CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 38/10
[2010] ZACC 25

In the matter between:

LAW SOCIETY OF SOUTH AFRICA	First Applicant
SOUTH AFRICAN ASSOCIATION OF PERSONAL INJURY LAWYERS	Second Applicant
QUADPARA ASSOCIATION OF SOUTH AFRICA	Third Applicant
NATIONAL COUNCIL FOR PERSONS WITH PHYSICAL DISABILITIES IN SOUTH AFRICA	Fourth Applicant
NONTLE JENNICA WILLEM	Fifth Applicant
BELINDA FLANAGAN	Sixth Applicant
LISHA GOVENDER	Seventh Applicant
JOHN QONDILE NTSHIZA	Eighth Applicant
MCEBISI DAKELA	Ninth Applicant
JERONICO MERVYN JANSEN	Tenth Applicant
DIVAN GERBER	Eleventh Applicant

and

MINISTER FOR TRANSPORT	First Respondent
ROAD ACCIDENT FUND	Second Respondent

Heard on : 12 August 2010

Decided on : 25 November 2010

JUDGMENT

MOSENEKE DCJ:

Introduction

[1] This is an application for leave to appeal against the judgment and order of the North Gauteng High Court[1] (High Court), handed down by Fabricius AJ. That court dismissed a constitutional challenge to amendments to the Road Accident Fund Act, 1996[2] (RAF Act). The impugned amending provisions were introduced by the Road Accident Fund Amendment Act, 2005[3] (amendment).

[2] Before the High Court, the applicants put up a far-reaching constitutional attack against certain provisions of the amendment and regulations made under it. They sought to have at least five legislative provisions, 25 regulations and one government notice declared inconsistent with the Constitution and invalid. The High Court dismissed all these claims but made no order as to costs.

[1] *Law Society of South Africa and Others v Minister of Transport and Another*, Case No 10654/09, North Gauteng High Court, Pretoria, 31 March 2010, unreported.

[2] Act 56 of 1996.

[3] Act 19 of 2005 which only came into force on 1 August 2008. See Proclamation R29 GG 31249, 21 July 2008.

[3] However, in the application for leave to appeal directly to this Court, the scope of the constitutional challenge has shrunk considerably. The applicants impugn only two provisions of the amendment and one regulation. They are—

(a) section 21 which abolishes a motor accident victim's common law right to claim compensation from a wrongdoer for losses which are not compensable under the RAF Act;

(b) section 17(4)(c) which limits the amount of compensation that the Road Accident Fund (Fund) is obliged to pay for claims for loss of income or a dependant's loss of support arising from the bodily injury or death of a victim of a motor accident; and

(c) Regulation 5(1) in which the Minister for Transport (Minister) has, pursuant to section 17(4B)(a) of the Act, prescribed tariffs for health services which are to be provided to accident victims by public health establishments.

[4] The core of the constitutional challenge is that these impugned provisions viewed alone or collectively as part of the legislative scheme—

(a) do not comply with the constitutional principle of rationality;

(b) unjustifiably limit at least one of the following fundamental rights: the right—

(i) to security of the person (section 12(1));

(ii) not to be deprived of property arbitrarily (section 25(1));

(iii) of access to healthcare services (section 27(1)); and

(iv) to adequate remedy (section 38).

All these rights are to be viewed in the light of the duty of the state to respect, protect, promote and fulfil these rights (section 7(2)).

Parties

[5] Before identifying the issues that fall to be determined, it may be helpful that I give a brief description of the litigants. The Law Society of South Africa (Law Society) is the first applicant. It represents some 20 000 attorneys in over 9000 law firms. Many of its members practice in the area of road accident litigation and represent the majority of people who claim compensation under the RAF Act. They make the point that their members and their clients are adversely affected by the impugned provisions. The Law Society also says that it pursues the litigation on behalf of many clients to whom their members provide services and who could not bring the proceeding themselves. They also claim to bring the action in the public interest in order to procure a just and equitable legal system. The second applicant is the South African Association of Personal Injury Lawyers. Its objectives also include protecting the legal rights and interests of road accident victims. Its members too represent victims of motor vehicle accidents, on whose behalf they act.

[6] The third applicant is the QuadPara Association of South Africa. It promotes the interests of quadriplegics, paraplegics and other people with mobility impairment, many of whom incur these conditions as a result of road accidents. Cited as the fourth applicant is the National Council for Persons with Physical Disabilities in South Africa, whose main purpose is to advance the interests of persons with physical disability and to eradicate legal impediments operating to the detriment of its members or people with physical disability.

[7] The first to the fourth applicants are voluntary associations with perpetual succession. All four have the capacity to institute legal proceedings in their own name and have mounted the present challenge in their own right, on behalf of their members and to advance the rights and interests of future accident victims and in the public interest.

[8] The fifth to the eleventh applicants are individuals who have been injured in road accidents after the impugned provisions came into operation. All of them assert that they will be materially prejudiced should the provisions remain in force because they deprive accident victims of adequate compensation from the Fund whilst granting wrongdoers complete immunity from civil liability for their unlawful conduct.

[9] The first respondent is the national Minister for Transport. He is cited as the member of the national executive responsible for the administration of the RAF Act. He

thus has a direct and substantial interest in the outcome of the appeal. The second respondent is the Fund. It is the statutory body established under the RAF Act to administer the compensation system envisioned by national legislation.

Issues

[10] It may be readily gathered from the preceding introduction that these issues arise for decision—

(a) whether it is in the interests of justice to grant the application for leave to appeal directly to this Court;

(b) whether the scheme of the amendment or each of the impugned provisions complies with the requirement of rationality;

(c) whether section 12(1)(c) of the Constitution applies to and protects the physical integrity of road accident victims;

(d) if it does, whether the right has been unjustifiably limited;

(e) whether section 25(1) of the Constitution applies to a claim for loss of earning capacity or of a dependant's support;

(f) if it does, whether the right has been unjustifiably limited;

(g) whether the tariff of health care services the Minister has prescribed under Regulation 5(1) limits the right of access to health care services required by sections 27(1)(a) and (2) of the Constitution;

(h) if it does, whether the right has been unjustifiably restricted;

(i) whether the impugned provisions of the amendment infringe the right to appropriate relief provided for in section 38 of the Constitution;

(j) what is the appropriate remedy, if any; and

(k) what costs order should be made?

Should leave to appeal be granted?

[11] In *Union of Refugee Women v Director: Private Security Industry Regulatory Authority,* we restated the considerations that are relevant for deciding whether to grant leave to appeal to this Court directly from the High Court:

> "Leave to appeal directly to this Court will be granted if it is in the interests of justice to do so. Each case is considered on its own merits. The factors relevant to a decision whether to grant an application for direct appeal have been listed as including whether there are only constitutional issues involved, the importance of the constitutional issues, the saving in time and costs, the urgency, if any, in having a final determination of the matters in issue and the prospects of success. These must be balanced against the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the Supreme Court of Appeal (SCA) is bypassed."[4] (Footnotes omitted.)

[12] With these considerations in mind, I am satisfied that the application for leave to appeal should be granted. This matter raises two main constitutional issues. The first relates to the rationality of the scheme of the RAF Act as amended. The threshold requirement of rationality to which all legislation must conform is an incident of the rule

[4] *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 21.

of law, a founding value of our Constitution. The second constitutional issue concerns the claim that the challenged provisions of the RAF Act infringe four specified rights provided for in the Bill of Rights.

[13] In my view, the public interest and thus the interests of justice require that the constitutionality of the legislative scheme be definitively considered by this Court at the earliest opportunity. The Fund, correctly so, does not oppose this Court hearing the appeal and in fact abides the Court's decision on whether leave to appeal should be granted. The Minister opposes leave to appeal being granted on the narrow ground that the applicants seek to appeal directly to this Court when they should have first approached the Supreme Court of Appeal. He takes the view that this matter concerns the development of the common law.

[14] It is true that ordinarily, when a matter concerns the adaptation of the common law, this Court is reluctant to bypass the Supreme Court of Appeal and sit as a court of first and final appeal without the benefit of its expertise in this area of the law.[5] However, this appeal does not relate to the development of the common law. It concerns, and only in part, the constitutional validity of the statutory abolition of common law claims of an accident victim against a wrongdoer to the extent that the Fund is not liable to compensate the victim. Even in that regard, we are called upon to determine whether

[5] See for example *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8 and *S v Bequinot* [1996] ZACC 21; 1997 (2) SA 887 (CC); 1996 (12) BCLR 1588 (CC) at para 15.

the abolition unjustifiably infringes constitutional rights. Thus, the core task before us is to test whether the amendment passes constitutional muster. The rest of the challenges to the amendment are unrelated to the common law.

[15] There are indeed other weighty considerations which favour this Court hearing a direct appeal from the High Court. We are informed that some 20 000 claims arise each month under the RAF Act. Many victims are poor and all are disadvantaged by the current uncertainty on what they may properly claim. I can find no cogent reason why it would be in the interests of justice for this legal uncertainty to be endured because of lingering litigation. What is indeed in the interests of justice is to decide promptly the constitutional validity of the amendment. A speedy decision would let victims or claimants know what may be due to them; the Fund would anticipate the likely extent of its liability for claims and the Minister would be informed of the constitutional defects, if any, that call for remedial action.

[16] Lastly, it should suffice to add that the challenge the applicants put up raises important constitutional issues and some do indeed carry a reasonable prospect that this Court might reach a conclusion different from that of the High Court. It is indeed in the interests of justice that we hear the appeal.

