because the evidence to support them had not been placed before that Court.

(b) The common law requirement that damages should sound in money is not beyond scrutiny, and the Constitutional Court stated that it was arguable that the right of access to healthcare services introduced factors that did not exist in the pre-constitutional era.

(c) Concerning the public healthcare remedy, compensation in a form other than money does not appear to be incompatible with the rule that the plaintiff must be placed in the position that she was, as if there had been no delict. The rule was not beyond scrutiny, and regarding the undertaking to pay remedy, there was room for development of the common law.

(d) The Court in *DZ* did not regard reform by the legislature 'as closing the door on the development of the common law'.

[30] The High Court stated that the judgment of the Johannesburg High Court in *MSM*,[6] provides 'compelling support' for the development of the common law; and that it agreed with the analysis in that case. There, the court considered a similar claim and granted the remedies, based on the evidence of the CEO of the relevant hospital, a manager of the provincial health department and medical specialists, which established that the State was able to provide future medical treatment at a standard equivalent to, or better than that of the private sector.

[6] *MSM obo KBM v MEC for Health, Gauteng Provincial Government* [2019] ZAGPJHC 504; 2020 (2) SA 567 (GJ); [2020] 2 All SA 177 (GJ) (*MSM*).

[31] The High Court held that the standard of future medical services required to be rendered by the MEC, 'was one of "reasonableness" which is in harmony with section 27(2) of the Constitution and its jurisprudence'. This standard, the High Court said, was in effect decided by Froneman J in *DZ*.

[32] The court accepted the evidence of the MEC's witnesses. It found that Mr Frachet, Mr Howes and Dr Wagner readily conceded deficiencies and maladministration in the Department over the years, and that they were sincere and truthful. The court stated that Mr Donaldson's evidence concerning the proxy indicators on which Prof Van den Heever relied, was more balanced and cautious; that the reports by the AGSA are not necessarily a good indicator of service delivery capacity; and that Dr Wagner presented cogent evidence pointing to problems with the use of proxy indicators.

[33] The court stated that Prof Van den Heever's expertise as an economist with 'immense knowledge of the economics relating to both private and public health sectors within the country', was 'beyond question'. However, it found that he did not 'tender evidence in direct rebuttal of the defendant's witnesses'; that he came to the conclusion that the Department lacks the system and leadership to competently run a health department without considering and analysing the remedies; that the child would remain within a system of social protection, and not be exposed to the risk of a lump sum payment being misappropriated by lawyers and trustees; and that his future medical needs may exceed the sum awarded.

[34] The High Court accepted the evidence of Mr Donaldson that the State would effectively pay twice for the child's damages, were he to run out of funds due to misappropriation or unanticipated medical expenses and then receive healthcare in the public sector. Whilst Mr Donaldson agreed that the remedies would not constitute a saving unless the State minimised the risk of medical

negligence and would be a departure from the principle of social solidarity, there were efforts to address the underlying causes of similar medical negligence cases, nationally. He said that the Department had been instructed by the National and Provincial Treasury not to budget for contingent liabilities, which is an incident of accountability and parliamentary oversight. This is not likely to be changed, and legislation to deal with medical negligence claims 'will only happen far in the future'.

[35] The High Court held that the rule offends the Bill of Rights 'on two obvious bases': (i) the Department's ability to carry out its obligation under s 27(2) of the Constitution to achieve the progressive realisation of the right to healthcare, is increasingly under pressure; and (ii) legal practitioners take 25% of damages awards, sometimes more, which significantly renders the rule unable 'to provide fully for the complainant'. Where large awards are made in accordance with the rule, the court held, huge deductions are made for legal services, which 'represents a further assault . . . on the constitutional rights of individual CP claimants and thus further offends the Bill of Rights and the constitutional obligation imposed on the state under section 27(2)'.

[36] The court found that the rule conflicts with the constitutional value system. In this regard, the court referred to the rights of everyone under s 27(1)*(a)*;[7] s 27(2); the rights of children under ss 28(1)*(c)* and 28(2);[8] and the right to equality under s 9(1).

[37] The court concluded that the 'limited incremental development' sought in terms of s 39(2) of the Constitution, was justified; and that on the evidence, it is also in the interests of justice that the common law be developed 'to provide

[7] Section 27(1)(a) of the Constitution provides: 'health care services, including reproductive health care'.
[8] Section 28(1)(c) of the Constitution states: 'to basic nutrition, shelter, basic health care services and social services'.
Section 28(2) reads: 'A child's best interests are of paramount importance in every matter concerning the child'.

courts which adjudicate medical negligence claims with a broader remedial framework'. The remedies, the court said, 'should be developed together as they operate in tandem', since the most expensive items inflating lump sum damages awards include the costs of caregivers, that the State is unable to provide in kind, which will reduce the efficacy of the undertaking to pay remedy. The development of the common law in the present case, according to the court, is consistent with the principle articulated in *Makate*[9] – changes to the existing law must be articulated with the same clarity as the rules and principles that they seek to replace.

[38] The High Court's order, in relevant part, reads as follows:

'PUBLIC HEALTHCARE REMEDY

2. The Defendant is directed to provide free of charge to B[…] N[…] ("BN") –

   2.1 All of the services, consultations, therapies, surgeries and other procedures itemised in annexure "A" ('the medical services'); and

   2.2 All of the supplies, supplements, medicines, devices, and other equipment itemised in annexure "B" ("the medical supplies"),

   at one of the following hospitals, in order of priority, depending on where the particular medical service or supply is available at the time that it is required:

      2.2.1 the Cecilia Makiwane Hospital, Mdantsane ("CMH"); or

      2.2.2 the Frere Hospital, East London ("Frere"); or

      2.2.3 a public hospital nominated by the public case manager (referred to in paragraph 18 below) in consultation with BN's private case manager appointed in terms of annexure "C",

      for the duration of his life, or such other duration as may be specified in any particular instance in annexures "A" and "B" to this order, provided that if the service or supply is to be made available in terms of paragraph 2.2.3, the Defendant will provide appropriate transport between CMH or Frere and the hospital nominated in terms of paragraph 2.2.3 free of charge.

