(MIS)UNDERSTANDING THE ONCE-AND-FOR-ALL RULE

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

1 Introduction

The "once-and-for-all" rule (OAFA rule) originated in English law. (For a detailed exposition of the historical development of this rule, see Van der Walt *Die Sommeskadeleer en die "Once and for All" Reel"* (unpublished doctoral thesis, University of South Africa) 1977.) It has been part of our law for the better part of a century (see discussion below). This rule entails that a plaintiff may not bring more than one action for damages, insofar as this action is based on the same cause of action (Potgieter, Steynberg and Floyd *Visser and Potgieter: Law of Damages* 3ed (2013) 153). The rule has particular significance for prospective loss because where a prospective loss is based on the same cause of action as past loss, the claim for the prospective loss has to be brought at the same time as the claim for past loss (*Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) (*Evins v Shield Insurance*). It stands to reason, therefore, that a claim cannot be instituted too soon because the damage arising from the delictual conduct has to be assessed properly. On the other hand, because all delictual claims prescribe after three years, the action for damages has to be brought before three years have passed (*Evins v Shield Insurance supra; s*ee also Potgieter *et al Visser and Potgieter: Law of Damages* 155 and further). Between the OAFA rule and the prescription of a delictual claim, there is not much opportunity for a plaintiff to become aware of the true extent of his or her future loss.

The Constitutional Court in *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* (2018 (1) SA 335 (CC) (*MEC Health*)) recently had to consider whether the common law, insofar as it relates to the OAFA rule, should be developed to make provision for instalment or periodic payments. The majority, per Froneman J, held that the law did not make provision for instalment payments but that any amendment to the rule should be left to the legislature. Jafta J, in his minority decision, held that it was not necessary to develop the common law, as it already made provision for instalment payments.

The purpose of this note is to show that the majority decision in *MEC Health* is based on an incorrect understanding of the nature and purpose of the rule, and that the rule does not necessarily exclude periodic or instalment payments. Awarding periodic payments in the case of prospective loss will, furthermore, result in a fairer dispensation, which is also, as is

shown below, more aligned with the fundamental principles of the law of delictual damages. Provision is already made for periodic payments in the case of compensation schemes such as the Road Accident Fund Act (56 of 1996) and the Road Accident Benefit Scheme Bill (B17 2017, which will replace the Road Accident Fund Act) and the Compensation for Occupational Injuries and Diseases Act (30 of 1993).

2 *Member of The Executive Council for Health and Social Development, Gauteng v DZ obo WZ*

2 1 Facts

DZ instituted a delictual action against the Gauteng MEC in the South Gauteng High Court after her child was born with cerebral palsy resulting from asphyxia during delivery. She alleged that the hospital staff had been negligent. The MEC conceded negligence on the part of the hospital staff and the parties furthermore agreed on the quantum of damages, but, in the words of Froneman J, it was "an agreement with a wrinkle" (par 2). The MEC, in her amended plea, contended that she did not have to pay the damages for future medical expenses in a lump sum. Instead she wanted to pay service providers directly if and when these expenses arose, within 30 days of presentation of a written quotation. The MEC further alleged that the common law allowed this and if not, the common law should be developed.

2 2 Courts a quo

The Gauteng MEC and the *amici* advanced the following three propositions in support of the amended plea (par 12):

a) Delictual compensation need not necessarily be paid in money; it can also be paid in kind.
b) The OAFA rule applies only to the determination of liability on the merits of a delictual claim and not to the quantification of damages.
c) A defendant may challenge the amount of damages claimed by the plaintiff on the basis that a plaintiff is more likely to use the money for public than for private healthcare; hence medical expenses should, in certain instances, rather be paid in kind – namely, by the provision of medical services.

For the purposes of this case note, the third proposition will not be discussed.

Both the High Court and the Supreme Court of Appeal dismissed the amended plea (par 3). The Supreme Court of Appeal held that the OAFA rule precluded payment of future medical expenses in the manner proposed by the defendant (par 3). In addition, it held that the development of the common law in this instance was better left to the legislature (par 3). The court also held that the MEC had failed to show that this manner of compensation would enhance access to healthcare (par 3).