Legislative history

[17] The statutory road accident compensation scheme was introduced only in 1942, well after the advent of motor vehicles on public roads. And even so, it came into effect only on 1 May 1946. As elsewhere in the world, statutory intervention to regulate compensation for loss spawned by road accidents became necessary because of an increasing number of motor vehicles and the resultant deaths and bodily injuries on public roads. The right of recourse under the common law proved to be of limited avail. The system of recovery was individualistic, slow, expensive and often led to uncertain outcomes. In many instances, successful claimants were unable to receive compensation from wrongdoers who had no means to make good their debts. On the other hand, it exposed drivers of motor vehicles to grave financial risk. It seems plain that the scheme arose out of the social responsibility of the state. In effect, it was, and indeed still remains, part of the social security net for all road users and their dependants.

[18] Ever since, the system of compensation has been under frequent investigation and legislative review. This became necessary presumably because the scheme was considered to be ever evolving and less than perfect. In an apparent search for a fair, efficient and sustainable system of compensation, no less than five principal Acts were passed and over decades government established at least nine commissions to review the funding, management and levels of compensation under the scheme.

[19] The first principal Act was the Motor Vehicle Insurance Act, 1942[6] which unsurprisingly was amended at least five times and was the subject of no fewer than four commissions of inquiry.[7] That legislation introduced a comprehensive scheme of compulsory third party motor insurance. Its expressed object was to provide for compensation for certain loss or damage caused unlawfully by means of motor vehicles. The scheme was originally underwritten and administered by a consortium of private insurance companies and funded by compulsory annual premiums payable by motorists.[8]

[20] Nearly 30 years later, the second principal Act, the Compulsory Motor Vehicle Insurance Act, 1972[9] was adopted. It was amended on at least seven occasions before its repeal in 1986.[10] This Act shifted the requirement for insurance from the owner or driver to the vehicle itself. It provided cover, for the first time, for loss occasioned by uninsured or unidentified motor vehicles. It introduced prescription of claims and excluded the liability of the Fund in certain instances and increased the benefits for passengers. It too was the subject of at least two commissions of inquiry.[11]

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[6] Act 29 of 1942.

[7] The Smit Commission of Inquiry in 1950; the Corder Commission of Inquiry in 1954; the Du Plessis Commission of Inquiry in 1962 and the Moll Commission of Inquiry in 1968.

[8] For an overview of the history of compulsory motor vehicle insurance under the Act, see Suzman & Gordon *The Law of Compulsory Motor Vehicle Insurance in South Africa* (Juta & Co, Cape Town 1954) 1 *et seq*.

[9] Act 56 of 1972.

[10] The Act was amended by the Compulsory Motor Vehicle Insurance Amendment Acts 22 of 1974; 87 of 1976; 69 of 1978; 23 of 1980; 2 of 1982; 4 of 1983 and by the Second General Law Amendment Act 94 of 1974.

[11] The Wessels Commission of Inquiry in 1976 and the Grosskopf Commission of Inquiry in 1981.

[21] Some 14 years later, the third principal Act, the Motor Vehicle Accidents (MVA) Act, 1986[12] was passed. The important change it introduced was a fuel levy to fund the system of compensation. Another significant change was that private insurance agents ceased to deal with hit and run claims. These were dealt with exclusively by the MVA Fund. This principal Act too was the subject of at least one commission of inquiry.[13] Only 3 years later in 1989, the fourth principal Act, the Multilateral Motor Vehicle Accidents Fund Act, 1989[14] came into force. It too was amended at least four times.[15] The Melamet Commission of Inquiry of 1992 was appointed in the wake of an actuarial deficit of the Fund that was estimated at R1 billion. The Commission found widespread inefficiencies in the system. It highlighted specific areas of abuse which included unnecessary delays by attorneys in lodging claims, overstated or fraudulent claims and inflated legal costs. The Commission recommended a number of internal administrative changes but stopped short of recommending a no-fault benefit system. And lastly, the fifth principal Act is the Road Accident Fund Act, 1996 which is still in force. It has been amended five times,[16] and has been subject of one major commission known as the Satchwell Commission which made many far-reaching recommendations.[17] The fourth

[12] Act 84 of 1986.

[13] The Viviers Commission of Inquiry in 1987.

[14] Act 93 of 1989.

[15] The Act was amended by the Multilateral Motor Vehicle Accident Fund Amendment Act 22 of 1992 and by the Financial Supervision of the Multilateral Motor Vehicle Accidents Fund Act 8 of 1993, and by Proclamations 102 GG 13597, 1 November 1991, and 62 GG 15004, 16 July 1993.

[16] The Act was amended by the Road Accident Fund Amendment Acts 15 of 2001, 43 of 2002 and 19 of 2005 and by the Revenue Laws Amendment Acts 19 of 2001 and 31 of 2005.

[17] The Satchwell Commission was formally named the Road Accident Fund Commission of Inquiry. Its report recommended that a new authority, to be called the Road Accident Benefit Scheme, should be created to implement

of the amendments only took effect in 2008.[18] It is this amendment which is the target of the present constitutional challenge. It is now convenient that I describe its salient features.

The scheme of the amendment

[22] Prior to its substitution by section 9 of the amendment, section 21 of the RAF Act read as follows:

> "When a third party is entitled under section 17 to claim from the Fund or an agent any compensation in respect of any loss or damage resulting from any bodily injury to or death of any person caused by or arising from the driving of a motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party may not claim compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle, or if that person drove the vehicle as an employee in the performance of his or her duties, from his or her employer, unless the Fund or such agent is unable to pay the compensation."

[23] In its amended form, section 21 now reads:

> "(1) No claim for compensation in respect of loss or damage resulting from the bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie—
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> (a) against the owner or driver of a motor vehicle; or
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> (b) against the employer of the driver.
>
> (2) Subsection (1) does not apply—
>
> (a) if the Fund or an agent is unable to pay any compensation; or

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a compensation system wherein the benefits would be as inclusive as possible and which would be based on need and not fault.

[18] Above n 3.

(b) to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than a third party, when that person witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle."

[24] The scheme brought into being by the amendment is not fully apparent from a mere comparison of the two sections. It becomes clearer when one has regard to the limited compensation to accident victims which the amended provisions of section 17 of the RAF Act introduce. In relevant parts, the section reads as follows:

"(1) The Fund or an agent shall—

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

(1A) (a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with the medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.

(b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act No. 56 of 1974).

. . . .

(4) Where a claim for compensation under subsection (1)—

(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or an agent to furnish such undertaking, to compensate—

(i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or

(ii) the provider of such service or treatment directly, notwithstanding section 19(c) or (d),

in accordance with the tariff contemplated in subsection (4B);

(b) includes a claim for future loss of income or support, the amount payable by the Fund or the agent shall be paid by way of a lump sum or in instalments as agreed upon;

(c) includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding—

(i) R182 047 per year in the case of a claim for loss of income; and

(ii) R182 047 per year, in respect of each deceased breadwinner, in the case of a claim for loss of support.

(4A) (a) The Fund shall, by notice in the Gazette, adjust the amounts referred to in subsection (4)(c) quarterly, in order to counter the effect of inflation.

(b) In respect of any claim for loss of income or support the amounts adjusted in terms of paragraph (a) shall be the amounts set out in the last notice issued prior to the date on which the cause of action arose.

(4B) (a) The liability of the Fund or an agent regarding any tariff contemplated in sub-section (4)(a), (5) and (6) shall be based on the tariffs for health services provided by public health establishments contemplated in the National Health Act, 2003 (Act No. 61 of 2003), and shall be prescribed after consultation with the Minister of Health.

(b) The tariff for emergency medical treatment provided by a health care provider contemplated in the National Health Act, 2003—

(i) shall be negotiated between the Fund and such health care providers; and

(ii) shall be reasonable taking into account factors such as the cost of such treatment and the ability of the Fund to pay.

(c) In the absence of a tariff for emergency medical treatment the tariff contemplated in paragraph (a) shall apply."[19]

[25] The amendment has retained several features of the old scheme and introduced far-reaching new features. Firstly, the scheme insures road users against the risk of personal injury and their dependants against the risk of their death caused by the fault of another driver or motorist. It has retained the underlying common law fault-based liability. This means that any accident victim or a third party who seeks to recover compensation must establish the normal delictual elements. The claimant must show that he or she has suffered loss or damage as a result of personal bodily injury or the injury or death of a breadwinner arising from the driving of a motor vehicle in a manner which was wrongful and coupled with negligence or intent.

[26] Before the amendment, section 21 provided clearly that a victim or third party may not claim compensation from the owner or driver of the vehicle or from the employer of the driver when he or she is entitled to claim from the Fund or an agent. To that extent only did a wrongdoer enjoy immunity. This meant that where no claim lay against the

[19] The amounts provided in subsection 17(4)(c) reflect the adjustment made in accordance with section 17(4A)(a) by BN 148 GG 33677, 29 October 2010.

Fund or an agent, a third party retained the common law residual claim to recover losses not recompensable under the RAF Act from a wrongdoer. However, the amended section 21 of the RAF Act abolishes this common law right. In plain language it provides that no claim for compensation arising from the driving of a motor vehicle shall lie against the owner or driver of a motor vehicle or against an employer of the driver. To this immunity from liability there are two exceptions. The one is if the Fund is unable to pay any compensation. The second is when the action for compensation is in respect of loss or damage resulting from emotional shock sustained by a person other than a third party. The emotional shock must have arisen when the claimant witnessed, or observed or was informed of the bodily injury to or death of another person as a result of a motor collision.

[27] Prior to its amendment section 17 obliged the Fund to compensate a third party in full for any loss or damage caused by or arising from the driving of a motor vehicle by another person. Except for passengers injured as a result of the negligent driving of a motor vehicle in which they were being conveyed, a third party was entitled to be compensated by the Fund in full. The liability of the Fund to a third party was thus unlimited. The amended section 17 limits the obligation of the Fund to compensate a third party in a number of material respects. These are:

(a) Non-pecuniary loss which is also referred to as general damages is limited to compensation for "serious injury" and shall be paid once off by way of a lump sum. What constitutes serious injury shall be assessed

by a medical practitioner based on a prescribed method adopted after consultation with medical service providers. However, the injury must be reasonably assessed in relation to the circumstances of the third party.