[9] *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) para 160.

UNDERTAKING TO PAY REMEDY

9. The Defendant shall in respect of the medical services and the medical supplies listed in annexure "C" at the Defendant's election –

   9.1 procure the medical service or medical supply required in the private healthcare sector so as to be provided timeously whenever it is required in terms of annexure "C"; or

   9.2 reimburse the Plaintiff, or any trust established for the benefit of BN, for their expenses reasonably incurred in procuring the medical service or medical supply in the private healthcare sector, within 30 days of presentation of an invoice for these.

10. By no later than 30 June of each year, BN's private case manager and the public case manager shall jointly submit to the Chief Financial Officer of the Department of Health, Eastern Cape, a care and management plan for the following financial year setting out the medical services and supplies to be provided to BN in terms of annexure "C" during the next financial year and the estimated cost of each item.

11. Within 30 days of this order and, in subsequent years, by no later than 31 August in each year, the public case manager shall communicate to the Plaintiff, or any trust established for the benefit of BN and BN's private case manager, the defendant's election referred to in paragraph 9 above.

12. In order to access the medical services and medical supplies referred to in paragraph 9.1 and to claim reimbursement in terms of paragraph 9.2 the public case manager will act as liaison person.'

[39] The development of the common law is stated in the order as follows:

'19. The common law is developed –

   19.1 so as to accommodate the public healthcare and undertaking to pay remedies provided for in this order;

   19.2 so that the once-and-for-all rule and the rule that damages must sound in money, are neither the exclusive nor the primary rules for the determination of a just and equitable remedy in terms of sections 38 and 172(1)*(b)* of the Constitution, in a claim arising from harm negligently caused by a public healthcare practitioner, provider or institution;

   19.3 so that no claim shall lie in respect of lumpsum money damages to the extent that–

19.3.1 any of the future medical services and medical supplies required by the Plaintiff (or the injured party) as a result of the injury are provided, by order of court, at a reasonable standard at a public healthcare institution; or

19.3.2 where a court does not so order, the Defendant provides an undertaking to –

(a) procure the medical service or medical supply required in the private healthcare sector so as to be provided timeously whenever it is required; or,

(b) reimburse the Plaintiff, or any trust or other entity established for the benefit of the injured party, for their expenses reasonably incurred in procuring the medical service or medical supply in the private healthcare sector, within 30 days of presentation of an invoice for it.'

The submissions

[40] The plaintiff submits that the High Court's decision should be reversed for the following reasons:

(a) The defendant failed to advance proper grounds for the development of the common law. On the contrary, the development of the common law by the High Court threatens several fundamental rights of both the plaintiff and the child.

(b) The defendant did not adduce sufficient evidence to satisfy the burden of proof regarding the need to develop the common law and the appropriateness of the remedies.

(c) The High Court incorrectly framed the standard of care to succeed with the public healthcare defence, as one of reasonableness. The defendant was required to show that the medical services to be provided by the State at no or a lesser cost, are of the same or an acceptably high standard, as the services claimed by the plaintiff.

(d) The High Court's development of the common law is not incremental, and the reform of the law of damages should be done by the legislature. The order will render the law relating to medico-legal claims uncertain and unpredictable, and will result in piecemeal litigation, because the court failed to circumscribe the development of the rule.

[41] The defendant argues that the plaintiff has not shown that the trial court has erred in any of its factual findings. Neither has she identified any basis for interfering with the trial court's exercise of a true discretion, both in determining a just and equitable remedy for the delict in question, or in applying s 173 of the Constitution in doing so.

[42] The defendant submits that a plea for the development of the common law is not a special defence and does not impose an onus on her. While the defendant is required to provide a factual matrix to substantiate the plea for the development of the common law, such development is primarily an issue of law and not fact; and the remedies do not constitute special defences. It is further submitted that to the extent that a plaintiff who seeks a monetary award establishes a prima facie case, an evidentiary burden shifts to the defendant to satisfy the court that the remedies are just and equitable in a particular case.

[43] The defendant also submits that the standard of care applicable to the public healthcare remedy is reasonableness, which is established on the evidence. In this case, so it is submitted, the record demonstrates that the evidence supports the development of the common law and the application of the remedies.

[44] SAMMLA's submissions, in sum, are these:

(a) A lump sum damages award in monetary terms must remain the default position, unless the State has shown a compelling reason to depart from it.
(b) An application for the remedies requires more than an argument of inadequate State resources. Those resources can be better spent by delivering public healthcare services to society at large.
(c) The standard for the public health care remedy is not reasonableness, but an acceptably high standard that is not inferior to services in the private healthcare sector in terms of quality, expertise, skill and availability.

(d) The High Court's order fails to provide just and equitable relief: it does not provide effective relief to the plaintiff; it is not sufficiently specific to minimise risks in future State conduct; and it does not have any built-in mechanisms to resolve any difficulties with its implementation.

The development of the common law is inappropriate

[45] The starting point is *Mighty Solutions*,[10] in which the Constitutional Court said this:

'Before a court proceeds to develop the common law, it must *(a)* determine exactly what the common-law position is; *(b)* then consider the underlying reasons for it; and *(c)* enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must *(d)* consider precisely how the common law could be amended; and *(e)* take into account the wider consequences of the proposed change on that area of law.'[11]

[46] The High Court's development of the common law – based on an *obiter dictum* in DZ – is superficially attractive, but in my judgment, unsound. The court neither considered the underlying reasons for the rule, nor the wider consequences of its radical development of the law of damages and the creation of new kinds of remedies. So drastic a reform, in my view, should not be made by judges.

[47] Fundamentally, the court disregarded the caution sounded in *Carmichele*[12] – reiterated in *Mighty Solutions*:

'. . . "[j]udges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary". The principle of separation of powers should thus be respected.'[13]

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[10] *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) (*Mighty Solutions*) para 38.
[11] Ibid para 39.
[12] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); 2002 (1) SACR 79 (CC) para 36.
[13] *Mighty Solutions* fn 10 para 39.