2 3 Constitutional Court

The MEC Gauteng approached the Constitutional Court for leave to appeal this decision. The court granted leave to appeal but dismissed the appeal with costs. Both the MECs of the Departments of Health of the Eastern and Western Provinces were granted admission as *amici curiae* (par 5).

2 3 1 Majority judgment

The majority judgment was delivered by Froneman J. The judgment is somewhat confusing insofar as its structure is concerned, but the legal questions that may be distilled from the judgment are the following:

a) Does the law of damages make provision for payment in kind?

To support the fact that our law does not make provision for payment in kind, Froneman J referred to *Standard Chartered Bank of Canada v Nedperm Bank Ltd* (1994 (4) SA 747 (AD)), where the court held that "where damages are due by law they are to be awarded in money because money is the measure of all things" (782A, quoted in par 14). Later in the judgment, Froneman J also refers to *The Premier, Western Cape NO v Kiewitz* (2017 (4) SA 202 (SCA)) to support the notion that compensation in personal injury matters must sound in money (par 23).

b) Are instalment payments precluded in terms of the OAFA rule?

The payments in kind proposed by the defendant amount to instalment payments since they would be made periodically, which, according to Froneman J, offends the OAFA rule. He defines the OAFA rule with reference to *Evins v Shield Insurance* (*supra* 835C–H; see discussion of *Evins* under heading 3 3 below). That the consequence of the OAFA rule is payment in a lump sum only begs the question. This depends on the whether or not the rule entails quantification, as averred by Froneman J (with no authority, even though he says excluding quantification is not borne out by our law). The only case, according to him, that has recognised instalment payments is that of *Wade v Santam Insurance Company Ltd* (1985 PH 33 (C)). Froneman J cited the following as reasons that instalment payments are precluded in terms of the OAFA rule:

i The case of *Wade*, which made provision for instalment payments has not been followed (par 58).

ii Historically, the only instances of periodic payments being made as part of a damages award were cases in which the parties agreed to it, or where execution followed upon an award already made (par 59).

c) Does the OAFA rule apply only to the determination of liability on the merits, or does it apply to quantification of damages?

The significance of this question is clear. If the OAFA rule applies only to the determination of liability and not to the quantification of damages, lump-sum payments for compensation for future loss would not be a requirement because the rule itself does not determine how payments should be made. It would only determine whether a defendant may be held liable, and where an action is brought on the same cause of action as a previous action, the

defendant could not be held liable in the second action. If the OAFA rule is indeed a rule relating to quantification, it would imply that it is used in the process of quantification and hence would determine that lump-sum payments are *a priori* part and parcel of damages for future loss. Froneman J held that regarding the OAFA rule as simply applying to determination of liability on the merits is not borne out by our law (par 17).

(d) Development of the common law

In deciding whether to develop the common law, the point of departure is section 39(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution). This section requires the courts "to promote the spirit, purport and objects of the Bill of Rights".

Froneman J lists the following steps that a court has to take when considering development under s 39(2) (par 31):

1) Establish the existing common-law position.
2) Consider the rationale underlying the rule.
3) Establish whether the rule offends section 39(2).
4) Where the rule does offend section 39(2), establish how the rule should be developed.
5) Take into account the consequences of the proposed development against the background of the relevant branch of the law.

Froneman J held that courts, in exercising their authority to develop the common law, should, in accordance with the doctrine of the separation of powers, be conscious that the legislature is "the major engine for law reform" (par 42). The courts cannot encroach on this authority. In considering the question of development, the court should take the following factors into consideration – in particular, whether the courts created the common-law rule, to what extent development is required, and whether the legislature is able to amend or abolish the common law (par 42).

Looking at the question of whether the OAFA rule should be developed in terms of section 39(2), Froneman J held that in order to develop the common law, there must be factual material upon which to base a decision whether to develop the law. In the present case, factual material was absent (par 57).