(b) Pecuniary damages, sometimes called special damages, are restricted in two important ways. First, compensation for loss of earning or of support falls to be calculated, irrespective of actual loss, on the basis of a maximum annual income which is currently set at R182 047 per year. The Fund is obliged to adjust the amount for the calculation of loss of income or support quarterly in order to counter the effect of inflation and the adjusted amount for purposes of the calculation is the one appearing in the last notice of adjustment issued before the date on which the cause of action arose.[20]

(c) Second, the Fund's liability to accident victims for costs of medical and healthcare services must be based on tariffs for health services provided by the public health establishment contemplated in the National Health Act, 2003.[21] The applicable tariff must be prescribed by the Minister after consultation with the Minister for Health.[22] The Minister has by

[20] Id.

[21] Act 61 of 2003.

[22] See section 17(4B)(a) read with 17(4)(a) of the RAF Act.

regulation prescribed a tariff identical to the Uniform Patient Fee Schedule (UPFS) in Regulation 5(1).[23]

[28] Before I turn to the constitutional attacks mounted, there is one more change to the old scheme that requires mention. As we have seen, as a general matter, third party claimants under the old scheme were entitled to recover unlimited compensation from the Fund. The passenger claims were a prominent exception to the uncapped liability. They were limited in terms of sections 18[24] and 19(b)[25] of the RAF Act. These provisions

[23] See GN R770 GG 31249, 21 July 2008.

[24] Prior to the amendments section 18 provided:

> "(1) The liability of the Fund or an agent to compensate a third party for any loss or damage contemplated in section 17 which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned, shall, in connection with any one occurrence, be limited, excluding the cost of recovering the said compensation, and except where the person concerned was conveyed in or on a motor vehicle other than a motor vehicle owned by the South African National Defence Force during a period in which he or she rendered military service or underwent military training in terms of the Defence Act, 1957 (Act 44 of 1957), or another Act of Parliament governing the said Force, but subject to subsection (2)—
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> (a) to the sum of R25 000 in respect of any bodily injury or death of any one such person who at the time of the occurrence which caused that injury or death was being conveyed in or on the motor vehicle concerned—
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> (i) for reward; or
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> (ii) in the course of the lawful business of the owner of that vehicle; or
>
> (iii) in the case of an employee of the driver or owner of the motor vehicle, in respect of whom subsection (2) does not apply, in the course of his or her employment; or
>
> (iv) for the purposes of a lift club where that motor vehicle is a motor car; or
>
> (b) in the case of a person who was being conveyed in or on a motor vehicle concerned under circumstances other than those referred to in paragraph (a), to the sum of R25 000 in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to or the death of any one such person, excluding the payment of compensation in respect of any other loss or damage.

imposed different caps on the compensation paid to different categories of passengers,

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(2) Without derogating from any liability of the Fund or an agent to pay costs awarded against it or such agent in any legal proceedings, where the loss or damage contemplated in section 17 is suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned and who was an employee of the driver or owner of that motor vehicle and the third party is entitled to compensation under the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993), in respect of such injury or death—

(a) the liability of the Fund or such agent, in respect of the bodily injury to or death of any one such employee, shall be limited in total to the amount representing the difference between the amount which that third party could, but for this paragraph, have claimed from the Fund or such agent or the amount of R25 000 (whichever is the lesser) and any lesser amount to which that third party is entitled by way of compensation under the said Act; and

(b) the Fund or such agent shall not be liable under the said Act for the amount of the compensation to which any such third party is entitled thereunder.

(3) Without derogating from any liability of the Fund or an agent to pay costs awarded against it or such agent in any legal proceedings, where the loss or damage contemplated in section 17 is suffered as a result of bodily injury to or death of a member of the South African National Defence Force, other than a person referred to in subsection (2), and the third party is entitled to compensation under the Defence Act, 1957, or another Act of Parliament governing the said Force in respect of such injury or death—

(a) the liability of the Fund or such agent, in respect of the bodily injury to or death of any such member of the said Force, shall be limited in total to the amount representing the difference between the amount which that third party could, but for this paragraph, have claimed from the Fund or such agent and any lesser amount to which that third party is entitled by way of compensation under the said Defence Act or the said other Act; and

(b) the Fund or such agent shall not be liable under the said Defence Act or the said other Act for the amount of the compensation to which any such third party is entitled thereunder.

(4) The liability of the Fund or an agent to compensate a third party for any loss or damage contemplated in section 17 which is the result of the death of any person shall in respect of funeral expenses be limited to the necessary actual costs to cremate the deceased or to inter him or her in a grave."

[25] Prior to the amendments section 19 provided:

"The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage—

. . . .

(b) suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death—

(i) was being conveyed for reward on a motor vehicle which is a motor cycle; or

(ii) is a person referred to in section 18(1)(b) and a member of the household, or responsible in law for the maintenance, of the driver of the motor vehicle concerned. . . ."

ranging from complete exclusion to a maximum of R25 000.[26] The amendment has removed the caps by repealing relevant parts of sections 18 and 19(b). This, of course, means that passengers whose claims were limited in the past, now stand to be recompensed on the same basis as all other victims.

Is the scheme rational?

[29] The Law Society together with the third to the eleventh applicants contends that the new scheme and in particular the abolition of the common law claim is irrational. They urge us to go beyond the rational connection test between means and ends when testing the rationality of a legislative measure and to embrace a standard of wider import that would ask not only whether the impugned legislative measure discriminates arbitrarily but also whether it "unfairly deprive[s] people of constitutional protection". Drawing on Thayer's theory first articulated in 1893,[27] the applicants contend that in circumstances where a legislative scheme "drops a guillotine on constitutional rights" (as in the present case where the right to physical integrity, property, access to health care and to an appropriate remedy are threatened), a court must ask whether the measure "unfairly deprive[s] people of constitutional protection" or, put differently, whether it abolishes individual rights.

[26] In *Tsotetsi v Mutual and Federal Insurance Co Ltd* [1996] ZACC 19; 1997 (1) SA 585 (CC); 1996 (11) BCLR 1439 (CC) the constitutional validity of the provisions placing a cap on passenger claims was dealt with but not decided. The cause of action arose before the Constitution came into force. In *Mvumvu and Others v Minister of Transport and Another*, Case No 7490/2008, Western Cape High Court, Cape Town, 28 June 2010, unreported, the Western Cape High Court has struck down some of the caps and referred the declaration of constitutional invalidity to this Court for confirmation. The matter was heard by this Court on 4 November 2010.

[27] Thayer "The origin and scope of the American Doctrine of Constitutional Law" (1893-1894) 7 *Harvard LR* 129. Also see a discussion of Thayer's theory by Lenta "Judicial restraint and overreach" (2004) 20 *SAJHR* 544.

[30] Accordingly, "the true rationality test", applicants contend, does not lead to declarations of constitutional validity where the scheme is "substantively unjust". And the scheme's substantive justness involves more than the "counting of straws" – more than merely listing, as the Minister has done in this case, reasons for adopting the scheme. Whilst the test is not one of proportionality, a court must evaluate the reasons, lest the principle of legality, as they put it, "should suffer by putting form over substance or the quantity of reasons over the quality of the reasoning." Thus in evaluating the rationale for a chosen policy, goes the argument, the court must engage with the evidence as in all disputes; it must evaluate the bases on which the impugned provision is sought to be justified as rational.

[31] Having formulated an expanded test, the applicants go on to measure the impugned scheme against that test and conclude that the new scheme is irrational because it unfairly deprives constitutional protection and is substantively unfair.

[32] A convenient starting point in evaluating these submissions is to restate, albeit tersely, the rationality standard that may be culled from the decisions of this Court. The constitutional requirement of rationality is an incident of the rule of law, which in turn is a founding value of our Constitution.[28] The rule of law requires that all public power

[28] Section 1(c) of the Constitution.

must be sourced in law.[29] This means that state actors exercise public power within the formal bounds of the law. Thus, when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily.[30] It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. The requirement is meant "to promote the need for governmental action to relate to a defensible vision of the public good" and "to enhance the coherence and integrity" of legislative measures.[31]

[33] A decision whether a legislative provision or scheme is rationally related to a given governmental object entails an objective enquiry.[32] The test is objective because:

> "Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."[33]

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[29] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) and *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[30] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 74-5 and *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 19.

[31] *Union of Refugee Women* above n 4 at para 36 and *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

[32] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) at paras 263; 274 and 284, and *Pharmaceutical* above n 29 at para 86.

[33] *Pharmaceutical* id at para 86.

[34] It is by now well settled that where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.[34]

[35] It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad.

[36] Unlike many other written constitutions, our supreme law provides for rigorous judicial scrutiny of statutes which are challenged for the reason that they infringe fundamental rights. That scrutiny is accomplished, not by resorting to the rationality standard, but by means of a proportionality analysis. Our Constitution instructs that no law may limit a fundamental right except if it is of general application and the limitation is reasonable and justifiable in an open and democratic society.

[34] *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51.

[37] A rights limitation analysis is wide ranging. Courts take into account all relevant factors that go to justification of the limitation. The enquiry is not restricted to the factors listed under section 36(1) of the Constitution. All factors relevant to that particular limitation analysis may be taken into account in reaching a decision whether the limitation on a fundamental right is constitutionally tolerable or not. It is significant that one of the relevant factors listed in section 36 is the "relation between the limitation and its purpose".[35] This is so because the requirement of rationality is indeed a logical part of the proportionality test. It is self-evident that a measure which is irrational could hardly pass muster as reasonable and justifiable for purposes of restricting a fundamental right. Equally so, a law may be rationally related to the end it is meant to pursue and yet fail to pass muster under the rights limitation analysis.