[48] As is evidenced by its judgment, the High Court did not consider the underlying reasons for the rule. In *Evins*,[14] Corbett JA stated that the object of the rule is finality of litigation:

'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.'

[49] The purpose of the rule, Corbett JA went on to say, is 'to prevent a multiplicity of actions based on a single cause of action and to ensure that there is an end to litigation'. The rule is not immune from criticism, and lump sum compensation cannot be perfect compensation for the future. Despite this, a court is required, with the assistance of an actuary and other experts, to determine the amount of compensation not only for past, but also future loss. And the amount it determines is awarded once and for all:

'. . . no matter whether or not the envisaged basis for calculating the future loss or damage subsequently eventuates, the contemplated contingencies materialize, or any unforeseen events overtake the claimant, for example, his death earlier than expected.'[15]

[50] Since it is unreasonable, indeed impossible, to predict with accuracy the nature and extent of losses that may arise in the future, damages awarded will sometimes exceed actual future medical expenses; and at other times be less than those expenses. In other words, the rule frequently results in over- or under-compensation, particularly where the claimant survives beyond the life expectancy estimated at the time of trial; or alternatively, dies earlier. But this is not new.[16] In retaining the rule as part of the common law, the courts have confronted the difficulties and reasoned that the benefits of the rule outweigh its shortcomings. In essence, the rationale for the rule is closure for the parties and judicial efficiency. The principle is that 'immediate certainty and finality are to

[14] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835H.
[15] *Marine & Trade Insurance Co Ltd v Katz NO* 1979 (4) SA 961 (A) (*Katz*) at 970F-G.
[16] Ibid.

be preferred above deferred precision'.[17] And damages are awarded in a lump sum 'to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions'.[18]

[51] The rule thus ensures finality and protects parties against multiple, piecemeal actions for damages, thereby ensuring fairness to both parties. Defendants are not subject to potentially endless, intermittent and indeterminate claims, which are difficult to plan for. And plaintiffs are not required to bring claims every time they wish to obtain part of the relief, which a court has already granted them. Yet that is precisely the effect of the High Court's order. This also shows that the court failed to consider the wider consequences of its development of the common law.

[52] The public healthcare remedy is a case in point. The defendant was ordered to provide the child, for the duration of his life, with all services, consultations, therapies, surgeries, supplies, supplements, medicines, devices and equipment at the following hospitals in the following order of priority: CMH, FH or a public hospital nominated by the public case manager in consultation with the child's private case manager (in which case the defendant must provide transport). These medical services and supplies are required to be of a reasonable standard. If the plaintiff fails to arrive with the child at a scheduled appointment for a medical service or fails to collect a medical supply, the defendant will be deemed to have complied with her obligations under the order.

[53] Arising from this remedy, there will certainly be disputes that a court will have to resolve on each occasion that a service, treatment, medication, device or equipment becomes unavailable – for whatever reason – and a dispute arises. The court will be called upon to decide: (i) whether the injury being treated or the

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[17] *Reyneke NO v Mutual & Federal Insurance Co Ltd* 1992 (2) SA 417 (T) at 420F.
[18] *DZ* fn 2 para 16.

medical supply sought is a consequence of the harm initially suffered by the child; (ii) whether the medical service or supply is of a reasonable standard; (iii) whether the defendant in fact failed to deliver the required service, medication or equipment; (iv) and whether that failure was wilful or negligent.

[54] The same applies to the undertaking to pay remedy. In terms of this remedy, the defendant was ordered, *at her election*, to procure medical services and supplies in the private healthcare sector, 'to be provided timeously whenever it is required', in relation to day-care and permanent residential facilities; caregivers; washing machines; and a private case manager and home visits by that manager. Undoubtedly, there will be disputes about whether the defendant exercised her election fairly, lawfully or reasonably; and whether medical services or supplies were required or rendered timeously.

[55] What all of this shows, is that open-ended remedies undermine finality, and repeated disputes increase legal costs. The result is continuous litigation, and an increased burden on the parties and the court system.[19] And courts could become long-term administrators of public healthcare, rather than adjudicators.

[56] The rule is designed precisely to prevent these issues from ever arising. It does so at the cost of perfect accuracy in calculating damages, but for important reasons related to the administration of justice. Little wonder, then, aware of future uncertainty in assessing damages, this Court stated that '[n]o better system has yet been devised for assessing general damages for future loss'.[20]

[57] The High Court neglected to consider the basic justifications for the rule, as well as the broader implications of its wholesale reform, as the discussion

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[19] *Watkins v Olafson* [1989] 2 SCR (*Watkins*) at 762d-f.
[20] *Anthony and Another v Cape Town Municipality* 1967 (4) SA 445 (A) at 451B.

above makes clear. In addition, it disregarded the factors that it was obliged to take into account in accordance with *Mighty Solutions*.

[58] I turn next to the question that the rule – a fundamental principle of the law of damages – should not be changed by a court, but only by the legislature. The High Court stated that the Court in *DZ* 'did not, however, regard this consideration as closing the door on the development of the common law'. It noted that a draft bill had been presented to Parliament for the amendment of the State Liability Act[21] to permit periodic payments and orders to provide treatment to an injured party in the public health sector. The court followed the approach in *MSM*,[22] namely that a litigant does not have to wait for Parliament to adopt the amendment, since the rule is judge-made and it was appropriate for a court to develop it.

[59] But that is a misconception of the principle of separation of powers and the role of the judiciary. To begin with, in the case of *DZ* itself, Froneman J repeated the warning that the major engine for law reform is the legislature.[23] The High Court embarked on a radical departure from an established principle in which controversial issues on resources and social policy were at stake. Such policy considerations are matters for Parliament, not the judiciary.