He held further that

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

2 3 2 Minority judgment

The Supreme Court of Appeal, as indicated above, held that the MEC's plea to substitute the lump-sum award made by the court, with direct payment to service providers if and when the medical services were required, was

precluded by the OAFA rule. Jafta disagreed with this notion and also with the majority judgment of Froneman for the following reasons (par 75):

1) The OAFA rule regulates judicial process and not execution or payment of a judgment debt.
2) The rule does not require that an amount of compensation, once determined by the court, has to be paid in a lump sum.
3) The purpose of the rule is to prevent a multiplicity of lawsuits based on a single cause of action, not to prevent periodic payments.
4) Neither *Evins v Shield Insurance*, nor any case of which the learned judge was aware, precluded payment in instalments.

Jafta concluded that he

> "[c]ould think of no reason in logic or principle which warrants that the inherent power of the High Court to order payment of a judgment debt in instalments should be restricted to cases involving execution on one's home only. The guiding principle for the exercise of that power must always be the interests of justice. If justice would be served by ordering periodic payments of a judgment debt, a superior court must consider making such an order." (par 85)

Because the rule did not preclude periodic payments, there was accordingly no need to develop the common law.

3 The once-and-for-all rule – an overview

In order to substantiate the statement in the introduction to this note, that the Constitutional Court in its majority decision has erred in its understanding of the OAFA rule, it is necessary to interrogate the rule itself in the context of prospective loss, its origin and its current formulation.

3 1 Prospective loss

Visser and Potgieter define prospective or future loss as follows:

> "It is damage in the form of patrimonial or non-patrimonial loss which will, with a sufficient degree of probability or possibility, materialise after the date of assessment of damage resulting from an earlier damage-causing event." (Potgieter *et al Visser and Potgieter: Law of Damages* 129)

Two types of prospective loss may be identified:

a) loss that has already manifested at the time of the trial – for example, the person is paralysed and can no longer work, a clear case of loss of earning capacity with the prospect that the plaintiff will incur medical expenses in the future; and
b) loss that has not yet materialised at the time of trial – for example, a plaintiff who has suffered head injuries could develop epilepsy in the future, compensation for which would be excluded both on the basis of the OAFA rule and prescription. (Potgieter *et al Visser and Potgieter: Law of Damages* 137–138)

3 2 Definition, purpose and origin of the rule

Visser and Potgieter define the rule as follows:

> "In claims for compensation or satisfaction arising out of a delict, breach of contract or other cause, the plaintiff must claim damages once for all damage already sustained or expected in the future in so far as it is based on a single cause of action." (*Law of Damages* 153)

In *Evins v Shield Insurance*, Corbett JA described the purpose of the rule as "prevent[ing] a multiplicity of actions based on a single cause of action and to ensure that there is an end to litigation" (835E). One of the earliest reported cases on the need to end litigation was *Ferrer v Arden* ((1599) 6Co. Rep. 7a, 9a, 77 Eng Rep. 263), where Lord Coke stated as follows: "[f]or if there should not be an end of suits, then a rich and malicious man would indefinitely vex him who hath right by suits and actions; and in the end (because he cannot come to an end) compel him to leave and relinquish his right …" (266).

The OAFA rule was received into South African law by the then Appellate Division in *Cape Town Council v Jacobs* (1917 A.D. 615), where the court held that "in an action at common law for damages for injuries sustained by an accident [the rule that] the plaintiff is only entitled to sue once and for all cannot, I think, be questioned" (620). The authority for the Appellate Division's adoption of the law was the English case of *Darley Main Colliery v Mitchell* (11 A C 132).

Van der Walt (*Die Sommeskadeleer en die "Once and For All" Reel*) comes to the conclusion that the application of the rule by the Appellate Division in 1917 was based on a misreading of the *Darley Main* case (335). In *Cape Town Council*, the rule had been applied as an absolute principle with general application (335). This, according to Van der Walt, was in fact the opposite of what had been decided in *Darley Main* (335). What is clear from the English case law discussed by Van der Walt is that the rule was formulated for the benefit of the defendant – namely, to preclude further actions from being instituted against him or her. From this perspective, it seems clear that the rule operates as a defence against liability, rather than a rule relating to the quantification of damages (335). It may also be added that the *Darley Main* case did not mention lump-sum payments as an absolute requirement. This being the case, there is no logical explanation for the conclusion that payments for future losses have to be made in a lump sum.

3 3 Evins v Shield Insurance Co Ltd – definition of "cause of action"

In *Evins v Shield Insurance*, the Appellate Division explained the OAFA rule with reference to the term "cause of action". The facts of the case were that the plaintiff and her husband were involved in a collision in March 1972. The plaintiff suffered serious bodily injuries and her husband was killed. She instituted a claim for damages in terms of the Compulsory Motor Vehicle insurance Act (56 of 1972, an early predecessor of the Road Accident Fund

Act 56 of 1996) for harm sustained as a result of her bodily injuries and for the death of her husband (loss of maintenance and support). While the claim for bodily injuries was duly completed, the claim for loss of support was incomplete as a result of non-compliance with the relevant legislation. In August 1973, the plaintiff caused summons to be served on the respondent pertaining to a claim for bodily injuries as well as a claim for loss of support. In September 1976, the plaintiff delivered a duly completed claim form for loss of support.

The question that the court had to answer was whether the second claim had prescribed (829G). This depended on whether the two claims were based on separate causes of action. If this had been the case, the second claim would have prescribed by the time summons was issued and served (834E–H).

The definition of "cause of action" is relevant to the prescription issue, as well as the OAFA rule (836A). The court, in defining "cause of action", drew a distinction between two approaches – namely, the "single cause" approach, and the *facta probanda* approach. In the case of the former, each damage-causing event constitutes a cause of action (839F–840F). Applied to the facts of *Evins v Shield Insurance*, this means that the bodily injury claim and the claim for loss of support would constitute a single cause of action. The OAFA rule would then preclude the second claim. The *facta probanda* approach, adopted in *Evins v Shield Insurance*, determines the existence of a cause of action in accordance with the material facts that need to be proved (839A). This means that the claims for bodily injuries and loss of support would constitute separate causes of action (839F). In *Evins v Shield Insurance*, the second claim had prescribed by the time it was instituted and the question of whether the OAFA rule would preclude it became moot (842H).

In reading Corbett J's judgment in *Evins v Shield Insurance*, it is clear that the OAFA rule operates as a defence against a plaintiff who seeks to bring a claim based on a cause of action that is also the basis for another claim already brought by the same plaintiff. The OAFA rule is, therefore, intended to be at the disposal of the defendant, to exclude liability. Furthermore, the *Evins v Shield Insurance* case says nothing about periodic payments. One could, therefore, conclude from this judgment, that periodic payments have not been ruled out.

3 4 Implications of lump-sum payments for future loss

Lump-sum payments involve predictions about uncertain future events. The problem facing a court in assessing future loss, specifically loss of earning capacity, is described very eloquently by Nicholas J in *Southern Insurance Association Ltd v Bailey NO* (1984 (1) SA 98 (A)):

> "Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss." (113G)

Application of the OAFA rule in South Africa has resulted in lump-sum payments for damages, past and future, insofar as the damage arises from one cause of action. (The implications of such lump-sum payments are discussed below.) From the above historical overview, it appears that the origin of the lump-sum payment requirement lies in an incorrect reception of English law. The implication of the OAFA rule, with the ostensible lump-sum payment requirement, is that the courts have to predict what losses the plaintiff will suffer in the future. In some cases the losses may not have arisen at the time of the trial – for example, a plaintiff may develop epilepsy in the future. In other instances, the injuries will already have manifested (for example, a loss of a limb), and the court will have to make an estimation of future loss of income as a result of this injury. While the courts may consider actuarial and other evidence in assessing damages for future loss, the judge has a discretion as to what evidence is allowed, as well as deciding the quantum of damages. Even where actuarial evidence is used, the exercise remains speculative (*Southern Insurance Association Ltd v Bailey NO supra* 113G). The result is that the plaintiff will either be under- or over-compensated. Because our courts tend to be conservative when awarding damages, the chances are good that the plaintiff will be under-compensated, rather than over-compensated. The rules of the law of damages also play a role in limiting damages awards.

4 If it ain't broke … is it?

The OAFA rule has, as it was pointed out above, been a part of our law for a long time. This is often cited as the reason that it should not change. It was also for this reason that Froneman J was loath to develop the law to make provision for instalment payments. The application of this rule in our law has, furthermore, also given rise to the notion that lump-sum payments in the case of prospective loss are axiomatic.

It is submitted that the historical development of the rule and its reception into our law, as well as the fundamental principles of the law of damages, in particular with reference to the *actio legis Aquiliae*, refute the notion that lump-sum payments for prospective loss are axiomatic.

4 1 Lump-sum payments and the fundamental rules of the law of damages

The application of lump-sum payments flies in the face of two fundamental rules of the law of damages:

a) Complete compensation

The purpose of delictual damages is, in terms of the sum formula rule, to place the plaintiff in the position he or she would have been in had the damage-causing event not taken place. The Supreme Court of Appeal held as follows in *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* (2005 (1) SA 299 (SCA)):

> "It is now beyond question that damages in delict (and contract) are assessed according to the comparative method. Essentially, that method, in my view,

> determines the difference, or, literally, the *interesse*. The award of delictual damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there been no delict. That surely says enough to define the measure." (par 15)

The purpose of an award of damages is, therefore, complete compensation, nothing less and nothing more (Midgley and Loubser *Law of Delict in South Africa* 3ed ((2017) 488–489). If the plaintiff is under-compensated, the ideal of complete compensation is thwarted. This is a very real possibility if, for example, the inflation rate is higher than expected in the future, or the plaintiff develops an unforeseen side-effect of the injury.

b) Compensation, not punishment

Linked to the notion of complete compensation is the principle that damages awarded in terms of South African law are compensatory in nature. In *Fose v Minister of Safety and Security* (1997 (3) SA 786 (CC)), the Constitutional Court held as follows:

> "It appears to be accepted that in the Aquilian action and in the action for pain and suffering an award of punitive damages has no place." (par 62)

While over-compensation of the plaintiff results in a windfall for the plaintiff, it also amounts to punishment of the defendant, which is contrary to the compensatory nature of the *actio legis Aquiliae*. Application of the OAFA rule could result in either of these consequences.

4 2 Exclusion of liability or quantification of damages?

Froneman J supported the view in his judgment that the OAFA rule is a rule of quantification, and determined that damages could not be paid in instalments. The notion of the OAFA rule being a rule that relates to quantification, can, however be challenged. The reason for this view may be sought in the treatment thereof in textbooks on the law of delict and damages. The OAFA rule is usually discussed within the context of quantifying damages (see for e.g., Loubser and Midgley 491 and further; and Neethling and Potgieter 235 and further), where the OAFA rule is discussed in the chapters dealing with assessment of harm and quantification of damages (see also Potgieter *et al Visser and Potgieter: Law of Damages* Ch 7). It is submitted that the reason for this is that the consistent application of the rule has implications for the way in which compensation for prospective loss is quantified. Because of this rule, damages arising from a cause of action, both past and future, have to be claimed in one lawsuit. The OAFA rule does not relate directly to the amount of damages and therefore in itself is not a rule for quantifying damages; it is a defence raised by the defendant to preclude further lawsuits on the same cause of action, in the same way that a defendant could also (after the passing of a prescribed period of time) raise the defence of prescription.

Because the rule precludes future actions based on the same cause of action, the courts have traditionally awarded damages as lump sums. The rule itself does not provide that damages have to be paid in a lump sum; rather, lump-sum payments are a consequence of the application of the rule.

The purpose of the OAFA rule is to preclude a multiplicity of claims – that is, to limit the liability of the defendant.

If the OAFA rule is not a rule pertaining to the quantification of damages, the notion of compulsory lump-sum payments as a result of the application of the rule is refuted.

4 3 Incorrect reception and understanding of the OAFA rule

As shown above, the OAFA rule has entailed that plaintiffs are awarded lump sums, although it is not clear that payments in instalments have ever been precluded by the rule. In the case of loss of future earnings, the amount is based on the plaintiff's earnings at the time of the damage-causing event, and the number of working years that (but for the damage-causing event) the plaintiff would have worked; the amount is then capitalised and discounted to present value. This entire process is fraught with speculation, particularly because the courts are not bound by actuarial evidence. Van der Walt's historical overview of the OAFA rule does not indicate that the lump-sum rule was ever a logical consequence of the OAFA rule. Hindert, HIndert and Dehner write (*Structured Payments and Periodic Payment Judgments* 2018):

> "One searches in vain for analysis of why a particular form of judgment might not be better expressed as a schedule of periodic payments than a lump sum. Nowhere in the standard texts on damages is there discussion of periodic payment arrangements." (par 1.02)

Periodic payments, if made an order of the court at the initial hearing, will not violate the OAFA rule because the objective of the OAFA rule – namely, to prevent a multiplicity of actions – will not be thwarted.

4 4 Accident Compensation Schemes and Periodic Payments

Accident compensation schemes in different countries already provide for periodic payments (e.g., Accident Compensation Act of New Zealand 49 of 2001, s 100). Closer to home, the Compensation for Occupational Injuries and Diseases Act (130 of 1993, s 56) and the Road Accident Fund Act (56 of 1996, ss 17(1)(*a*) and 4(c)) make provision for periodic payments in the case of prospective losses such as future loss of earnings and loss of support. The Road Accident Benefit Scheme Bill (2017 – see e.g., ss 35, 36 and 38) will, when it comes into operation, likewise make provision for periodic payments.

5 Conclusion

Awarding lump-sum payments for future loss claims involves predicting uncertain future events and is by its nature speculative, resulting in over- or under-compensation of the plaintiff. This results in two fundamental principles of the law of damages being flouted – namely, the sum-formula

rule and the notion of compensatory damages. Furthermore, the efficacy of a lump-sum payment presupposes that it will be invested in such a way that, by the expiry of the period for which it is awarded, the money will be depleted. There is, however, ample evidence of plaintiffs who have regarded their lump-sum payment as a lottery payout and who have spent the money in such a way that it does not last the full period for which compensation was awarded.

It is submitted that Jafta's judgment is correct. The OAFA rule does not preclude periodic payments; the lump-sum payments result from the application of the rule to prevent a multiplicity of suits based on the same cause of action. The OAFA rule exists therefore for the benefit of the defendant. In the present case, the offer of deferred and periodic payment came from the defendant, thus waiving the protection that the OAFA rule offers a defendant. It makes no sense to prevent a defendant from making an offer of deferred and periodic payment. Furthermore, as Jafta noted, the offer of periodic payment was based on the same lawsuit, so that the OAFA rule is not applicable. Periodic payments are not new to South African law as evidenced by provisions of the Compensation for Occupational Injuries and Diseases Act and the Road Accident Fund Act.

The historical development of the rule does not appear to preclude periodic payments. This, coupled with the fact that limiting payments for claims for future damages to lump-sum payments, may infringe basic principles of the law of delict.

In light of the above discussion, coupled with Jafta's minority decision, it is safe to say that the OAFA rule does not require any development for periodic payments to be made by the courts. In the absence of legislation, the courts will probably continue to make lump-sum payments, and the problems of under- and over-compensation will continue. As Nicholas J stated in *Southern Insurance v Bailey* (*supra*)*,* while such claims are speculative, the court cannot adopt a "*non possumus* attitude" and do nothing (114A); there is an obligation on the courts to ensure that damages are assessed and quantified in order that a victim of delictual conduct may be compensated.

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