[38] I return to the applicants' request that this Court adapt the rationality standard to apply also when a legislative measure unfairly deprives people of constitutional protection or is substantively unjust. This invitation should be declined. Our supreme law protects fundamental rights adequately. No legislative measure may limit an entrenched right except in the manner permitted by our supreme law. It is accordingly unnecessary to deploy the rationality standard to provide constitutional protection which section 36 already provides. Where an applicant complains that specific entrenched rights are infringed by a law, the real question to be asked is whether the restriction, if found to exist, is reasonable and justifiable. It is accordingly inappropriate to transplant

[35] Section 36(1)(d) of the Constitution.

Prof. Thayer's notion of rationality as the only "true rationality test" for judicial review of legislation into our jurisprudence when rationality is a mere threshold requirement for the exercise of all public power.

[39] The applicants further urged us to incorporate fairness as an element of rationality. Again, the applicants conflate the rationality and proportionality standards of review. I have already remarked that fairness is not a requirement in the rationality enquiry. If the substance of the complaint is about the deprivation of fundamental rights, it would be subject to the proportionality requirements of section 36 and not of mere rationality.

The rationale for the abolition of the common law claim

[40] We have described in some detail the legislative provisions that end the residual common law claim of an accident victim against a wrongdoer and replace it with a scheme that caps compensation payable by the Fund.[36] The applicants charge that by abolishing the residual claim, the new scheme is a radical departure from the avowed purpose of this class of social security legislation which is to provide, as judicial precedent suggests, the fullest possible protection to victims of road accidents.[37] They assert that the premise of the new scheme is to confer immunity on negligent drivers against all residual common law claims by their innocent victims who are now under-

[36] See [27] above.

[37] In this regard, see *Engelbrecht v Road Accident Fund and Another* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) at para 23 and *SA Eagle Insurance Co Ltd v Van der Merwe NO* 1998 (2) SA 1091 (SCA) at 1095J-1096A.

compensated because the scheme has arbitrarily capped their claims. The applicants argue that the rationale offered by the Minister for abolishing the common law claim does not withstand rational scrutiny. It is thus necessary to describe briefly the purpose of the scheme advanced by the Minister.

[41] The Minister, in a deposition made on his behalf by Ms MC Koorts, the Deputy Director-General: Public Entity Oversight of the Department of Transport, states that the roots of the 2005 amendment are to be found in the early 1990s. He explains that the legislative changes were made necessary by an ever-growing funding deficit of accident claims and, after 1994, also by the constitutional obligation to remove arbitrary forms of differentiation in the compensation of accident victims. He says that for decades the Fund was not fully funded. The income derived from the levy charged motorists on the fuel they purchase[38] did not match the liability which the Fund incurred year after year. This remained so despite the rapid increase of the fuel levy from two cents per litre in 1988[39] to 72 cents per litre presently.[40] For instance, for the five year period from 1985 to 1989 the funding deficit as seen against the value of proven claims ran to R906 million. From 1990 to 1995 the funding deficit rose to nearly R4.2 billion and by the end of 1996 it stood at R6.347 billion. In an affidavit filed on behalf of the Minister for

[38] Section 5 of the RAF Act read with section 47 of and Schedule 1 Part 5B to the Customs and Excise Act 91 of 1964.

[39] See table 10.1 in the Report of the Road Accident Fund Commission, 2002 at 219.

[40] Schedule 1 Part 5B to the Customs and Excise Act 91 of 1964.

Finance, we are informed that the accumulated deficit stood at R39.964 billion in 2009.[41] In effect, the Fund, he says, was doing business whilst technically insolvent.

[42] The Minister tabulates the sources of the envisaged interim financial savings. Firstly, the removed cap of R25 000 on the compensation to be paid to different categories of passengers is expected to lead to an increase in the compensation paid under the scheme by 15%. Although no saving is expected in relation to passenger victims, their claims too will be capped in the same way as all other accident victims. However, new caps on the claims for loss of income and support would result in a saving of only 1% to 3% of the Fund's total liability. The biggest savings likely to reduce the growing deficit would be derived from savings related to general damages being paid only to victims who suffer "serious injury". It is expected that this reform would reduce compensation by between 35.8% and 39%. Lastly, the compensation for medical expenses if based on the National Health Reference Price List[42] (NHRPL) for emergency medical treatment and the new UPFS tariff for other medical treatment, would bring about a saving of between 2% and 6% of compensation payable.

[41] In the High Court the Minister for Finance brought an application for leave to intervene on the grounds that the national treasury has a direct and substantial interest in ensuring and preserving any statutory provision which has the effect of maintaining the effective management of the resources of the Fund and ensuring efficiency in the expenditure of revenue raised through a compulsory contribution by road users in the form of a fuel levy. For reasons which are not immediately relevant, the High Court refused to grant the Minister for Finance leave to intervene, but ruled that the evidence tendered by the Minister is admitted as evidence in this application.

[42] See [87] *et seq* below.

[43] Another big cost saving, according to the Minister, will be derived from the reduced cost of administering the scheme. We are informed that the Fund's administrative costs are 44% of the total compensation paid. They include legal costs of about R2.5 billion made up of the Fund's own legal costs of about R900 million and its contribution to claimants' legal costs of about R1.6 billion. The party and party portion of the claimants' legal costs, if added, all amount to a R2.4 billion bill for delivering the Fund's services for the year ending 31 March 2009.

[44] The Minister has furnished two further explanations for the scheme. First, he states that with the start of constitutional democracy in 1994, the irrational legislative differentiation between the compensation due to passengers, on the one hand, and to drivers and pedestrians, on the other, became vulnerable to constitutional challenge. It became necessary to amend the legislation in order to give effect to the constitutional requirements regarding (a) expenditure which is efficient, effective and economical; (b) prohibition of irrational differentiation and (c) reasonable access to social security and health care.

[45] Second, he explains that whilst the economic viability of the Fund and the removal of unfair differentiation were important goals, the ultimate vision is that the new system of compensation for road accident victims must be integrated into a comprehensive social security system that offers life, disability and health insurance cover for all accidents and diseases. He acknowledges that a fault-based common law system of compensation for

road accident victims would be at odds with a comprehensive social security model. The intention is therefore to replace the common law system of compensation with a set of limited no-fault benefits which would form part of a broader social security net as public financial support for people who are poor, have a disability or are vulnerable. He goes on to state that the design of a comprehensive social security system is complex and will take time. However, Cabinet has approved the principle on 18 November 2009 and published a draft no-fault policy for public comment and consultation.[43]

[46] He would have us accept that the new scheme is a first step to greater reform. It is an interim measure towards the restructuring of the Fund's scheme into one which pays compensation on a no-fault basis. The new scheme has been adopted as an interim measure in order to arrest the ever bulging financial deficit of the Fund which cannot be adequately funded by constant increases in the petrol levy. If the unfunded deficit is left to grow it will, in time, harm the country's financial soundness. The Minister further explains that the purpose of the scheme is to make the RAF Act less vulnerable to constitutional challenges on the ground that it differentiates unfairly between accident victims and does not create reasonable access to social security and health care.

[47] The question that remains is whether, in the light of the rationale that the Minister has advanced, the scheme is rational? The applicants say that it is not because firstly, the

[43] See the "Draft Policy on the Restructuring of the Road Accident Fund as Compulsory Social Insurance in Relation to the Comprehensive Social Security System", GN 121 GG 32940, 12 February 2010.

continued existence of the residual common law claim does not influence the financial viability of the scheme whatsoever. On this argument, the objective of meeting the basic needs of every victim by making the scheme fully funded is not furthered by abolishing a residual claim against the wrongdoer. They contend that there is no proper relation between the objects of the scheme and the means it invokes.

[48] It cannot be denied that the abolition of the residual common law claim does not worsen or improve the financial standing of the Fund. The damages recoverable through the residual common law claim and the cost of pursuing it are entirely outside the funding remit of the Fund. The party at risk is not the Fund but the negligent motorist or his or her employer. Thus on the face of it, it would not be sufficient to put up the need to reduce the ever growing deficit of the Fund as the object for abolishing the common law claim. This however, is not the end of the matter.

[49] The scheme must be seen as a whole and not only in the light of the abolition of the common law claim. A vital part of the project to render the scheme sustainable is to place a cap on various heads of damages and to exclude all claims for general damages that are not a result of "serious injury".[44] The excluded claims for general damages are said to be 61% of all claims for general damages and would reduce the compensation payable by the Fund by well more than a third. This means that the compensation claimable under the residual common law action against motorists would potentially

[44] See section 17(1) and 17(1A) of the RAF Act.

increase in direct proportion to the level of the caps imposed. With the common law residual claim in place and with no legislative indemnity for negligent motorists, what the Fund would save in monetary terms because of capped liability for compensation would in effect have to be paid by liable motorists. This simply means that negligent motorists would have to bear the risk of substantially increased residual claims from accident victims.

[50] The colossal risk to which the new cap exposes all drivers (from which the Fund would previously have protected them by paying full compensation), as against the relatively small inattentiveness or oversight that could give rise to the risk, lends further support to the abolition of the common law action. What is more, the retention of the common law claim does not sit well with a social security compensation system that aims to provide equitable compensation (as distinct from the right to sue for compensation) for all people regardless of their financial ability. There are two aspects to this incongruity. The first is that the common law claim would be actually recovered only from those drivers or owners who are capable of in fact paying compensation or who are able to afford the required insurance. In my view, the number of drivers and owners who would be able to pay would be very small. It would be pointless for any person to sue in circumstances where actual recovery would not result. The second consideration is that the right to sue would be available only to those who can afford to pay legal fees or who are granted legal aid. And it is unlikely that legal aid would be granted to people who have claims that are in fact irrecoverable because of the inability of the driver or owner to

pay. These two factors would have a negative effect on an equitable compensation system if the common law right of action were to be retained.