[60] In this regard, the decision of the Supreme Court of Canada in *Watkins*,[24] referred to in *DZ*,[25] is instructive. There, the appellant, who was rendered a quadriplegic in a motor vehicle accident, was awarded a lump sum payment, which included damages for loss of earning capacity in the future and damages for future care. The Court of Appeal set aside the lump sum award for future care

[21] State Liability Act 20 of 1956.
[22] *MSM* fn 6 para 188.
[23] *DZ* fn 2 para 34.
[24] *Watkins* fn 19.
[25] *DZ* fn 2 para 48.

and ordered in its stead that the provincial government pay the plaintiff a monthly payment adjusted annually for inflation, subject to deductions for ongoing care which the plaintiff might receive from the provincial government. One of the issues was whether the Court of Appeal erred in substituting periodic payments for a lump sum award.

[61] On this issue, the Supreme Court of Canada set aside the Appeal Court's order and restored the judgment of the trial court. It held that in the absence of enabling legislation or the consent of all parties, a court should not order that a plaintiff forego his traditional right to a lump sum award for future care – a principle long established at common law – for a series of periodic payments. The Supreme Court further held that the courts are ill-equipped to consider fully the complexities associated with introducing the concept of periodic payments.

[62] In declining the invitation to change the rule, McLachlin J said:

'Over time, the law in any given area may change; but the process of change is a slow an incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.

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 the 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 more 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 the 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 is the legislature,*

as the elected branch of government, which should assume the major responsibility for law reform.'[26]

[63] That is the case here. The High Court, in a single case, abolished the rule in complete disregard of the impact of its order on other fundamental rights, and without considering the social and economic effects of the order on cases of this kind nationally. It did so with no assurance of the continuity of treatment or payments by the Province under the order, apart from the say-so of the defendant's witnesses. I revert to this aspect below. Contrary to the court's conclusion, this was no 'limited incremental development' of the common law. Rather, it is a radical restructuring of the law of damages.

[64] As to the impact on fundamental rights, the order implicates the right to equality in s 9(1) of the Constitution. It results in differentiation between the claims of children who are rendered quadriplegics at birth in a private hospital, because of medical negligence, and those who suffer such injury in a public hospital. The former are entitled to claim damages in a lump sum, while the latter not, simply because they sustained the injury in a public hospital. There is further differentiation between the wrongdoers: those in a private hospital would have to pay damages in a lump sum, whilst no claim for lump sum money damages may be made 'in a claim arising from harm negligently caused by a public healthcare practitioner, provider or institution'.

[65] The consequences of the latter order by the High Court – which it failed to consider – are devastating. This is because the real reason for the high incidence of children born with cerebral palsy in public hospitals in the Province, is negligence by the staff at those hospitals – the same hospitals, ie CMH and FH, which have been ordered to provide the public healthcare remedy. Indeed, Dr Wagner conceded that there is no comparison between the public and private

[26] *Watkins* fn 19 at 760d-761a. Emphasis added.

healthcare sectors regarding the occurrence of cerebral palsy cases. And the Province has the highest number of medico-legal cases involving cerebral palsy in the country, arising from the negligence of hospital staff. Is the answer to the ongoing negligence caused by public health practitioners and providers at CMH and FH, that the common law should be developed? I think not. And this, when the evidence discloses that the remedies will not result in the saving of public funds, unless the State reduces the risk of medical negligence.

[66] The order thus meets the threshold test for inequality.[27] For present purposes, it is unnecessary to decide whether the differentiation is rationally connected to a legitimate government purpose – the alleged obligation to achieve progressive realisation of the right to healthcare envisaged in s 27(2) of the Constitution – or whether it amounts to unfair discrimination.[28] Prima facie, the differentiation between different classes of children and medical practitioners, based purely on whether the injury occurs in a private or public healthcare facility, is objectively irrational. It is therefore hard to see how the High Court concluded that the rule conflicts with the Constitution's value system, or the right to equality.

[67] The High Court's order also implicates the right to dignity enshrined in s 10 of the Constitution.[29] The plaintiff has been deprived of the personal freedom to choose how, when and where the child should obtain future medical care. This decision, intrinsic to dignity and quality of life, is left to the vagaries of the State, which both caused the harm and controls the child's medical care, at its discretion. This, in a case where future political and budgetary changes matter. Further, the plaintiff testified that she experienced trauma every time she attended CMH; and

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[27] I Currie and J de Waal *The Bill of Rights Handbook* 6 ed (2013) at 216.

[28] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 105; *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 para 53; *Rafoneke and Another v Minister of Justice and Correctional Services and Others* [2022] ZACC 29; 2022 (6) SA 27 (CC); 2022 (12) BCLR 1489 (CC) para 70.

[29] Section 10 of the Constitution provides: 'Everyone has inherent dignity and the right to have their dignity respected and protected'.

that she was reluctant to take the child to CMH, which caused the injury in the first place, or to FH.

[68] What this shows, is that reforming the law of damages involves policy-laden decisions. It is not merely correcting an injustice, but reshaping health policy and public finance, and impacts upon the rights to dignity and equality before the law. These are legislative questions, not judicial ones.

[69] Fundamentally, the High Court ignored its proper institutional role in the separation of powers. As stated, it is the legislature that is responsible for law reform. Courts decide disputes between parties. They are confined to the evidence before them. They are not the elected branch of government and have no mandate to redesign an entire compensation system. Courts cannot gather evidence, nor consult broadly. They are ill-equipped to predict the systemic consequences of the abolition of the rule. They cannot test the long-term sustainability of an order of the kind made in this instance. This is crucial, because future medical care commitments, such as the public healthcare and undertaking to pay remedies depend on proven reliability, something courts cannot properly evaluate in adversarial litigation. Yet this adverse effect is precisely the consequence of the High Court's order.

[70] The point may be illustrated by reference to the English Damages Act, 1996. Prior to the passing of that Act, no court in the United Kingdom (UK) decided in a single case that lump sum payments were problematic. Instead, the change to the rule was made by Parliament, after taking into account Law Commission reports; actuarial evidence; medical cost projections; and input from insurers, the National Health Service, claimant groups and lawyers. These considerations inevitably, are controversial issues of social, economic and financial policy. They are not amenable to judicial reform; and can be resolved by the legislature only after full consideration of factors which cannot be brought

into clear focus, or be assessed and weighed, by a court in the course of a trial between two parties.

[71] So, in the UK, deficiencies in the rule, specifically as they relate to the uncertainty of life expectancy predictions, changes in medical costs over time, over- and under-compensation and the need for periodical payments, were left to Parliament to cure. Consequently, the Damages Act 1996 retains lump sum damages as the default position, but contains a structured alternative. Section 2, in relevant part, provides:

'(1) A court awarding damages for future pecuniary loss in respect of personal injury –

(a) May order that the damages are wholly or partly to take the form of periodical payments, and

(b) Shall consider whether to make that order.

(2) A court awarding other damages in respect of personal injury may, if the parties consent, order that the damages are wholly or partly to take the form of periodical payments.

(3) A court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure.'

[72] These provisions also illustrate the social and economic effects of the High Court's order nationally – which it disregarded – and why a drastic change to the law of damages should be made by the legislature. The Damages Act constitutes a single, coherent national rule concerning damages for future pecuniary loss in respect of personal injury. It ensures equal treatment of similarly situated claimants. Indeed, the Minister's affidavit in the application to be admitted as an *amicus*, states that the national Department intends to create a countrywide permanent structure for provinces, aimed at supporting the remedies, and to ensure continued treatment under the remedies, should a child with cerebral palsy relocate from one province to another. One of the strongest reasons for a single national rule is to avoid fragmentation, and to ensure legal certainty and

uniformity. And as stated in *Mighty Solutions*, 'legal certainty is essential for the rule of law – a constitutional value'.[30]

[73] By contrast, the High Court's order does exactly the opposite, as is demonstrated by this very case. Different divisions of the High Court have reached different outcomes concerning the development of the common law. The High Court and the Johannesburg High Court in *MSM* developed the common law to provide for the remedies. In *Nortje*,[31] the Durban High Court declined to do so, holding that the rule must be changed by the legislature.

[74] Likewise, in *AD*,[32] the court declined to develop the common law by abolishing the rule. The case concerned the financial burden of lump sum awards on public hospitals, which hampers the State in progressively realising the right of access to healthcare services, and in fulfilling its obligation to provide basic healthcare services to all children.[33] As Rogers J put it, 'awards in favour of the few are said to harm the rights of the many'.

[75] The reasoning in *AD* warrants repetition:[34]

'[64] In my view, however, a radical departure of that kind should be left to the legislature. The decision is one of policy. There are arguments for and against the lump-sum rule. While the lump-sum rule may sometimes result in over-compensation or under-compensation, it has the advantage of finality. An order for periodic payments inevitably involves risk of ongoing disputes as to whether particular medical expenditure is reasonable and whether it arises from the injury for which the defendant is liable. An order against an organ of state to make indeterminate payments over an indeterminate period may present significant budgetary and fiscal challenges. In order properly to assess its annual requirements under such an order, an organ of state would have to obtain annual updates on the claimant's condition and likely

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[30] *Mighty Solutions* fn 10 para 38.
[31] *Nortje v Road Accident Fund* 2022 (4) SA 287 (KZD).
[32] *AD and Another v MEC for Health and Social Development, Western Cape Provincial Government* [2016] ZAWCHC 181.
[33] *AD* fn 32 para 60.
[34] *AD* fn 32 paras 64-65.

medical requirements. Even if this information were readily obtainable, its assessment could be time-consuming and expensive. If the lump-sum rule were varied, there would be many aspects of definition and detail which would more appropriately be regulated by a statutory scheme.

[65] In our constitutional democracy it is the legislature and not the courts which has the major responsibility for law reform. The judiciary must exercise caution, confining itself "to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society" (*Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC) para 36; *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd & Another* 2016 (1) SA 621 (CC) paras 37-40). It has also been observed that a constitutional principle that tends to be overlooked when generalised resort is made to constitutional values is the principle of legality: "Making rules of law discretionary or subject to value judgments may be destructive of the rule of law" (*Bredenkamp & Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 39).'

[76] For the above reasons, the MEC has no real answer to the question that Parliament and not the courts, is responsible for law reform. She argues that *Watkins* has no application, because s 39 of our Constitution requires development of the common law, unlike the position in Canada; and that the Court in *DZ* considered *Watkins* but nonetheless endorsed the remedies. The short answer to the argument is this. The inability of a court to recast the law of damages and the reasons why it should not do so, were not before the Constitutional Court in *DZ*. Moreover, the suggestion that the remedies be considered was *obiter*, and the Court itself emphasised that the major engine for law reform is the legislature.

[77] As to securing the continuity of treatment and payments, the High Court stated that the defendant tendered evidence 'which points ineluctably to the conclusion that both hospitals . . . are capable of providing [the child] with the medical services and supplies he requires at a reasonable standard or above'; and that 'funds have been ring fenced specifically for this purpose'. But this

conclusion – on the Department's own version – is unsustainable on the evidence and based on the say-so of the defendant's witnesses. It is unnecessary to traverse the evidence in any detail. A few points will suffice.

[78] The evidence makes it irrational to conclude that lifelong future medical treatment for the child will be provided at CWH or FH, or that future payments will reliably be made under the remedies. Dr Wagner was driven to concede that there is no systemic evidence of the performance of the Eastern Cape Rehabilitation Programme (the Rehabilitation Programme) for children with cerebral palsy, using a multidisciplinary team approach as envisaged in the remedies. This concession demonstrates that there is no proof of sustained multidisciplinary care, no performance data for the Rehabilitation Programme, and no evidence of long-term staffing, infrastructure or service continuity.