[51] Another relevant factor is that the Minister assures us that the scheme is transitional and thus an interim measure. It is a step in the journey to reform the compensation regime to motor accident victims. However, it must be said that during the interim stage, the obvious soft belly of the scheme is that it is still fault-based. Whilst recourse to a residual claim is ousted and levels of compensation are capped or, in the case of general damages arising from non-serious bodily injuries, excluded, claims of victims are constrained by the requirement of driver negligence. It seems that the constraint imposed by the fault requirement suppresses the quantum of compensation to accident victims. Its temporary retention serves an obvious role of lowering the Fund's liability to compensate victims.

[52] The saving grace may be two cardinal considerations. The Minister and the Fund have made out a compelling case for the urgent reduction of the Fund's unfunded and ballooning liability. Simply put, urgent steps must be taken to make the Fund sustainable so that it can fulfil its constitutional obligations to provide social security and access to healthcare services. This is a pressing and legitimate purpose. The second consideration is that the government has committed to restructuring the Fund's scheme into one which would pay compensation on a no-fault basis and as part of its duty to facilitate access to

social security and health care.[45] On the evidence, there is no cause to doubt this commitment. What remains uncertain is how long the transitional stage will last. The applicants have submitted that even a transitional legislative scheme must pass constitutional muster. It too must meet the rationality test. That is undoubtedly correct. All laws must satisfy constitutional dictates. To meet this contention, the Minister has encouraged us to adopt the reasoning of the Supreme Court of Canada which has held in comparable circumstances that when government brings about reform which entails several steps and involves complex and competing policy options it must be permitted to do so in incremental measures and "be given reasonable leeway to deal with problems one step at a time."[46]

[53] There is indeed much to be said for this contention. I have earlier sketched the history of legislation that regulated third party insurance since 1942. It is a tale of numerous commissions of inquiry and frequent reform involving intricate and competing policy and legislative options. After more than six decades a fair, effective and financially viable scheme of compensation remains elusive. However, if on all accounts the impugned legislative scheme is an incremental measure towards reform and is a rational step in that direction, the lawmaker should be permitted reasonable room or leeway to advance the reform. This does not however mean that the mere fact that a

[45] See section 27(1)(a) and 27(1)(c) of the Constitution.

[46] See *Thompson Newspapers Co v Canada (Attorney General)* [1998] 1 SCR at 53; *Egan v Canada* [1995] 2 SCR 513 at 573 and *McKinney v University of Guelph* [1990] 3 SCR 299 (SCC) at 317.

prevailing system is but a step in the wake of a wonderful legislative ideal can for that reason only ever justify the violation of constitutional rights in the interim.

[54] We must keep in mind not only the government's intermediate purpose in enacting this legislation, but also its long-term objective. The primary and ultimate mission of the Fund is to render a fair, self-funding, viable and more effective social security service to victims of motor accidents. The new scheme is a significant step in that direction. On all the evidence it is clear, and the Minister and the Fund assure us, that the ideal legislative arrangement should not require fault as a pre-requisite for a road accident victim to be entitled to compensation for loss arising from bodily injury or death caused by the driving of a motor vehicle. Therefore, the abolition of the common law claim is a necessary and rational part of an interim scheme whose primary thrust is to achieve financial viability and a more effective and equitable platform for delivery of social security services.

[55] On balance, I am satisfied that the abolition of the common law claim is rationally related to the legitimate government purpose to make the Fund financially viable and its compensation scheme equitable.

[56] It remains to consider the attack to the scheme based on the Bill of Rights. This attack was premised on sections 12, 25, 27 and 38, read together with the duties in section 7(2).

Does the scheme infringe the right in section 12?

[57] In this Court, the applicants have submitted that the abolition of the common law claim infringes the right to be free from all forms of violence in terms of section 12(1)(c) read with section 7(2) of the Constitution. This is not the argument the applicants presented before the High Court. In that court, the first four applicants relied on the provisions of section 12(2)[47] which are directed at protecting bodily and psychological integrity. To this argument the Minister conceded in the High Court that section 12 which protects the freedom and security of the person read with section 7(2) and section 38 of the Constitution means that the state is obliged to afford an appropriate remedy to victims of motor vehicle accidents who suffer bodily injury as a result of someone else's negligence. The High Court considered itself not bound by the concession of the Minister and concluded that section 12(2) of the Constitution does not apply nor was it intended to apply to victims of motor vehicle accidents in the context of the state being obliged to afford an appropriate remedy to such victims. Given the outcome I reach, I do not think that it is necessary to embark on an excursion on the differences, if any, between section 12(1)(c) and 12(2) of the Constitution. I will approach the claim of the applicants on the basis they have presented it in this Court.

[47] Section 12(2) provides:

> "Everyone has the right to bodily and psychological integrity, which includes the right—
>
> (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments without their informed consent."

[58] Before we determine whether the scheme infringes section 12(1)(c), we must determine its reach, in particular whether it protects the security of the person of someone who may be injured or killed as a result of the negligent driving of a motor vehicle. Section 12(1) of the Constitution is directed at protecting the physical integrity of a person. In its terms, everyone has the right to "security of the person". It is clear from section 12(1)(c) that the protection includes the right "to be free from all forms of violence from either public or private sources".[48] It seems correct, as some commentators suggest, that the right is engaged whenever there is an "immediate threat to life or physical security" deriving from any source.[49]

[59] Section 12(1)(c) does not have an obvious equivalent in international conventions. Some commentators suggest that this right is an innovation in our Bill of Rights.[50] Woolman *et al* suggest that section 12(1)(c) draws its inspiration from article 5 of the Convention on the Elimination of all forms of Racial Discrimination (CERD).[51] CERD imposes both negative and positive duties on state parties. The negative obligation entails protecting people from 'violence or bodily harm whether inflicted by government

[48] The interim Constitution of 1993 did not have a provision which is an equivalent of section 12(1)(c) of the Constitution. However, in *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) at para 44 this Court relied on section 11 of the interim Constitution for the finding that the state bears the duty to prevent criminals in custody from committing acts of violence against members of the public.

[49] Woolman *et al* (eds) *Constitutional Law of South Africa* vol 3 (Juta & Co, Cape Town 2009) 40-9.

[50] Currie & De Waal *The Bill of Rights Handbook* 5 ed (Juta & Co, Cape Town 2005) 303.

[51] Woolman *et al* above n 49 40-8. South Africa signed the Convention on 3 October 1994 and ratified it on 10 December 1998.

officials or by any individual, group or institution'.[52] Affirmative obligations require state parties to prohibit, punish and discourage violence. These positive obligations

[52] Article 5 provides:

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) *The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;*

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

require both legislative and executive action to combat violence.[53] It must be explained that although the Convention is directed at racially motivated violence, section 12(1)(c) of the Constitution aims to put a stop to all forms of violence that inevitably would violate the security of a person. Section 12(1)(c) too, requires the state to protect individuals both negatively by refraining from such invasion itself and positively by restraining or discouraging its functionaries or officials and private individuals from such invasion.[54]

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks." (Emphasis added.)

[53] Article 2 provides:

"(1) States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

(2) States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

[54] See Currie & De Waal above n 50 303-5.

[60] Implicit in the applicants' submissions is that violence directed at victims of motor vehicle accidents violates the integrity of the person; that the state has positive and negative obligations to protect victims and that an abolition of a common law right to claim damages arising from motor vehicle accidents amounts to a breach of this duty. In this Court, the Minister again concedes that when someone is injured or killed as a result of the negligent driving of a motor vehicle, the victim's right to security of the person is infringed by the negligent driver. The Minister also accepts that the state is obliged, in terms of section 7(2), to protect road users against the risk of infringement of this kind. His attitude parts ways with that of the applicants' in relation to whether the protection the state affords to victims must include a civil claim against the wrongdoer for the full amount of the loss. The Minister accordingly denies that the amendment breaches the duty the state has under section 7(2). He argues that to the contrary the new scheme provides protection to the security of the person of road accident victims by creating a statutory claim.

[61] The question is whether section 12(1)(c) protects the security of the person of someone injured or killed as a result of the negligent driving of a motor vehicle. The jurisprudence on section 12(1)(c) has not confronted the kind of duty the state bears to protect the bodily integrity of victims of motor vehicle accidents. In *S v Baloyi*,[55] a case

[55] *S v Baloyi (Minister of Justice and Another intervening)* [1999] ZACC 19; 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC).

which concerned legislative protection of a person from domestic violence, this Court described the state's duty in broad, if not open-ended, terms:

> "The specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources. Read with section 7(2), section 12(1) has to be understood as obliging the State directly to protect the right of everyone to be free from private or domestic violence."[56] (Footnote omitted.)

[62] In *Rail Commuters*,[57] this Court was confronted with delictual claims which arose from the failure of an organ of state to discharge its constitutionally mandated duty to prevent violence against passengers who used its trains. Relying on the duty of the state organ derived from section 12(1)(c) read with section 7(2) this Court outlined the correct approach as follows:

> "The principle of accountability, therefore, may not always give rise to a legal duty whether in private or public law. In determining whether a legal duty exists whether in private or public law, careful analysis of the relevant constitutional provisions, any relevant statutory duties and the relevant context will be required. It will be necessary too to take account of other constitutional norms, important and relevant ones being the principle of effectiveness and the need to be responsive to people's needs."[58] (Footnote omitted.)

[63] The concession that the Minister has made, is the correct one. A plain reading of the relevant constitutional provision has a wide reach. Section 12(1) confers the right to

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[56] Id at para 11.

[57] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC).

[58] Id at para 78.

the security of the person and freedom from violence on "everyone". There is no cogent reason in logic or in law to limit the remit of this provision by withholding the protection from victims of motor vehicle accidents. When a person is injured or killed as a result of negligent driving of a motor vehicle the victim's right to security of the person is severely compromised. The state, properly so, recognises that it bears the obligation to respect, protect and promote the freedom from violence from any source.