[79] Consequently, the order granting the remedies has no foundation in the evidence. A pre-trial conference between the parties resulted in the conclusion of Annexure A to the High Court's order, which details the type and frequency of future consultations, therapies, and surgeries that the child will require. Given the absence of proof of operational capacity and institutional reliability of the Rehabilitation Programme, or cerebral palsy care generally, there is no guarantee that the Department will be able to meet its obligations under the remedies specified in Annexure A.

[80] Thus, there is a real risk that the child will, in all likelihood, not be able to secure the following services: a dietician, which he needs annually until he is 18; domiciliary physiotherapy, chest physiotherapy and occupational therapy, which he needs for the rest of his life; a paediatric neurologist, whom he needs to consult four times a year until he is 17; and speech and language therapy, once a month for the rest of his life, just to name a few. These are services essential to ensuring

that the child lives a life that adequately provides for some semblance of normalcy, considering his severe medical condition.

[81] This is quite apart from Dr Salojee's evidence. She said that there are chronic supply shortages and backlogs at CWH and FH, caused by a lack of funding; and that the continuity of therapy and provision of critical equipment, such as standing frames and seating devices, depends on unpredictable budgets or donations. As one example, the Department obtains spare wheelchair parts from a non-profit organisation at no cost, and not from its own funds.

[82] As to the Department's inability to make future payments in terms of the undertaking to pay remedy, again, on its own version, the Department cannot in any event give effect to the right of access to healthcare under s 27(1) of the Constitution, for lack of sufficient resources. Dr Wagner said that at the start of the 2021 financial year, the Department had a budget deficit of R 4.4 billion in respect of accruals, which impeded its ability to render healthcare services.

[83] This merely underscores the fact that the remedies are objectively insecure. Dr Wagner testified that funds for the remedies had been ring fenced for the then current financial year, and that it 'will be ring fenced in the ensuing years'. However, on her own evidence, funds for the remedies were ring fenced for only two financial years. This, in circumstances where Dr Wagner conceded that the Department's 'financial position is a threat' to the services it generally provides, let alone to its ability to sustain the remedies; and where the Department is already unable to pay its suppliers for services provided – when Dr Wagner testified (22 November 2021) they were owed R1.2 billion, which she said was projected to grow to about R4.5 billion by the end of that financial year.

[84] Prof van den Heever's economic critique drives the point home. He observes that the Department's books are in dire shape: it carried roughly

R1.8 billion in overdue invoices (mostly medical and pharmaceutical bills) and about 7.2% of its budget was tied up in arrears in excess of 30 days – by far the worst in the country. Indeed, systemic mismanagement of, and unauthorised and irregular expenditure by, the Department, are common ground. Treasury reports and civil-society audits have repeatedly flagged systemic financial mismanagement and a 'culture of impunity' in the Province's health finances.

[85] It is trite that a court order must be based on evidence; and be effective, enforceable and capable of implementation. The High Court's order fails on all four. A court cannot grant remedies based on hope, goodwill or discretion. The order creates no vested right to payment of future medical treatment and expenses; and shifts the risk from the wrongdoer (the Department) to the victim (the child).

[86] In the result, the High Court's order, ironically, violates the child's best interests. The remedies create uncertainty and expose the child – who is vulnerable and has suffered a catastrophic injury – to systemic failure by the Department. It also deprives the child (and the plaintiff) of the financial autonomy that lump sum damages provide.

[87] This brings me to the High Court's second reason for developing the common law. It held that large fee deductions from awards by lawyers constitute an infringement of the rights of individual claimants; and that this also impedes the State in carrying out its obligation under s 27(2) of the Constitution. This is a misdirection.

[88] The Contingency Fees Act 66 of 1997 – which the court acknowledged is constitutional – promotes access to justice,[35] and gives effect to the s 34 right of

[35] *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* [2004] 3 All SA 20 (SCA); 2004 (9) BCLR 930 (SCA); 2004 (6) SA 66 (SCA) para 40.

access to courts.[36] The Act may be the only mechanism through which claimants may obtain redress for wrongs committed against them by the State. The High Court erred in finding that payment of costs to legal practitioners in terms of lawful agreements – under strict supervision of the courts – renders the rule in conflict with the Constitution.

[89] Misconduct by legal practitioners in relation to lump sum awards must be regulated through the Legal Practice Council, other professional bodies and ultimately, the courts, when practitioners are removed from the roll – not by development of the common law. Such misconduct has nothing to do with the constitutional obligation under s 27(2), which must be carried out by the State, regardless of the fees charged by legal practitioners, whether in terms of the Contingency Fee Act or otherwise. As a matter of law, the person who has been harmed by the negligent act of another is entitled to be placed in the position she would have been had the harm not been inflicted. Allied to this principle is the rule that damages must be paid in a lump sum – whether the claimant is legally represented, or not. It follows that Mr Howes' evidence on this score is irrelevant.

[90] In any event, the High Court's reasoning is flawed. It found that where the award and future medical expenses are not high, legal fees of 25% 'will not make a great difference to the claimant's quantum of damages'. However, the tendency of lawyers to take 25% of the claim in cases of cerebral palsy, and sometimes more according to the evidence, the court said, 'punches a significant hole in the capacity of the once and for all monetary award to provide fully for the complainant'. This is a *non sequitur*; if lawyers are in principle lawfully entitled to a percentage of an award as a contingency fee, the amount of the award should not matter. It is simply no justification for the development of the common law.

[36] Section 34 of the Constitution states: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

[91] The above examples not only show that the High Court disregarded the effects of its order on fundamental rights, but also why judges should not drastically recast an established principle of law, such as the rule. The rule is such a settled part of our common law that it was proper for the legislature – not a court – to intervene in limited circumstances to relax it. Thus, in 1978, Parliament introduced a statutory departure from the rule by amending the Motor Vehicle Insurance Act 56 of 1972, to permit future medical expenses arising from a motor vehicle accident to be covered by an undertaking by authorised insurers. Section 17(4)*(b)* of the Road Accident Fund Act 56 of 1996 provides for a similar undertaking. As this Court explained in *Katz*:[37]

'The legislature . . . departed from the common law principle of a singular cause or right of action for all compensation for past and future loss or damage, and has substituted for the latter the statutory principle of its being sufficient unto the day if and when the claimant has to pay.'