[64] This constitutional duty finds echo in an array of measures both legislative and executive. It is commonplace that statutory and common law rules of the road are in great measure directed at preventing injury and death on the road. Road safety sits at the core of most of these protective measures. That explains why their breach is almost invariably reinforced by criminal sanction. Ready examples would be offences related to driving without a valid licence, roadworthiness of motor vehicles, speeding, reckless and negligent driving and driving under the influence of alcohol.[59] Considerable human and other resources are deployed to administer and enforce rules of the road by dedicated law enforcement structures of provincial and local government.

[65] The Minister, correctly so, draws our attention to other statutory provisions which ensure that the security of the person of motor accident victims is protected. A ready example would be the constitutional and statutory requirement that no person may be

[59] See sections 12, 42, 43, 59, 63 and 65 of the National Road Traffic Act 93 of 1996.

refused emergency medical treatment.[60] Although the right is written in negative terms, at the very least, victims of motor accidents would be entitled not to be denied emergency healthcare by a health care provider, health worker or health establishment. In addition, section 4 of the National Health Act requires the Minister to prescribe categories of people who are eligible for free non-emergency health services at public health establishments. It appears that motor vehicle accident victims whose medical care is wholly or partially funded by the Fund are full paying patients at public health establishments. That must be so because the Fund would bear the duty to pay.

[66] The real question is whether poor motor accident victims who otherwise qualify for non-emergency health care free of charge may be denied it. It seems to me there is no valid reason for reading the ministerial determination of fees in this narrow manner that would deny accident victims access to non-emergency health care, if they otherwise qualify as impecunious.[61] The state pays grants to disabled people[62] including victims of motor vehicle accidents. Lastly, it must be added that the RAF Act is itself a social security measure directed at protecting the victims of motor vehicle accidents. It may properly be seen as part of the arsenal of the state in fulfilling its constitutional duty to protect the security of the person of the public and in particular of victims of road accidents. Its principal object is to ameliorate the plight of victims rendered vulnerable

[60] Section 27(3) of the Constitution provides: "No one may be refused emergency medical treatment." Also see section 5 of the National Health Act 61 of 2003 which provides: "A health care provider, health worker or health establishment may not refuse a person emergency medical treatment."

[61] See section 4 of the National Health Act.

[62] See section 9 of the Social Assistance Act 13 of 2004.

by motor accidents. The state may also respect and protect bodily integrity by creating a statutory right to compensation in the event of bodily injury or death arising from a motor collision. In this sense, the impugned legislation is part of that social security.

[67] For all these reasons, I conclude that the state incurs section 12 obligations in relation to victims of road accidents.

Has the abolition of the common law unjustifiably limited section 12(1)(c)?

[68] The applicants' argument that by abolishing the common law claim, the legislature has unjustifiably limited their right to physical integrity or freedom from violence, will now be addressed. They say that the impugned scheme terminates the duty of the wrongdoer to recompense the victim and in that way takes away the effectiveness of the remedy provided for the infringement of the right to physical integrity.

[69] First, the lawgiver has the power to change or adapt the common law provided that the change is not inconsistent with the Constitution. Section 39(3) acknowledges the existence of other rights or freedoms that are recognised or conferred by the common law, customary law or legislation[63] to the extent that they accord to the supreme law. This does not mean that the Constitution limits the legislative power of Parliament in relation to adapting or abolishing parts of the common law, indigenous law or of existing

[63] Section 39(3) provides: "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

legislation. Whilst existing rights, whatever their origin, remain important, it is indeed open to Parliament to adapt or abolish existing rights sourced in any existing law provided that in doing so, it acts within the confines of the Constitution.

[70] It would be wrong to understand section 39(3) as providing a bulwark against any adaptation of the common law. If anything, section 39(2) enjoins courts to develop the common law in line with the dictates of the Constitution. In practice, courts adapt and in some instances abolish the common law, so too indigenous law, in order to ensure that these sources of law are well suited to the demands of our modern times and the normative grid of the Constitution.

[71] It is open to Parliament, as it is to the courts, to adapt the common law provided that in that process the Constitution is not breached. The ultimate question resolves itself into whether the statutory abolition of the common law remedy to recover damages from a wrongdoer breaches the Constitution.

[72] It bears repeating that the common law provides a claimant with a delictual remedy to recover from a wrongdoer damages arising from bodily injury or the death of a breadwinner caused by the unlawful and negligent driving of a motor vehicle. The delictual remedy vindicates the right to bodily integrity. The question is whether the common law delictual remedy also protects and enforces, in the language of section

12(1)(c) of the Constitution, the right to the security of the person which includes the entitlement to be free from all forms of violence from either public or private sources.

[73] In *Fose v Minister of Safety and Security*[64] this Court had to decide whether a breach of a constitutionally entrenched fundamental right may be vindicated by a delictual remedy such as an award of damages. In that case, the applicant contended that he was entitled to a public law remedy of constitutional damages and not to a private law remedy of delictual damages. The contention was that any person who applied to court for "appropriate relief" for an infringement of a fundamental right under the interim Constitution may not resort to a delictual remedy because the claimant was entitled only to a constitutional remedy.[65] The Court held that in principle "appropriate relief" was relief that was required to protect and enforce the interim Constitution and that there was no reason in principle why "appropriate relief" should not include an award of damages where such an award was necessary to protect and enforce constitutionally recognised fundamental rights.[66] The Court observed that our private law of delict was flexible and that in many cases the common law would be broad enough to provide all the relief that would be appropriate for a breach of constitutional rights.[67] In the result the Court declined to grant constitutional damages.

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[64] [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851(CC).

[65] Under the interim Constitution a claimant who applied to court was entitled to "appropriate relief" under section 7(4)(a). Fundamental rights were protected in chapter 3 of the interim Constitution.

[66] *Fose* above n 64 at para 60.

[67] Id at para 58. Also see *Rail Commuters* above n 57 at para 81.

[74] It seems clear that in an appropriate case a private law delictual remedy may serve to protect and enforce a constitutionally entrenched fundamental right. Thus a claimant seeking "appropriate relief" to which it is entitled, may properly resort to a common law remedy in order to vindicate a constitutional right. It seems obvious that the delictual remedy resorted to must be capable of protecting and enforcing the constitutional right breached.

[75] Turning to the present facts, it seems plain that but for its statutory abolition, victims of motor accidents were entitled to invoke the common law delictual remedy to recover damages against wrongdoers relying on the constitutional protection to their bodily integrity or security of the person. Simply put, they could seek to recover damages in order to secure their bodily integrity. It must follow that when Parliament abolishes the common law right of recourse it also limits the right entrenched in section 12(1)(c) of the Constitution. It diminishes the motor accident victims' capacity to protect and to enforce the right to the security of the person. This limitation would render the abolition of the common law remedy unconstitutional unless it is justifiable.

Is the limitation of section 12 justifiable?

[76] Section 12(1)(c) is limited by a law of general application. What remains is to probe whether the limitation is reasonable and justifiable in a democratic society that prides itself on the founding values of our Constitution.

[77] As we have seen, the prime purpose of the legislative scheme is to provide reasonable, fair and affordable compensation to all innocent victims of motor accidents. It is to be expected that a scheme which depends on public funding would at times have income less than the compensation victims may be entitled to. It is thus fair and reasonable that the scheme should have a cap as to the character and extent of the compensation each victim is entitled to.

[78] As I understand it, the real complaint of the applicants is that they have lost the common law right of recourse and have to contend with a ceiling on their claim for general damages and to loss of income or support. They add that the common law right of recourse against wrongdoers comes at no cost to the Fund. That is true. It is the wrongdoer and not the Fund that would be liable for the residual common law damages. The Minister and the Fund have advanced adequate justification for this limitation. They rehearse no fewer than eleven substantive grounds of justification, most of which are cogent. The over-arching grounds are the urgent need to make the Fund financially viable and sustainable, and to make its compensation regime more inclusive, transparent, predictable and equitable.

[79] The right to the security of the person is of great importance. The adequate protection of bodily integrity is often a prerequisite to the enjoyment of all other guaranteed rights. As I have shown earlier, the right is protected by the state in a myriad

of ways. The protection includes providing a publicly funded insurance to compensate accident victims. However, the state's constitutional duty to protect and enforce the right to security of the person need not always include a civil claim for damages in delict or indeed any private law remedy.[68] In this regard O'Regan J said the following:

> "These remarks should not, of course, be understood to suggest that delictual relief should not lie for the infringement of constitutional rights in appropriate circumstances. There will be circumstances where delictual relief is appropriate. It is important, however, that we do not overlook the value of public law remedies as effective and appropriate forms of constitutional relief. It should also be emphasised that a public law obligation such as that under discussion does not automatically give rise to a legal duty for the purposes of the law of delict."[69]

[80] The impugned scheme puts in the place of the common law residual right a compensation regime that is directed at ensuring that the Fund is inclusive, sustainable and capable of meeting its constitutional obligations towards victims of motor vehicle accidents. In any event, the limitation of the right is only partial because a victim is entitled to compensation, although now limited, under the legislative scheme. Given the purpose and the importance of the scheme and in the absence of less restrictive means and having taken into consideration other relevant factors I am satisfied that the limitation of section 12(1)(c) of the Constitution is reasonable and justifiable.

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[68] See *Fose* above n 64 at paras 77-80. This position seems to accord with the position Canadian courts have taken that the right to security of the person under section 7 of the Charter does not include a right to a civil claim for damages for personal injury. See *Taylor v Canada (Minister of Health)* (2007) 285 D.L.R. (4th) 296 at para 55; *Filip v Waterloo (City)* (1992) 12 C.R.R. (2d) 113 at 117; *Budge v Calgary (City)* (1991) 6 C.R.R. (2d) 365 at 372-3; *Wittman (Guardian Ad Litem) v Emmott* (1991) 77 D.L.R.(4th) 77 at 87-9; *Whitbread v Walley* (1990) 77 D.L.R. (4th) 25 at 27-8 and *Medwid v Ontario* (1988) 48 D.L.R. (4th) 272 at 282 and 287-8.