Residual issues

[92] The following issues remain: the replacement cost of a wheelchair and transporter buggy; the frequency and costs of physiotherapy and occupational therapy; case management services; and the costs of the creation and administration of a trust in favour of the child.

[93] It is common ground that the child needs a wheelchair and transporter buggy. The parties have reached agreement on the costs of these items (in 2020). The cost of the wheelchair is R19 000, and a Madiba lightweight transporter buggy costs R15 000.

Physiotherapy

[94] The dispute about physiotherapy concerns its frequency and cost. The plaintiff's expert, Ms G Hughes, recommended a high frequency of intensive physiotherapy in the child's early years to maximise its benefits, with tapering

[37] *Katz* fn15 at 973C; *Mbele v Road Accident Fund* [2016] ZASCA 134 para 10.

sessions as he ages. The defendant's expert, Dr Gillian Saloojee, presented a structured physiotherapy schedule that provides for significantly fewer therapy hours than Ms Hughes' recommendation.

[95] Although the evidence discloses that there is a lack of scientific consensus on the exact frequency of the physiotherapy required, it appears from Dr Saloojee's evidence that the physiotherapy that the child requires until he reaches the age of 13, is higher than at any other stage of his life, and that the frequency of therapy tapers off with the passage of time. Ms Hughes' testimony provides a rational basis for the higher frequency of physiotherapy, given the child's profound disabilities and the plateauing of benefits if the therapy is too infrequent.

[96] In the circumstances, the recommendation that the child is entitled to physiotherapy of 40 sessions per year from the ages of 12-17 years; and 30 sessions per year from age 18 for life, is reasonable. The rates for such physiotherapy shall be calculated at 2020 values, namely R750 per hour for all physiotherapy sessions, and home visits at a half-day fee of R350 per visit.

Occupational therapy

[97] The evidence shows that the child has serious cerebral palsy-related impairments affecting mobility, selfcare and the use of assistive devices, which is treated by occupational therapy. The plaintiff's expert, Ms Caga, is of the view that the following annual hours of occupational therapy, including sitting and checking of equipment and home visits, are required. Until the age of 12 years: group therapy 15 hours, individual occupational therapy 20 hours, 10 hours for fitting and checking of equipment and 3 hours for home visits (per annum); age 13-17 years: group therapy 10,5 hours, individual occupational therapy 12 hours, fitting and checking of equipment 8 hours and home visits 3 hours; from 18 years

for life: group therapy 3 hours, individual occupational therapy 4 hours, fitting and checking of equipment 8 hours and home visits 4 hours.

[98] Ms Caga testified that the child would require occupational therapy as follows: age 10-12: one session per week, ie, 52 sessions per annum; and thereafter for the remainder of the child's life, one session per month ie, 12 sessions per annum. In view of the child's present age, the appellant will not insist on the 52 sessions per annum required between the ages of 10 to 12.

[99] Dr Saloojee adopted a conservative approach to the occupational therapy requirements, particularly if it is borne in mind that the child would probably have benefited from more intense therapy during the past two years. In its order, the High Court effectively adopted the defendant's occupational therapy plan and did not consider 12 versus 4 sessions per year; it simply chose the defendants holistic package as constitutionally acceptable. In the circumstances, the frequency of occupational therapy recommended on behalf of the plaintiff, overall, is fair and reasonable.

[100] Concerning the hourly rates for occupational therapy, Ms Caga initially (2020) opined that each session or hour should be costed at R750. When she testified during November 2021, she stated that the hourly rate for occupational therapy varied between R650 and R850. Ms Krige was of the view that occupational therapy should be costed at R650 per hour and regarded the amount of R750 to be on the high side. She also estimates local home visits at R750 per hour. In the circumstances, an hourly rate of R750 for occupational therapy is fair and reasonable.

Case manager

[101] It is common ground that the child will require case management services for the rest of his life and to that end, the appointment of a case manager is clearly

warranted. In issue however is the extent of the services to be provided and the costs thereof.

[102] On behalf of the defendant, Ms Krige, the occupational therapist, adopted a conservative view concerning the extent of the services to be provided by the case manager, which is reflected in the order of the trial court. Her view was preferred above that of Ms Caga, on behalf of the defendant.

[103] Ms Caga suggested provision for the case manager as follows: first year – 100 hours to review living arrangements; to source necessary equipment and therapies; and to attend appointments with other role-players such as trust managers, architects, builders, etcetera. Concerning home visits, she recommended the following: first year – two home visits per month (24 visits), thereafter home visits annually for the remainder of the child's life; after the first year – 24 hours per year for the following three years; from the fifth year onwards – 12 hours per annum until the child reaches 21 years and thereafter 6 hours per annum for the remainder of his life.

[104] The case management provided for by Ms Krige, and adopted by the trial court, is too conservative and inadequate to properly cater for the child's reasonable ongoing needs. Instead, the approach adopted on behalf of the plaintiff is more realistic as adjusted in the appellant's notice of appeal, and is in the circumstances, fair and reasonable.

[105] It appears from the evidence that the trial court's adopted plan (with minimal private case management) was tailored to the public healthcare remedy and is insufficient in a lump sum context. Ms Caga recommended an average hourly rate of R750 and R1 200 per home visit. These rates were determined in May 2020 and should be allowed as set out above.

The trust

[106] The trial court granted the remedies and dismissed the plaintiff's claim for the costs of the creation and administration of a trust in favour of the child, to protect the damages awarded. The court reasoned that the amount awarded as a lump sum did not justify this claim.

[107] The trial court erred. It lost sight of the fact that damages of nearly R4 million had been awarded as a lump sum. Further, the plaintiff has never really been gainfully employed and has no experience nor skills in dealing with such a large sum of money.

[108] In these circumstances, and the fact that the trial court's order is set aside, a trust in favour of the child must be created. It follows that the defendant is liable for the costs of the creation and administration of the trust.