[69] *Rail Commuters* above n 57 at para 81.

Consequently the legislative abolition of the residual common law claim passes constitutional muster.

Does a cap on compensation for loss of income or of dependants' support infringe the right to property under section 25(1) of the Constitution?

[81] The applicants contend that the right to property under section 25(1) of the Constitution is engaged "when medical costs are caused, earning capacity is reduced or destroyed and dependants' support from their breadwinners cut off." They submit that these are a "bundle of rights and assets"[70] or "rights with a monetary value" or "new property"[71] all of which the constitutional property clause protects. The applicants invoke *Phumelela Gaming and Leisure Ltd v Gründlingh*,[72] a case in which this Court accepted that loss of goodwill is protected by section 25 of the Constitution, in order to make the submission that goodwill is to a legal person what earning capacity is for a natural person.[73]

[82] To meet this argument, the Minister contends that when someone incurs costs he does not suffer a deprivation of property merely because the net value of his estate is

[70] See *Administrator, Natal, and Another v Sibiya and Another* 1992 (4) SA 532 (A) at 539A-B; *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917A-C and *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665. Also see *Libyan American Oil Company (LIAMCO) v Government of Libyan Arab Republic* (1981) 20 ILM 1; 62 ILR at 140 and Reich "The New Property" (1964) 73 *Yale LJ* 773.

[71] Chaskalson "The property clause: Section 28 of the Constitution" (1994) *SAJHR* 131 at 132.

[72] *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC).

[73] For this proposition they rely on Neethling *et al Law of Delict* 6 ed (LexisNexis Butterworths, Durban 2010) at 19 n 153 and Van Heerden & Neethling *Unlawful Competition* 2 ed (LexisNexis Butterworths, Durban 2008) at 16.

thereby reduced. If it were so, every imposition of tax would constitute a deprivation of property because the net value of the taxpayer's estate is thereby reduced. The Minister also submits that one's earning capacity does not constitute property protected under section 25. On this argument earning capacity is an element of the security of the person protected under section 12. The Minister also sought to persuade us that it is the negligent driver and not the state that causes a victim to incur loss of income or support. The legislative scheme does not deprive a victim of income or support. It regulates the extent to which the Fund would be liable. It simply provides a legislative underpin by way of a right to compensation for an innocent victim.

[83] The meaning of property under the property clause is indeed a vexed question. This is so for several reasons. I cite two only. "Property" as used in the property clause is a word of broad and inexact purport and yet it is not defined. The common law and indigenous law traditions conceptualise property and legal relationships that relate to it in different ways. Section 25(4)(b) makes it clear that property is not limited to land. It must follow that both corporeal and incorporeal property enjoy protection. For present purposes let it suffice to state that the definition of property for purposes of constitutional protection should not be too wide to make legislative regulation impracticable and not too narrow to render the protection of property of little worth. In many disputes, courts will readily find that a particular asset of value or resource is recognised and protected by law as property. In other instances, determinations will be contested or prove elusive.

[84] Happily, in this case, given the conclusion I reach, it is unnecessary to resolve the debate whether a claim for loss of earning capacity or for loss of support constitutes "property". I will assume without deciding in favour of the applicants that a claim for loss of earning capacity or of support is "property".

[85] Even if the impugned law does deprive the victim of property in the form of reduced compensation for loss of earning capacity or support, the deprivation must be arbitrary before a limitation of the right may occur. Arbitrary deprivation of property may be procedural or substantive. I do not understand the applicants' constitutional challenge to include a complaint that the impugned statute resorted to an arbitrary procedure for reducing compensation. They attack the scheme as substantively irrational; as an arbitrary deprivation of property.

[86] I have already found that the scheme, including the reduction of compensation recoverable for loss of income or support, properly advances the governmental purpose to make the Fund financially viable and sustainable and to render the compensation regime more transparent, predictable and equitable. Accordingly, I am unable to find an arbitrary deprivation of property, which is the threshold requirement for a limitation of section 25(1). It follows that absent a limitation of the right, I need not enter into a justification analysis in relation to section 25(1). The constitutional challenge to the amendment on the ground that it infringes section 25(1) of the Constitution must fail.

Whether the prescribed UPFS tariff under Regulation 5(1) is rational and if so, whether it limits the right to have access to health care services?

[87] In Regulation 5(1), the Minister has prescribed that the tariff for claims to be paid by the Fund for hospital and other medical treatment is that prescribed in the UPFS tariff.[74] The sharp end of the applicants' constitutional attack against the Regulation is four-fold. They contend, in the first instance, that the Regulation is irrational and thus unconstitutional. Secondly, that the tariff deprives the innocent victim of an effective remedy in breach of section 12 read together with section 7(2) of the Constitution; thirdly, that it is retrogressive and not progressive as required by section 27(2); and last that it is unreasonable and therefore in breach of section 27(1)(a).

[88] For these contentions, the applicants draw attention to the facts which may be gleaned from the specialist testimony of Dr Edeling, a neurosurgeon; Dr Oelofse; Dr Baalbergen; Dr Theron; and Dr Campbell. To this list must be included Mr Seirlis, the National Director of the third applicant, QuadPara Association of South Africa, as well as Ms Best. Certain facts appear from the evidence. The prescription of UPFS makes it impossible for road accident victims to obtain treatment in a private health care centre. Dr Edeling explains why. The tariff is so low that road accident victims will not be able to obtain treatment from private health care institutions.

[74] Regulation 5(1) provides:

> "The liability of the Fund or an agent contemplated in section 17(4B)(a) of the Act, shall be determined in accordance with the Uniform Patient Fee Schedule for fees payable to public health establishments by full-paying patients, prescribed under section 90(1)(b) of the National Health Act, 2003 (Act No. 61 of 2003), as revised from time to time."

[89] He draws attention to three tariffs which show what fees medical practitioners generally receive and compares the UPFS tariff with those tariffs and fee guidelines for the payment of private medical care. The lowest of the three tariffs is the NHRPL. This is a list of procedure codes and descriptions, rules and modifiers with a reference price overseen by the Department of Health. Most medical aid schemes determine their baseline rate of payment for medical services as a percentage of the NHRPL rate. The second tariff is the Compensation for Occupational Injuries and Diseases (COID) tariff according to which the Workman's Compensation Commissioner pays for the medical treatment of injured workers. It is said to be double the NHRPL tariff and 300% to 500% higher than the UPFS tariff. The last comparator tariff is the Health Professions Council Ethical Tariff for Medical Practitioners (HPCMP) which is generally known as the "ethical ceiling" of what private medical practitioners could charge. Although this tariff has recently been scrapped it is still used by medical practitioners as a reasonable guideline. The ceiling for senior medical practitioners was up to 120% of the HPCMP tariff. What stands out clearly from the above is that in practice, the costs of private medical services vary between the NHRPL and the HPCMP tariffs. It must follow that the UPFS tariff is far below the lowest of these tariffs. It simply cannot be compared with the rates commonly charged for reasonable private care. This conclusion is supported by Drs Oelofse and Baalbergen.

[90] On behalf of the respondents, Dr Fleming, a neurologist, testified that most neurologists would be prepared to work for fees prescribed under the NHRPL tariff. However, his evidence does not meet head-on the evidence of the applicants. This is so, because he does not say that neurologists will be willing to work at the UPFS tariff. As we have seen, the NHRPL tariff is said to be 300% to 500% higher than the UPFS tariff.

[91] I have no hesitation in finding that the UPFS tariff is a tariff that is wholly inadequate and unsuited for paying compensation for medical treatment of road accident victims in the private health care sector. The evidence shows that virtually no competent medical practitioner in the private sector with the requisite degree of experience would consistently treat victims at UPFS rates. This simply means that all road accident victims who cannot afford private medical treatment will have no option but to submit to treatment at public health establishments.

[92] It emerges from the evidence that the UPFS tariff does not cover material services which road accident victims require and which are provided by the private health care sector. Dr Edeling draws specific attention to quadriplegic needs. He lists services which do not appear on the UPFS tariff which relate to home visits by a psychiatrist, counselling by a psychologist, home nursing services and home-based physiotherapy. The evidence suggests that for victims rendered quadriplegic or paraplegic living in informal settlements or living far away from hospitals or clinics, home visits can mean the difference between life and death. It is clear, that the UPFS tariff is inadequate for

paying compensation for medical treatment for road accident victims and in particular in relation to victims rendered quadriplegic or paraplegic.

[93] Lastly and perhaps more importantly, the evidence shows that in certain material respects the public health institutions are not able to provide adequate services crucial to the rehabilitation of accident victims who are permanently disabled. Dr Edeling testifies that over many years in practice as a neurosurgeon he has had to assess hundreds of permanently disabled road accident victims with head and spinal injuries. He has been confronted on a repeated basis with evidence of very inadequate facilities at public health institutions. In very detailed evidence, Mr Seirlis explains the lot of a road accident victim who is rendered quadriplegic or paraplegic. He or she requires immediate and long-term medical and rehabilitative care. Many require specialised care for life, without which they have to face life-threatening complications. He adds that even with care such patients easily develop urinary tract infections, pulmonary complications such as pneumonia and frequent bowel obstruction all of which need urgent and continuous medical care. He adds that these services are mostly not available from state facilities but are available from private health care providers.

[94] A quadriplegic or paraplegic is constantly at risk in a state hospital as a result of the chronic lack of resources, paucity of staff and inexperience in dealing with spinal cord injuries. This evidence is confirmed by Ms Best, the President of the Occupational Therapy Association of South Africa. She finally concludes by stating that payment by

the Fund at UPFS rates will make it nearly impossible for seriously injured patients to procure medical and rehabilitative care on a sustained basis in the private sector. Lastly, Dr Baalbergen, Dr Campbell and so too Dr Theron reach the stark conclusion that spinal cord injured patients who are wholly dependent on state health care facilities commonly receive substandard care and are at the material risk of untimely death due to untreated complications.

[95] The affidavit of Dr Lekalakala has been put up by the respondents to answer the detailed evidence of the applicants I have shortly rehearsed above. He does not answer the specific complaints of the applicants. He concedes, properly so, that there are serious deficiencies within the state health care centres and acknowledges that there are vast disparities between the public and private sector, a matter which remains a key challenge. To his affidavit he attaches the National Plan for the Efficient and Equitable Development of Tertiary and Regional Hospital Services (National Plan) and expresses the hope that the deficiencies in the public health system will be addressed in time. The National Plan, which was drafted in 2004, frankly confesses to serious systemic challenges due to chronic underfunding and an ever increasing demand for services. It recognises that this under-resourcing of public healthcare establishments leads to poor quality of care, substantial geographic inequality of care, poor referral systems between regional and tertiary hospitals and a lack of patient transport. In short, the National Plan, in great part, acknowledges the deficiencies of public health systems which were described by the expert testimony presented on behalf of the applicants.

[96] It is indisputable that imposing public health tariffs on road accident victims amounts to restricting them to treatment at public health institutions, if they cannot fund the healthcare themselves. In some instances, that restriction will be perfectly reasonable and adequate. However, the overwhelming and undisputed evidence demonstrates that road accident victims who are rendered quadriplegic or paraplegic require specialised care for life without which there can be life-threatening complications which if unattended lead to their inevitable demise.

[97] To this charge, the respondents have no effective answer. They acknowledge the vast disparity between private and public healthcare establishments and explain how they propose to improve public healthcare establishments. What they do not do, is to meet head-on the complaint that quadriplegic or paraplegic road accident victims would not easily survive the health care services at public hospitals.

[98] Another important, but not individually decisive, consideration is that actuarial evidence demonstrates that an implementation of the UPFS tariff would save the Fund no more than 6% of its total compensation bill. This relatively meagre saving seen against other compelling factors makes it unreasonable to consign quadriplegics and paraplegics to a possible death by reducing their adequate access to medical care in pursuit of a financial saving of a negligible order. The respondents do not suggest that there is a historical or present unfairness related to giving serious spinal injury accident victims

access to private health care services whilst public health provision is being progressively improved.

[99] I am satisfied that the UPFS tariff is incapable of achieving the purpose which the Minister was supposed to achieve, namely a tariff which would enable innocent victims of road accidents to obtain the treatment they require. UPFS is not a tariff at which private health care services are available; it does not cover all services which road accident victims require with particular reference to spinal cord injuries which lead to paraplegia and quadriplegia. The public sector is not able to provide adequate services in a material respect. It must follow that the means selected are not rationally related to the objectives sought to be achieved. That objective is to provide reasonable healthcare to seriously injured victims of motor accidents.

[100] I may briefly add that, even if Regulation 5(1) were found to be rational, the tariff is in any event under-inclusive in relation to the healthcare needs of quadriplegic and paraplegic road accident victims and, for that reason would be unreasonable and thus in breach of section 27(1)(a) read together with section 27(2) of the Constitution.

[101] Having reached this conclusion I need not resolve the balance of the constitutional complaints in relation to the tariff. I would accordingly strike down Regulation 5(1) and the Minister would be obliged to make a fresh determination.

Whether the right to adequate remedy in terms of section 38 of the Constitution has been infringed?

[102] The applicants submit that section 38 of the Constitution has been infringed because the amendment provides an inadequate remedy in the place of one it displaces and in that way, negatively affects the applicants' right to a remedy as envisioned in section 38 of the Constitution. In effect, the applicants invite us to determine whether the scheme introduced by the amendment breaches the right to adequate remedy for loss incurred by motor accident victims. It is so that the amendment does abolish the residual common law right to claim losses not compensable under the RAF Act.

[103] This complaint is without merit. Section 38 is available to an applicant who alleges that a right in the Bill of Rights has been infringed or threatened. Where that is so, a court may grant appropriate relief. Save in relation to Regulation 5(1), which I find inconsistent with the Constitution, the scheme does not infringe any right in the Bill of Rights. The amendment has introduced a rational scheme that thus passes that threshold requirement. Even if the new scheme is a limitation on the right to approach a competent court, I have already found that the limitation the scheme places on the right to adequate remedy is reasonable and justifiable in all the circumstances. For the new scheme to advance the reform package it promotes, the residual common law claim must give way to a more inclusive, sustainable and equitable system of compensation for road accident victims. It must also be remembered that the amendment furnishes an underpin, or, if you will, a right to compensation, to all motor accident claimants who have incurred

losses arising from negligent driving. It is so that the scheme changes the liability of the Fund from unlimited to limited compensation to accident victims. The limitation is not only rational but also reasonable and justifiable. As we have seen, it is necessary to reform the compensation system of the Fund. Public funds to finance the liability of the Fund are finite. The scheme must be sustainable, open and fair to every victim. This ground for challenging the constitutional validity of the amendment too must fail.

What is the appropriate remedy?

[104] It should be clear that I would dismiss all constitutional challenges save the one against Regulation 5(1). Whilst in the High Court the applicants attacked section 17(4B) which empowers the Minister to make Regulation 5(1), in this Court the applicants rightly limited the attack to Regulation 5(1). This change of stance is well taken. The empowering provision, section 17(4B),[75] does not require the Minister to prescribe, as he did, the UPFS tariff in particular. It simply empowers the Minister to prescribe, after consultation with the Minister for Health, a tariff based "on the tariffs for health services provided by public health establishments". The provision seems to recognise that there is

[75] Section 17(4B) provides:

> "(a) The liability of the Fund or an agent regarding any tariff contemplated in subsections (4)(a), (5) and (6) shall be based on the tariffs for health services provided by public health establishments contemplated in the National Health Act, 2003 (Act No. 61 of 2003), and shall be prescribed after consultation with the Minister of Health.
>
> (b) The tariff for emergency medical treatment provided by a health care provider contemplated in the National Health Act, 2003—
>
> (i) shall be negotiated between the Fund and such health care providers; and
>
> (ii) shall be reasonable taking into account factors such as the cost of such treatment and the ability of the Fund to pay.
>
> (c) In the absence of a tariff for emergency medical treatment the tariffs contemplated in paragraph (a) shall apply."

more than one tariff for health services in public health institutions and that, subject to the required consultation, and the constitutional imperative of reasonable access to healthcare, the Minister is empowered to fashion a tariff. It need not be the UPFS tariff.

[105] The order I intend to make is that Regulation 5(1) is inconsistent with the Constitution. I would not suspend the order of constitutional invalidity. Firstly, the evidence shows that a number of victims of road accidents that occurred before the effective date of the amendment are entitled to and do receive health care in private institutions. A cost which the Fund seems to be bearing well. Secondly, a suspension of the order would create unnecessary hardships for those who urgently need appropriate treatment that is not available in public healthcare establishments but is accessible in private hospitals. In any event, the actuarial evidence placed before us shows that an implementation of Regulation 5(1) has minimal adverse financial impact. If implemented, the Fund would save no more than 6% of its total claims expenditure. Whilst the Minister takes time to reformulate the tariff to be made under the empowering provision, accident victims must be entitled to access adequate healthcare.

[106] Nor do I intend to limit its retrospective application. The retrospective application to the date the Regulation took effect, will ensure that the liability of the Fund for healthcare needs of victims of motor accidents and in particular quadriplegics and paraplegics who fell victim to road accidents from the inception of the amendment up to the date of the order remains intact. The order is intended to afford victims of motor

vehicle accidents compensation for medical treatment or health services to which they would have been entitled had the Amendment Act not been passed.

What costs order should be made?

[107] The High Court made no order as to costs. No cogent reasons have been advanced why that decision not to award costs should be interfered with. In this Court the applicants enjoy a certain measure of success. They had to come to this Court to upset the order of the High Court on Regulation 5(1). They are entitled to be reimbursed for at least a part of the costs they have incurred in this Court. My considered view is that the Minister must pay one third of the costs of the applicants which costs shall include the costs for the use of two counsel for each set of applicants.

Order

[108] The following order is made:

(a) The application for leave to appeal is granted.

(b) The appeal is dismissed save to the extent set out below.

(c) The appeal against the order of the High Court dismissing the applicants' constitutional challenge to Regulation 5(1) issued by the Minister for Transport on 21 July 2008 in terms of section 17(4B)(a) of the Road Accident Fund Act 56 of 1996, is upheld.

(d) It is declared that Regulation 5(1) is inconsistent with the Constitution and invalid.

(e) Until the Minister for Transport prescribes a new tariff for health services in terms of section 17(4B)(a) of the Road Accident Fund Act, a third party who has sustained bodily injury and whom the Road Accident Fund is obliged to compensate as contemplated in sections 17(4)(a), 17(5) and (6) of the Road Accident Fund Act, is entitled to compensation or health services as if he or she had been injured before the Road Accident Fund Amendment Act, 19 of 2005 came into operation.

(f) The Minister for Transport is ordered to pay one third of the costs of the first to the eleventh applicants, which shall include costs of two counsel.

Ngcobo CJ, Brand AJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concur in the judgment of Moseneke DCJ.

For the First and Third to Tenth Applicants:	Advocate JJ Gauntlett SC and Advocate FB Pelser instructed by Bowman Gilfillan Inc.
For the Second Applicant:	Advocate G Budlender SC and Advocate N Mayosi instructed by Bowman Gilfillan Inc.
For the Eleventh Applicant:	KM Röntgen of Röntgen & Röntgen Inc.
For the First Respondent:	Advocate W Trengove SC, Advocate MR Madlanga SC and Advocate HJ de Waal instructed by the State Attorney, Johannesburg.
For the Second Respondent:	Advocate S Budlender, Advocate B Makola and Advocate N Mji instructed by Bell Dewar Inc.