Conclusion

[109] The High Court's development of the common law in terms of ss 39 and 172 of the Constitution, is no 'incremental development': it constitutes structural reform of the law of damages. A radical change to the law of damages must be made by the legislature and be applied within a uniform national framework. Consequently, *MSM*[38] was wrongly decided and should not be followed.

[110] On the Department's own version, the remedies are uncertain and insecure. This is inconsistent with the principle of law that a claimant must be fully (and effectively) compensated for the loss suffered as a result of the defendant's delict. The High Court's order is inappropriate; even well-intentioned judicial innovation can cause greater injustice where, as here, the court lacks institutional competence, and the efficacy of the remedies is doubtful. The appeal must therefore succeed.

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[38] *MSM* fn 6.

Costs

[111] As regards the appeal, there is no reason why costs should not follow the result. The High Court made no order of costs concerning the action, including the costs of the trial.

[112] The High Court erred in failing to order the defendant to pay the plaintiff's costs, specifically the costs regarding the common law claim for damages in respect of which the plaintiff enjoyed substantial success. These costs relate to general damages, loss of earnings, and the items concerning future medical, hospital and related expenses, which were settled between the parties prior to and during the trial.

Order

[113] The following order is issued:

1 The appeal succeeds with costs, including the costs of two counsel.

2 The High Court's order is set aside and replaced with the following:

'1. The plaintiff is entitled to payment of the agreed costs of future hospital, medical and related care and supplies, set out in items 1 to 15 of Annexure 'A' to the minute of the pre-trial conference held on 10 November 2021, as adjusted on the basis of consensus subsequently reached, including interest thereon as agreed and recorded in the said minute.

2. The caregiving requirements of the child and the costs thereof comprise the following:

2.1 He shall be entitled to attend the Canaan Care Centre, East London (the Centre), daily from Mondays to Fridays, except on public holidays and school holidays (when the Centre cannot accommodate him) for as long as the Centre can accommodate him until the age of 16 years.

2.2 During the remaining hours and days when the child is not accommodated in the Centre, he shall be entitled to permanent and full-time care (24 hours per day) by trained caregivers for the remainder of his agreed lifetime ("the caregiving hours").

2.3 The costs of accommodation at the Centre amounted to R2 000 per month in November 2021. The costs of caregiving from November 2021 shall be determined at the base rate of R450 per hour (the applicable rate in November 2021) on an annual basis, which costs shall be actuarially calculated and computed.

2.4 Every four years, the plaintiff shall be entitled to purchase a new Madiba 2 Go wheelchair at a cost of R19 000 (2020 values). The plaintiff shall also be entitled to acquire a Madiba Lightweight Transporter at a cost of R15 000 (2020 values). These costs shall be actuarially calculated and computed.

2.5 The child will be entitled to receive physiotherapy (for the treatment of neurological, respiratory and other purposes) for the remainder of his agreed lifetime, as follows: from 12-17 years of age, 40 hours hourly sessions per annum and thereafter 30 hourly sessions per annum, costed at the rate of R750 per hour (2020 values), as well as four annual home visits by a physiotherapist, each to be costed as a half-day fee at the rate of R350 per hour. These costs shall be actuarially calculated and computed.

2.6 The child is entitled to receive 12 hourly sessions of occupational therapy (including fitting and checking of equipment) per annum for the remainder of his agreed lifetime, calculated at the rate of R750 per hour (2020 values),

the costs of which shall be actuarially calculated and computed.

2.7 The plaintiff shall be entitled to employ the services of a case manager for the remainder of the child's life, to render case management services as follows:

2.7.1 First year – 50 hours to review living arrangements, source equipment and therapies, and attend appointments with other role-players such as trustees, architects and builders;

2.7.2 First year – one home visit per month (ie 12 visits) and thereafter one home visit per annum for life;

2.7.3 After the first year, 24 hours per year for case management for the following three years;

2.7.4 From the fifth year onwards, 12 hours of case management per annum until the child is 21 years old and thereafter six hours per annum for the remainder of his life, at a cost of R750 per hour and R1 200 per home visit respectively, which costs shall be actuarially calculated and computed.

2.8 The plaintiff is entitled to the costs of the creation and administration of a trust in favour of the child, to protect the award, which costs shall be actuarially determined by downward adjustment of a figure equivalent to 8.5% of the sum awarded, in accordance with the child's limited life expectancy as agreed between the parties.'

3. The defendant shall pay the plaintiff's costs of suit in the High Court, including, but not limited to, the costs consequent upon the employment of two counsel, and the qualifying and/or preparation

and/or reservation fees of the plaintiff's expert witnesses who testified and/or produced expert reports.

4. The matter is remitted to the High Court to:

   4.1 determine the quantum of the plaintiff's claim in respect of the issues dealt with in sub-paragraphs 2.1 to 2.8 supra in accordance with this order, but subject to consideration of the fact that the judgment and order of the court have remained in operation, and by taking account of the extent to which effect has been given thereto;

   4.2 make an order in respect of the creation of a trust for the sole benefit of the child, on such terms and conditions as it considers appropriate, which shall include the costs of administration of the trust;

   4.3 make an order as to the costs of the issues remitted to the court in accordance with this order.

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A SCHIPPERS

JUDGE OF APPEAL

Appearances:

For the appellants:	G Alberts SC with C Du Toit
Instructed by	S Booi & Sons Attorneys, Queenstown
	Eugene Attorneys, Bloemfontein
For the respondent:	A Dodson SC with A Raw and O Motlhasedi
	The State Attorney, East London
	Webbers Attorneys, Bloemfontein
For the *amicus curiae*:	K Pillay SC with Z Cornelissen
	Joseph's Inc, Johannesburg
	McIntyre Van Der Post Attorneys, Bloemfontein
For the first *amicus curiae* (Minister of Health):	G Budlender SC
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
For the second to ninth *amici curiae*:	R Williams SC with T Sarkas
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein