In the matter between:

LAW SOCIETY OF SOUTH AFRICA
SA ASSOCIATION OF PERSONAL INJURY LAWYERS
THE QUADPARA ASSOCIATION OF SOUTH AFRICA
NATIONAL COUNCIL FOR PWPD
MONTLE JENNICA WILLEM
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JERONICO MERVYN JANSEN
DIVAN GERBER

and

MINISTER OF TRANSPORT
THE ROAD ACCIDENT FUND

THE MINISTER’S SUBMISSIONS
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THE RAF SCHEME

Introduction

1. The RAF Act 56 of 1996 provides for a social security scheme funded by all motorists (owners and drivers of motor vehicles) for the protection of all road users (motorists, their passengers and pedestrians). The applicants attack three features of the scheme introduced by the RAF Amendment Act 19 of 2005: the abolition of the claimant’s common law claim;\(^1\) the cap on claims for loss of earnings or support;\(^2\) and the introduction of the UPFS tariff for the quantification of the compensation paid for medical expenses.\(^3\)

2. The constitutional validity of these features must be judged under the requirement of rationality as an element of the rule of law in terms of s 1(c), and the “reasonable measures” requirement of s 27(2) of the Constitution. The facts germane to these two constitutional standards overlap. The features of the scheme under attack, must moreover be judged in the context of the scheme as a whole. We accordingly begin by describing the background, nature and purpose of the scheme and its amendment, before we turn to the applicants’ attacks on it.

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\(^1\) Section 21

\(^2\) Sections 17(4)(c)

\(^3\) Regulation 5(1)
The common law

3. The common law of delict protects road users and their dependants against injury or death caused by the fault of others. Its protection is however inadequate in the following respects.

4. Its first flaw is that it is fault-based and provides inadequate protection to road users:

4.1. It does not provide a remedy to the victims of motor accidents for which no one is to blame, for instance those caused by animals or acts of God.

4.2. The guilty driver receives no compensation even if his fault is no more serious than the momentary inattention of which all motorists are guilty from time to time.

4.3. The dependants of the guilty driver do not have any remedy although they are invariably innocent.

5. The second flaw is that the victim only has recourse against the guilty driver:

5.1. The victim’s claim against the guilty driver is of no value if the guilty driver cannot be identified as happens with hit-and-run accidents; if the guilty driver cannot be found; or if the guilty driver does not have the means to pay compensation and is uninsured.
5.2. If the victim does recover compensation from the guilty driver, the latter may be financially ruined despite the fact that his fault was no more serious than the momentary inattention of which all motorists are guilty from time to time.

6. The first and second flaws lead to and are exacerbated by the third, that common law claims are often only resolved by litigation. The litigation typically comes to trial years after the event. The forensic inquiry into fault becomes artificial and its outcome unpredictable, particularly when it depends on the faded memories of witnesses to a traumatic incident of mere seconds’ duration years earlier. It is an unsatisfactory mechanism for the determination of the fate of the victims of the accident and of the driver blamed for it.

7. To these flaws should be added a fourth, that the claims of passengers often lie against their own driver who may be their parent, child, spouse or friend. It means that the claim can only be enforced at the expense of their relationship. If the driver is insured against liability, it introduces a risk of collusion between victim and driver.

The essence of the scheme

8. The main features of the RAF scheme are as follows:

8.1. The scheme insures road users against the risk of their own injury and their dependants against the risk of their death, caused by the fault of another motorist.
8.2. The scheme is funded by motorists by a levy on their fuel.\(^4\)

8.3. The scheme immunises all motorists in return for their funding, against the risk of liability for the injury or death of other road users.

9. The scheme addresses some of the inadequacies of the common law:

9.1. It cures the second flaw. It compensates the victim even if the guilty driver cannot be identified, cannot be found or does not have the means to pay compensation. It also immunises all motorists against the risk of liability for the death or injury of other road users.

9.2. It alleviates the third flaw insofar as it enhances the prospects of resolving claims without litigation.

9.3. It cures the fourth flaw in that passengers’ claims for compensation lie against the RAF, even when the guilty driver is a parent, child, spouse or friend.

10. The scheme does not yet address the first flaw and to that extent also does not cure the third flaw of the common law, in that it is still fault-based. Government has however committed itself to cure these flaws by restructuring the scheme into one which compensates victims on a no-fault basis. Cabinet approved of the principle on 18 November 2009.\(^5\) The Minister published a draft policy paper on the matter on 12 February 2010.

\(^4\) Section 5 of the RAF Act read with s 47 and Schedule 1 Part 5A of the Customs and Excise Act 91 of 1964

\(^5\) Draft Communications Strategy RD49 vol 16 p 1504
11. The scheme is self-funding, as social security schemes typically are. It means that a balance must be maintained between the fuel levy on the one hand and the levels of compensation paid by the scheme on the other. The fuel levy has rapidly increased from 2 cents per litre in 1988\textsuperscript{6} to 71 cents per litre today.\textsuperscript{7} Despite this increase, the scheme has been running at a rapidly increasing annual deficit since the 1980’s. The discounted present value of the accumulated deficit came to R39.9b at the end of the 2009 financial year.\textsuperscript{8}

The shared interests of all road users

12. The Law Society complains that the scheme unfairly benefits “violators” at the expense of “victims”. The premise of their complaint is that the scheme mediates the conflicting interests of discrete opposing groups of violators on the one hand and victims on the other. But we submit that the premise is wrong:

12.1. A “violator” is a motorist who negligently causes a motor accident in which another road user is injured or killed. But he is also a road user and thus a potential “victim” with an interest in the compensation the Fund pays to victims.

12.2. A “victim” is a road user who is injured or a dependant of a road user who is killed in a motor accident. But he is often also a motorist and

\footnotesize
\textsuperscript{6} Satchwell Report vol 1 chap 10 p 219 table 10.1
\textsuperscript{7} Schedule 5B of the Customs and Excise Act
\textsuperscript{8} Donaldson vol 11 p 1076 paras 48 and 49
thus a potential “violator” with an interest in the immunity from liability the scheme affords to motorists.

13. These shared interests are particularly germane when one evaluates the scheme with an eye to the future. It is not yet known who will become violators and victims. All motorists may become violators and they and all other road users may become victims. They share the following interests in all three elements of the scheme:

13.1. All of them are potential victims with an interest in the compensation paid to victims under the scheme.

13.2. Motorists fund the scheme and thus have an interest in its cost. But even those who are not motorists and use buses and taxis, also have an interest in the cost of the scheme because the fuel levies paid in the operation of those buses and taxis, are passed onto them.9

13.3. Motorists have an interest in the immunity from liability the scheme affords to them. But even those who are not motorists and use buses and taxis, also have an interest in it. The owners and drivers of the buses and taxis will insure themselves if they are not immunised from liability. They will pass on the cost of their insurance to their passengers.

9 Donaldson vol 11 p 1077 para 50
14. We do not suggest that the balance the scheme strikes between these interests is immaterial because they are shared by all users of the road. It does however have the following implications:

14.1. The balance the scheme strikes is not one between two discrete and opposing groups of violators and victims. All motorists have an interest in the immunity provided to motorists, all motorists and all other road users have an interest in the compensation the scheme pays to victims, and all of them have an interest in the fuel levy by which the scheme is funded.

14.2. There is no correct or obvious balance between the two extremes of,

- a scheme which pays full compensation to victims on a no-fault basis but at astronomical cost, and
- a scheme which immunises motorists, pays no compensation to victims and thus costs nothing.

14.3. The appropriate balance is a matter of judgment in the allocation of the risks of injury and death inherent in the use of the road. It has to be based on considerations such as the plight of victims and particularly those of them who are too poor to fend for themselves, the exposure of motorists to the risk of liability which may cause their financial ruin and the capacity of motorists to fund a scheme which assumes all or some of these risks.

14.4. It is the prerogative of the state to strike this balance and it must be afforded much leeway in that regard.
The 2005 reforms

Passengers’ claims

15. The old scheme capped passengers’ claims in terms of ss 18 and 19(b). They imposed different caps on the compensation paid to different categories of passengers, ranging from total exclusion to a maximum of R25 000. The caps were arbitrary and unjust.\textsuperscript{10}

16. The 2005 Amendment removed the caps by repealing the relevant provisions of ss 18 and 19(b). Passengers are now compensated on the same basis as all other victims. This reform will increase the compensation paid under the scheme by 15%.\textsuperscript{11}

Claims for loss of income or support

17. The old scheme paid full compensation for loss of income or support. Sections 17(4)(b), 17(4)(c), 17(4A) and Regulation 4 now limit these claims to a fixed annual amount which is adjusted for inflation every quarter. It currently stands at

\textsuperscript{10} This court did not determine their constitutional validity in Tsotetsi v Mutual and Federal Insurance Co 1997 (1) SA 585 (CC) only because the accident in the case had pre-dated the Constitution. The Western Cape High Court recently struck down some of the caps in Mvumvu v Minister of Transport [2010] ZA WCHC 105 (28 June 2010).

\textsuperscript{11} Koorts vol 7 p 620 para 54.1
R178 642. We describe this reform more fully when we deal with the applicants’ attack on it.

The cost of the compensation

18. The scheme has since the 1980’s been running at a loss. The accumulated deficit stood at R39,9b at the end of the 2009 financial year.\(^\text{12}\) The RAF estimated that the removal of the caps on passengers’ claims would increase the compensation by 15% while the new caps on claims for loss of income and support would bring about a saving of only 1% to 3%.\(^\text{13}\)

19. The Minister of Finance and National Treasury concluded that the unlimited obligations of the RAF are an excessive burden on taxpayers and that it would be unreasonable to seek to meet this liability on a fully funded basis.\(^\text{14}\) National Treasury is moreover obliged to record the RAF’s unfunded liability as a liability of the fiscus which “impacts negatively on South Africa’s credit-rating and increases the cost of capital”. If it continues to grow unchecked, “it will in due course inhibit the state’s capacity to raise loan funding for the general purposes of government”.\(^\text{15}\)

20. Mr Donaldson explains that it is not a solution simply to increase the fuel levy:

“\textit{The levy can be increased, but not without a significant impact not just on the general economy but also on poor people, on whom such an increase}
inevitably has a disproportionate impact. The structure of South African cities, with the poor located on the periphery, means that transport costs are a significant expense for the poor, more so than in other countries, and disproportionately higher than for wealthier people. Suppliers of goods are scarcely affected because they pass input costs increase onto customers but this comes at a cost for there is a corresponding effect on price increases, the inflation rate and the repo rate. Economic modelling by National Treasury shows that increasing the fuel levy will result in slower investment and economic growth.”

21. The applicants’ expert actuary Mr Munro, says the RAF could be funded on a “pay-as-you-go basis”. But the choice of the approach to the RAF’s funding is government’s prerogative. Its resistance to pay-as-you-go funding is understandable. Under pay-as-you-go the RAF only raises sufficient fuel levies in the current year to meet its liabilities incurred in prior years which fall due for payment in the current year. It incurs liabilities in the current year that exceed the current fuel levies on the understanding that they will be paid from the fuel levies raised in the future years in which they fall due for payment. It means that the RAF lives beyond its means.

22. The 2005 amendments imposed the following additional limits on the compensation paid under the scheme in an effort to reduce the growing deficit:

16 Donaldson vol 11 p 1077 para 50
17 Munro vol 14 p 1356 paras 12 to 18
22.1. General damages are only paid to victims who suffer serious injury.\textsuperscript{18} It is expected to reduce the compensation by 35,8\% to 39\%.\textsuperscript{19}

22.2. The compensation for medical expenses is based on the NHRPL tariff for emergency medical treatment and the UPFS tariff for other medical treatment.\textsuperscript{20} This limitation is expected to bring about a saving of between 2\% and 6\%.

22.3. The RAF no longer pays any compensation to secondary victims who suffer emotional shock but are not injured or lose a breadwinner.\textsuperscript{21}

\textit{The cost of administering the scheme}

23. The cost of administering the scheme has also become excessive due to the complexity of the scheme and its propensity for costly litigation. The Fund’s delivery costs are 44\% of total compensation paid. It includes legal costs of R2,4b comprising the Fund’s own legal costs of R900 000 and its contribution to claimants’ legal costs of R1,6b. The attorney-client portion of the claimants’ legal costs should be added to the amount of R2,4b to determine the overall legal costs of administering the scheme.\textsuperscript{22}

\begin{thebibliography}{9}
\bibitem{18} The proviso to s 17(1) read with s 17(1A) and Regulation 3
\bibitem{19} Koorts vol 7 p 620 para 54.2
\bibitem{20} Sections 17(4)(a), 17(4B), 17(5) and Regulation 5
\bibitem{21} Sections 19(g) and 21(2)(b)
\bibitem{22} Koorts vol 7 p 625 para 58.5 and p 637 paras 111.1 to 112
\end{thebibliography}
24. Some of the 2005 reforms should help to reduce these costs. The restriction of general damages to claimants who suffer serious injury will reduce the number of claims by some 61% and thus reduce the RAF’s administrative burden.\(^\text{23}\) The standardisation of the rates at which compensation is paid for medical expenses should also simplify the administration of these claims and significantly reduce litigation about them.

**Abolition of the common law claim**

25. The 2005 reforms abolish the claimant’s common law claim against the guilty driver or owner for the claimant’s residual loss not covered by the scheme.\(^\text{24}\) We shall describe this reform more fully when we address the applicants’ attack on it.

**A first step to greater reform**

26. The 2005 amendments are an interim measure towards the restructuring of the RAF scheme into one which pays compensation on a no-fault basis.\(^\text{25}\) The Supreme Court of Canada has held that, when government brings about reform of this kind, it must be permitted to do so by incremental measures and “be given reasonable leeway to deal with problems one step at a time”.\(^\text{26}\)

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\(^{23}\) Koorts vol 7 p 620 para 54.2  
\(^{24}\) Section 21(1)  
\(^{25}\) Koorts vol 7 p 620 paras 55 to 60  
ABOLITION OF THE COMMON LAW CLAIM

Background

27. Under s 21 before its amendment, claimants retained their common law claims against the guilty motorist, for their residual loss not covered by the scheme. The only common law claims of consequence, were the passengers’ claims against the guilty driver for their residual loss beyond the cap imposed by ss 18 and 19(b). Their claims were sometimes of value but often not, for instance when the guilty driver could not be found; the guilty driver had no means and was not insured; or the guilty driver was the claimant’s parent, child, spouse or friend and was not insured.

28. When the 2005 reforms were introduced, parliament did not have the option of maintaining the status quo. The 2005 reforms introduced substantial new limits on the compensation paid under the scheme. They materially increased the claimants’ uncovered losses for which the guilty driver would have been liable at common law. Parliament’s choice was accordingly between maintaining the common law claim and thereby materially increasing the risk of liability to which motorists are exposed on the one hand and abolition of the common law claim on the other.

29. Parliament chose the latter option. It was a sensible choice for the following reasons:

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Dodd v Multilateral Motor Vehicle Fund 1997 (2) SA 763 (A) 766 to 769
29.1. Motorists are the funders of the scheme for the benefit of all road users. It would be unfair to expose them to significantly greater risk of liability at common law. The prudent among them would have had to bear the cost of additional liability insurance over and above the fuel levy.

29.2. It may be argued that the owners and drivers of buses and taxis do not bear the costs of the fuel levy because they pass it on to their passengers. But the same logic implies that,

- if the owners and drivers are immunised against the risk of liability at common law, the benefit of their reduced cost of liability insurance is similarly passed on to their passengers, and

- if the owners and drivers are exposed to greater liability at common law, their increased cost of liability insurance is similarly passed on to their passengers.

30. The maintenance of the common law claim encourages parallel claims and litigation arising from the same road accident, against the RAF under the scheme and against the guilty driver at common law. This propensity for parallel litigation would be significantly increased if the common law claim were not abolished by the 2005 amendments which reduce the compensation payable under the scheme and thus increase the amount recoverable at common law. It would increase the overall cost of the scheme.

31. The applicants overstate the value of the common law claim by their premise that it is always recoverable. That is often not so for instance when the guilty driver cannot be identified or cannot be found; the guilty driver does not have the means to pay the claim and is not insured; or the guilty driver is the claimant’s parent, child, spouse or friend and is not insured.
32. The applicants say that the common law claim is recoverable if it lies against the drivers of 40% of motor vehicles which are insured and of the motor vehicles of the state which are not insured. But it still means that something in the order of half of all the common law claims are practically worthless.

33. There is a very substantial overlap between the motorists who are relieved of the risk of common law liability and the road users whose common law claims are abolished. All motorists are also road users. They receive the benefit but also make the sacrifice of the abolition of the common law claim. Only those road users who are passengers or pedestrians and not also motorists, make the sacrifice without receiving the benefit of the abolition of the common law claim. But they are also the road users who benefit from the scheme without making any direct contribution to it.

The abolition is rational

Introduction

34. The Law Society contends that the abolition of the common law claim is irrational. But they base their contention on a range of tests for rationality which are incompatible with the test laid down by this court.

The test

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28 First applicant’s heads p 14 paras 24 to 47
35. The rationality requirement applied to legislation means that “there must be a rational relationship between the scheme which (the legislature) adopts and the achievement of a legitimate governmental purpose”. The legislature may not act “capriciously or arbitrarily”.

36. The following features of this test are important to this case:

36.1. The test is objective. The subjective understanding and purpose of the legislature, is not relevant in the determination of its rationality. Chaskalson P explained in Pharmaceutical Manufacturers why this was so:

“The question whether a decision is rationally related to the purpose for which the power was given calls for an objective inquiry. 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.”

36.2. The legislation does not need to be reasonable, fair or appropriate to be rational.

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29 New National Party of SA v Government of the RSA 1999 (3) SA 1091 (CC) para 19; Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) para 74

30 Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA 2000 (2) SA 674 (CC) paras 86, 89 and 90; UDM v President of the RSA 2003 (1) SA 495 (CC) para 56; Merafong Demarcation Forum v President of the RSA 2008 (5) SA 171 (CC) paras 62, 263, 274 and 284

31 Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA 2000 (2) SA 674 (CC) para 86

32 Jooste v Score Supermarket Trading 1999 (2) SA 1 (CC) para 17; New National Party of SA v Government of the RSA 1999 (3) SA 191 (CC) para 24; Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA 2000 (2) SA 674 (CC) para 90; Khosa v Minister of Social
36.3. It is the scheme of the legislation and not its individual provisions in isolation that must be rationally related to the achievement of a legitimate governmental purpose.\textsuperscript{33}

*The abolition meets the test*

37. The abolition of the common law claim meets the test for rationality, whether judged on its own or as part of the scheme as a whole. We have already described its rationale. It affords protection to the motorists who fund the scheme for the benefit of all road users. The scheme as a whole protects all road users against the risk of injury and their dependants against the risk of their death in road accidents.

38. This court’s reasoning in Jooste on the rationality of COIDA is equally applicable to the RAF scheme:

> "Whether an employee ought to have retained the common law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy. It involves a policy choice which the legislature and not a court must make. The (applicant’s) contention

\textsuperscript{33} S v Lawrence 1997 (4) SA 1176 (CC) para 70; Jooste v Score Supermarket Trading 1999 (2) SA 1 (CC) para 17; Premier, Western Cape v President of the RSA 1999 (3) SA 657 (CC) para 93; New National Party of SA v Government of the RSA 1999 (3) SA 191 (CC) paras 19 and 24; Bel Porto School Governing Body v Premier, Western Cape 2002 (3) SA 265 (CC) paras 41 and 44; Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) para 52; Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) paras 74 and 82; Van der Merwe v RAF 2006 (4) SA 230 (CC) paras 49 and 54
represents an invitation of this Court to make a policy choice under the guise of rationality review; an invitation which is firmly declined. The Legislature clearly considered that it was appropriate to grant to employees certain benefits not available at common law. The scheme is financed through contributions from employers. No doubt for these reasons the employee’s common law right against an employer is excluded. Section 35(1) of the Compensation Act is therefore logically and rationally connected to the legitimate purpose of the Compensation Act, namely a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.34

The Law Society’s attack

39. The Law Society’s attack on the rationality of the scheme is unfounded because it is based on four new tests for rationality which are incompatible with the one laid down by this court.

40. First, the Law Society argues that, “in circumstances where a scheme categorically drops a guillotine on constitutional rights”, the “standard test as expressed by Thayer” requires the court to inquire into whether the measure “unfairly deprives people of constitutional protection”.35 The Law Society says that Professor Thayer articulated this test in his 1893 paper on “The Origin and Scope of the American Doctrine of Constitutional Law”.36 But their submission

34 Jooste v Score Supermarket Trading 1999 (2) SA 1 (CC) para 17
35 First applicant’s heads p 14 paras 27 to 30 at p 15 para 29
36 (1893) Little, Brown, and Company, Boston (also 7 Harvard LR 129)
seems to be based on a misunderstanding of the description of Professor Thayer’s work in Professor Lenta’s article on “Judicial Restraint and Overreach”:

40.1. Professor Thayer’s paper did not articulate a test for rationality. He advocated extreme judicial restraint and deference to the legislature. He said that the courts should only overturn legislation if it was “so clear that it is not open to rational question” that the legislation was unconstitutional. It was for the legislature to choose how to legislate and “whatever choice is rational is constitutional.”

40.2. Professor Thayer advocated rationality as the only basis for the constitutional review of legislation. It is accordingly inappropriate to transplant his understanding of rationality into our law where rationality is a mere threshold requirement for the exercise of all public power.

40.3. Professor Thayer’s paper did not say that the rationality test involves an inquiry into whether legislation “unfairly deprives people of constitutional protection”. The Law Society says that such an inquiry must be undertaken when legislation “categorically drops a guillotine on constitutional rights”. But in those circumstances our Constitution requires a fully-fledged proportionality inquiry in terms of s 36, and not mere rationality. The Law Society’s suggestion conflates the threshold test for rationality applicable to all legislation and the proportionality requirement of s 36 for legislation which limits fundamental rights.
40.4. The point of the Law Society’s invocation of Professor Thayer’s paper is to suggest that the test for rationality involves an inquiry into fairness. But this court has frequently emphasized that it does not.\(^\text{39}\)

41. The Law Society secondly seeks to bolster its contention that fairness is an element of rationality by arguing that the Minister justified the abolition of the common law claim on the basis of fairness and that it should accordingly “fail for being irrational if the deprivation of the constitutional protection is not fair”.\(^\text{40}\) But this argument is also flawed for the following reasons:

41.1. It is based on the Law Society’s characterisation of the Minister’s justification of the abolition of the common law claim. But the Minister’s subjective opinion on the justification of the abolition of the common law claim is irrelevant to its rationality. The test for rationality is objective.\(^\text{41}\)

41.2. The Law Society’s argument postulates “\textit{the deprivation of constitutional protection}”. But such a deprivation is subject to the proportionality requirement of s 36 and not mere rationality. The Law Society again conflates the two.

\(^\text{39}\) Jooste v Score Supermarket Trading 1999 (2) SA 1 (CC) para 17; New National Party of SA v Government of the RSA 1999 (3) SA 191 (CC) para 24; Pharmaceutical Manufacturers Association of SA: In \textit{re Ex parte} President of the RSA 2000 (2) SA 674 (CC) para 90; Khosa v Minister of Social Development 2004 (6) SA 505 (CC) para 67; Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) paras 81 to 84; Merafong Demarcation Forum v President of the RSA 2008 (5) SA 171 (CC) paras 62, 72 and 279; Poverty Alleviation Network v President of the RSA 2010 (6) BCLR 520 (CC) para 71

\(^\text{40}\) First applicant’s heads p 17 paras 33 and 34

\(^\text{41}\) Pharmaceutical Manufacturers Association of SA: In \textit{re Ex parte} President of the RSA 2000 (2) SA 674 (CC) paras 86, 89 and 90; UDM v President of the RSA 2003 (1) SA 495 (CC) para 56; Merafong Demarcation Forum v President of the RSA 2008 (5) SA 171 (CC) paras 62, 263, 274 and 284
41.3. This court has frequently emphasized that fairness is not a requirement for rationality.\textsuperscript{42}

42. The Law Society thirdly invokes the requirements for government programmes this court laid down in Grootboom.\textsuperscript{43} But it was concerned with the “reasonable measures” requirement of s 26(2).\textsuperscript{44} It cannot be imported into the test for rationality.

43. The Law Society lastly argues that,

\begin{quote}
“Because the abolition of the common law claim patently entails the abrogation of established rights, it requires to be justified in terms of s 36 of the Constitution in order to be valid.”\textsuperscript{45}
\end{quote}

But the abolition of the common law claim does not deprive anybody of vested rights. It is a mere prospective amendment of the common law. Nobody has a constitutionally protected right to the future maintenance of the common law of delict.\textsuperscript{46}

\textbf{The right to security of the person}

\textsuperscript{42} Jooste v Score Supermarket Trading 1999 (2) SA 1 (CC) para 17; New National Party of SA v Government of the RSA 1999 (3) SA 191 (CC) para 24; Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA 2000 (2) SA 674 (CC) para 90; Khosa v Minister of Social Development 2004 (6) SA 505 (CC) para 67; Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) paras 81 to 84; Merafong Demarcation Forum v President of the RSA 2008 (5) SA 171 (CC) paras 62, 72 and 279; Poverty Alleviation Network v President of the RSA 2010 (6) BCLR 520 (CC) para 71

\textsuperscript{43} First applicant’s heads p 23 para 46

\textsuperscript{44} Government of the RSA v Grootboom 2001 (1) SA 46 (CC) paras 40 to 43

\textsuperscript{45} First applicant’s heads p 34 para 66

\textsuperscript{46} Pinnick v Cleary 42 ALR 3d 194 (1971) at 206
44. The Law Society argues that the abolition of the common law claim infringes the right to be free from all forms of violence in terms of s 12(1)(c) of the Constitution.\(^4^7\) SAAPIL supports the Law Society and seems to go further by arguing that the right to security of the person is infringed by any abolition or limitation of any remedy by which it is protected.\(^4^8\) Their arguments seem to be based on the following propositions:

44.1. 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.

44.2. The state is obliged in terms of s 7(2), to protect road users against the risk of infringements of this kind.

44.3. The protection the state affords to wrongdoers, must at least include a civil claim against the wrongdoer for the full amount of the victim’s loss.

44.4. The state thus breaches its duty in terms of s 7(2) if it limits the victim’s civil claim against the wrongdoer in any way.

45. We accept the first and second propositions but dispute the third and fourth. The Constitution obliges the state to protect road users’ right to security of the person. It does not require the state to afford the victim a civil claim against the wrongdoer for the full amount of his loss.

\(^{47}\) First applicant’s heads p 30 paras 59 to 61

\(^{48}\) Second applicant’s heads p 3 paras 1 to 9
46. The RAF scheme is not the only measure by which the state protects road users against the risk of injury or death on the road. It also does so by an array of measures including the following:

46.1. All the common law and statutory rules of the road are in large measure designed to prevent injury and death on the road. They include the National Road Traffic Act 93 of 1996 which reinforces the rules of the road by criminal sanctions for a panoply of offences including reckless or negligent driving and driving under the influence of alcohol.

46.2. The rules of the road are administered and enforced by dedicated law enforcement structures at provincial and local government level.

46.3. Section 27(3) of the Constitution and s 5 of the National Health Act 61 of 2003 ensure that the victims of motor accidents always have access to emergency medical treatment.

46.4. The state ensures that all motor accident victims have access to the medical treatment they require – free of charge if they are poor and at conservative tariffs commensurate with their ability to pay if they are not.

46.5. Employees injured or killed in motor accidents in the course of their employment, are protected under COIDA.

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49 Section 63

50 Section 64

51 Section 4 of the National Health Act 61 of 2003; Daya vol 3 p 268 para 38
46.6. The state pays grants to the disabled in terms of s 9 of the Social Assistance Act 13 of 2004.

47. This protection compares favourably for instance with the state’s protection of the victims of violent crime who have no effective remedy against the perpetrator and for whom there is no social security programme.

48. This court implicitly recognised in Rail Commuters that the state’s constitutional duty to protect the public’s right to security of the person, need not include a civil claim for damages in delict or indeed any private law remedy at all.\(^{52}\)

49. The Canadian courts have frequently held that the right to security of the person under s 7 of the Charter, does not embrace a right to a civil claim for damages for personal injury.\(^{53}\) The Supreme Court of Canada summarily dismissed a contention to the contrary in Whitbread.\(^{54}\)

**The right to property**

50. The Law Society argues that the prohibition of the arbitrary deprivation of property in terms of s 25(1) of the Constitution “is clearly engaged when medical costs are caused, earning capacity is reduced or destroyed and dependants’ support from their breadwinner cut off” because “one’s property – bundle of

\(^{52}\) Rail Commuters Action Group v Transnet 2005 (2) SA 359 (CC) paras 77 to 80

\(^{53}\) Budge v Calgary (1991) 6 CRR 2nd (Alberta CA) 372 to 373; Filip v Waterloo (1992) 12 CRR 2d 113 (Ontario Court of Appeal) 117; Medwid v Ontario (1988) 48 DLR 4th 272 (Ontario Supreme Court); Taylor v Canada (Health) (2007) 285 DLR 4th 296 (Ontario Superior Court of Justice) 55; Whitbread v Walley (1988) 51 DLR 4th 509 (British Columbia Court of Appeal) para 45; Whitbread v Walley [1990] 3 SCR 1273 (SCC); Wittman (Guardian of) the Emmott (1991) 77 DLR 4th 77 (British Columbia Court of Appeal)

\(^{54}\) Whitbread v Walley [1990] 3 SCR 1273 (SCC)
rights and assets – is thereby reduced”. We submit that this contention is unfounded for the following reasons.

51. It is a misconception to say that someone who incurs costs, suffers a deprivation of property merely because the nett value of his estate is thereby reduced. It would otherwise for instance mean that every imposition of tax constitutes a deprivation of property because the nett value of the taxpayer’s estate is thereby reduced. One’s property rights are not diminished by costs incurred.

52. One’s earning capacity also does not constitute property in one’s estate subject to protection under s 25. Earning capacity is an element of the person protected in terms of s 12.

53. It is in any event the negligent driver and not the state, who causes the victim to incur medical costs and lose income or support. The state’s responsibility is limited to its duty under s 7(2) to protect road users against the risk of injury or death on the road. We have already submitted that the abolition of the common law claim does not infringe that duty.

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55 First respondent’s heads p 32 para 62
THE CAP ON CLAIMS FOR LOSS OF EARNINGS OR SUPPORT

Background

54. The old scheme provided full cover to claimants for their own loss of earnings and to their dependants for their loss of support if they were killed. It meant that the scheme was skewed in favour of the rich (whose protected income and support was high) against the poor (whose protected income and support was low) despite the fact that both contributed to the scheme in equal measure. The poor in effect subsidised the claims of the rich.56

55. This injustice was addressed by the new sections 17(4)(b), 17(4)(c), 17(4A) and Regulation 4. They impose a cap on the annual amount for which compensation is paid. The amount is adjusted for inflation every quarter. It currently stands at R178 642.

56. This cap will only affect 0.8% of claimants.57 It will bring about a saving of between 1% and 3% in the compensation paid under the scheme.58

The cap is rational

57. We described the test for rationality in our submissions on the abolition of the common law claim.

56 Koorts vol 7 p 681 paras 326 to 327; Donaldson vol 11 p 1073 para 43
57 Koorts vol 7 p 614 para 46.1 and p 657 para 153
58 Koorts vol 7 p 620 para 54
58. The Law Society argues that the cap is arbitrary because there is no evidence of the manner in which it was determined. But it is for the applicants to establish irrationality. The test is in any event objective. The considerations upon which parliament based its determination of the cap, are irrelevant.

59. The Law Society argues that the cap is irrational because the claimant is not compensated for the delay between the date when the loss is suffered and the claim quantified (subject to the cap which is then current), and the date on which the claim is paid. But that is merely to say that the claimant does not receive interest on his claim for past loss of earnings. There is nothing irrational about it. It was the rule at common law before its amendment by s 2A of the Prescribed Rate of Interest Act 55 of 1975.

60. The Law Society argues lastly that the cap has a disproportionate effect on children and young victims who cannot insure their unrealised future earning capacity. This submission is unfounded for the following reasons:

60.1. The cap favours children and young victims insofar as it is an annual and not a global cap. It allows children and young victims to claim compensation for the income they would have earned over their entire working lives, subject only to the annual cap.

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59 First applicant’s heads p 25 paras 50 and 51
60 First applicant’s heads p 27 paras 54 to 56
61 Koorts vol 7 p 612 para 45.5 and p 617 para 49
60.2. Children and young victims qualify for personal accident insurance and non-income replacement disability insurance by which they can top up their compensation for loss of earnings under the scheme.\footnote{Koorts vol 7 p 656 para 152}

60.3. The Law Society’s statement that the earning capacities of children and young victims who are seriously injured “are usually completely destroyed”,\footnote{First applicant’s heads p 28 para 56} is an exaggeration not borne out by the evidence on which it is based.\footnote{Daya vol 1 p 43 paras 63 to 64} The only children and young victims who will not be fully compensated for their loss of earnings, are those whose annual loss exceeds the amount of the cap. It only affects 0.8% of claimants generally.\footnote{Koorts vol 7 p 614 para 46.1 and p 657 para 153} There is no reason to think that it will affect any greater proportion of children and young people.
THE UPFS TARIFF

The nature and scope of the tariff

61. The Uniform Patient Fee Schedule or UPFS tariff, is the highest tariff public hospitals charge to their full paying patients. It is prescribed by s 17(4B)(a) read with Regulation 5(1), as the tariff at which the RAF compensates claimants for their medical expenses for non-emergency treatment.

62. The UPFS tariff only applies to goods and services provided by public hospitals. The compensation for goods and services they do not provide, is governed by Regulation 5(3):

62.1. The starting point is s 17(1). It imports the common law standard for the quantification of loss and includes the cost of any goods or services third parties reasonably require as a result of their injury.\textsuperscript{66}

62.2. Section 17(4B) does not restrict the goods and services for which a claimant may claim compensation. It merely provides for the tariff upon which the RAF’s liability must be based, that is, quantified.

62.3. Regulation 5 prescribes the tariff envisaged by s 17(4B). Regulation 5(1) prescribes the UPFS tariff. Regulation 5(2) provides for the tariff for emergency treatment. Regulation 5(3) recognises that Regulations 5(1) and (2) do not cover the field. It says that “in circumstances other

\textsuperscript{66} Marine and Trade Insurance v Katz NO 1979 (4) SA 961 (A) 972F to H
than contemplated in" Regulations 5(1) and (2), the RAF’s liability “shall be based on any reasonable quotation”.

62.4. The latter provision caters for any goods and services for which Regulations 5(1) and (2) do not provide. They include any medical treatment the third party reasonably requires which is not provided by public hospitals under the UPFS.

The reason for the tariff

63. The introduction of the UPFS tariff was inspired by the report of the Satchwell Commission. It unanimously recommended that a tariff be introduced for the quantification of claims for medical expenses but divided on the tariff which should do so:

“A tariff should govern the cost of provision of healthcare, rehabilitation and life care. The opinion of the Commission is divided with regard to the tariff which should be acceptable:

(a) The majority (Commissioners Phiyega and Sithole) recommended that the administrative authority of the road accident benefits scheme should determine its own tariff (to be known as the RABS Tariff) after discussions with service providers and other interested parties.

(b) The minority (Commissioner Satchwell) recommends that the administrative authority should not design a new tariff additional to the many tariffs currently operative in South Africa and internationally and that the UPFS developed and implemented by South Africa’s Department of Health for use in public sector facilities
should be utilised and applied by the administrative authority of the road accident benefits scheme."\(^{67}\)

64. The reasons why the Commission recommended a tariff, are described in volume 2 chapters 26 to 28 of its report. Their essence is as follows:

64.1. Upwards of 80% of road accident victims are treated at public hospitals at no cost to the victim or the RAF.\(^{68}\) This may in part be due to the fact that, until their claims are settled and the RAF assumes liability for their medical expenses, they do not have access to private healthcare.\(^{69}\) The evidence however suggests that, even after these claimants have been compensated for their future medical expenses at private hospital rates, they continue to use public facilities instead.\(^{70}\)

64.2. Only a small minority of road accident victims receive private healthcare, usually with the aid of their own medical schemes or medical insurance.\(^{71}\) The RAF’s role is accordingly merely, “to compensate the minority of individuals who can document the care they have already received at private facilities and for which payment has been made by their medical aid schemes or medical insurer, with resulting double compensation."\(^{72}\)

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\(^{67}\) Satchwell Report vol 2 para 26.184

\(^{68}\) Satchwell Report vol 2 paras 26.177, 27.178, 27.181(a) and 28.56. Also see Koorts vol 7 p 625 para 58.4

\(^{69}\) Satchwell Report vol 2 paras 26.132 to 26.142

\(^{70}\) Satchwell Report vol 2 paras 26.175 to 26.178

\(^{71}\) Satchwell Report vol 2 paras 27.178 and 28.107 to 28.110. Also see Edeling vol 3 p 231 paras 44 to 45

\(^{72}\) Satchwell Report vol 2 para 28.108
64.3. The Commission concluded that these features render the current system inequitable:

“The current system is inequitable because it only reimburses those who are already insured. Consequently, the majority of road accident victims, although they pay the fuel levy, receive no medical benefits from the Fund. The public health sector, which bears the greatest financial burden of cost of road accidents, receives no compensation.”^3

64.4. The Minister echoes this conclusion:

“The poor were subsidising the wealthy to access exclusive healthcare services. While the majority of road accident fund victims (as high as 80% to 85%) were treated in public hospitals, the public health care received no or limited payment for services rendered.”^4

65. The effect of making the UPFS tariff applicable to all claimants, is to treat all of them on equal footing. The majority of upwards of 80% continue as before, to use public hospitals but now at the RAF’s expense. The minority who would previously have used private healthcare, now have a choice: they may use public healthcare at the RAF’s expense or receive the cash equivalent at the UPFS tariff and apply it towards the cost of their private healthcare. As they are by and large the more affluent segment of society who have their own medical aid or medical insurance, they will not suffer any ill effect.

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^3 Satchwell Report vol 2 para 28.110

^4 Koorts vol 6 p 625 para 58.4
66. The introduction of the UPFS tariff thus resolves the following anomalies:

66.1. It removes the inequity of the previous reality that the poor who were treated at public hospitals, in effect subsidised the private healthcare of the more affluent.

66.2. It eliminates the over-compensation for future medical expenses computed at private rates, which are paid to claimants who in fact prefer and continue to use public health facilities.

66.3. It allows public hospitals to recover the UPFS tariff from the RAF for their treatment of road accident claimants. This should provide the public health system with a much-needed cash injection.  

The cost of private specialised neurological services

67. SAAPIL argues that the UPFS tariff is “so low that road accident victims will not be able to obtain treatment at private healthcare institutions”.  

The evidence on which they base this submission, is that of witnesses whose expertise and evidence are in the main confined to the highly specialised neurological treatment of seriously injured spinal cord and head injuries:

67.1. Dr Edeling is a neuro-surgeon and makes it clear that he testifies to the adequacy of the UPFS tariff “mainly from a neurosurgical point of view”.

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75 Satchwell Report vol 2 paras 27.177 to 27.181
76 Second applicant’s heads p 8 paras 19 to 32 at p 8 para 20
77 Edeling vol 3 p 218 para 26
67.2. Dr Baalbergen practises exclusively in neuro rehabilitation and speaks from that background.\textsuperscript{78}

67.3. Dr Oelofse's evidence is more general but it was only filed in reply and cannot broaden the applicant's case.\textsuperscript{79}

68. The high-watermark of the applicants' case is that there are highly specialised neurological services available in the private sector but only at a price higher than the UPFS tariff compensates for them. It means that road accident victims will either have to go to public hospitals for this treatment or buy it in the private sector by topping up their UPFS based compensation.

\textbf{Services for which UPFS does not provide}

69. SAAPIL submits that the UPFS tariff \textit{“does not provide for material, medical and healthcare services which road accident victims require, and which are provided by the private healthcare sector”}. It again relies on Dr Edeling's evidence for this submission.\textsuperscript{80}

70. Ms Le Roux, the Director of the Department of Health responsible for the administration of the UPFS, disputes Dr Edeling's evidence on this score.

\textsuperscript{78} Baalbergen vol 4 p 336 para 4

\textsuperscript{79} Oelofse vol 16 p 1580

\textsuperscript{80} Second applicant's heads p 15 paras 33 to 36 at p 15 para 33
71. It is however not necessary to resolve this dispute. We have already submitted that, on a proper interpretation of Regulation 5, the UPFS tariff only applies to the goods and services provided by public hospitals. A road accident victim who reasonably requires goods and services they do not provide, is entitled to be compensated for them in terms of Regulation 5(3).

The quality of public health services

72. SAAPIL submits that state hospitals “lack the facilities and the staff to provide adequate care to spinal cord injured patients.”

73. The respondents’ main deponent, Ms Koorts, expected the Department of Health to address the evidence on which this submission is based. The Director of Health Mr Lekalakala has however not done so comprehensively. We accordingly accept that, on the evidence before this court, state hospitals lack the facilities and staff to provide long-term care which is adequate in all respects to spinal cord injured patients.

Security of the person

74. SAAPIL’s submissions are confined to the validity of Regulation 5(1) which prescribes the UPFS tariff for the compensation of medical expenses. It does not say that Regulation 5(1) in itself breaches the constitutional right to security

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81 Second applicant’s heads p 17 paras 37 to 70 at p 24 para 52
82 Koorts vol 6 p 581 para 6.8, p 655 para 148, p 662 para 253, p 669 para 276, p 686 para 344 and p 689 paras 479 to 480
83 Lekalakala vol 12 p 1102
of the person in terms of s 12(1) or the state’s duty to protect it in terms of s 7(2).\textsuperscript{84} It cannot do so because Regulation 5(1) merely gives effect to s 17(4B)(a) of the RAF Act which SAAPIL does not attack.

75. We have in any event addressed SAAPIL’s submissions on the security of the person attack on the abolition of the common law claim.

The UPFS is rational

76. We described the test for rationality in our submissions on the rationality attack on the abolition of the common law claim.

The Minister of Health’s letter

77. SAAPIL contends that the Minister of Transport’s decision to make Regulation 5(1), was irrational because the Minister of Health had said in a letter to him, that the UPFS tariffs “are not inherent to cost recovery and were never intended for the private health sector including the RAF”.\textsuperscript{85} But this submission is unfounded for the following reasons.

78. First, the applicants never raised this contention in their founding papers. The Minister has not had an opportunity to respond to it. We do not know whether he saw the letter, how he understood it, whether he agreed with it, what advice he received on it, whether it affected his decision on Regulation 5(1) or how it did so. It is accordingly not open to the applicants to advance this contention.\textsuperscript{86}

\textsuperscript{84} Second applicant’s heads vol 3 paras 1 to 9 at p 5 para 9

\textsuperscript{85} Second applicant’s heads p 40 para 80.1

\textsuperscript{86} NDPP v Zuma 2009 (2) SA 277 (SCA) para 47
79. SAAPIL says that the Minister acted irrationally because he had been told that the UPFS was inappropriate for his purpose and he “had no other information before him”. But this is a mere assertion with no evidence to support it. We know at least that the Minister or those advising him, knew that Judge Satchwell had recommended the UPFS tariff.

80. The high-watermark of SAAPIL’s contention is that the Minister acted irrationally in the light of the information available to him. But the test for rationality is objective. It is irrelevant whether or not the Minister acted rationally in the light of the information available to him.

The purpose of the UPFS tariff

81. SAAPIL contends that the UPFS tariff is incapable of achieving its purpose, which is to enable road accident victims to obtain “the treatment they require from private practitioners”. But that is not the purpose of Regulation 5(1). Its enabling s 17(4B)(a) says that the tariff “shall be based on the tariffs for health services provided by public health establishments”. The UPFS is the highest of those tariffs payable by full-paying patients. It was entirely appropriate for the Minister to adopt its rates.

82. It does not mean that either s 17(4B)(a) or the Minister intended that “the medical services should be provided only at public hospitals”. Regulation 5(1)
means merely that everybody is compensated for their medical expenses at the same rates, wherever they are treated. The overwhelming majority of road accident victims are treated at public hospitals. Only a small minority seek private care. Their choice to do so is not determined by the compensation they (or their medical aid funds) receive from the RAF. They will continue to receive private healthcare.

**The UPFS is not retrogressive**

83. SAAPIL contends that Regulation 5(1) is a retrogressive measure in breach of s 27(2) of the Constitution.\(^{90}\)

84. The applicants did not raise this cause of action in their founding papers. The respondents have never had an opportunity to address it. This is particularly significant because this court suggested in Grootboom that a deliberately retrogressive measure needs to be “*fully justified by reference to the totality of the rights provided in the Covenant and in the context of the full use of maximum available resources*”.\(^{91}\) It is accordingly not open to the applicants to raise this cause of action.

85. SAAPIL’s contention is in any event based on an incorrect reading and application of s 27(2). It does not oblige the state to achieve the progressive realisation of the rights in s 27(1). It obliges the state to take reasonable legislative and other measures, within its available resources, to do so. It must aim at the progressive realisation of the rights in s 27(1) but the benchmark by

\(^{90}\) Second applicant’s heads p 41 paras 85 to 89

\(^{91}\) Government of the RSA v Grootboom 2001 (1) SA 46 (CC) para 45
which it is judged, is the reasonableness of its conduct, given the constraints of its available resources. That is the question to which we now turn.

The UPFS is reasonable

86. SAAPIL argues that the UPFS tariff is not reasonable. But it is one component of the RAF scheme which is in turn one of the measures by which the state gives road users access to social security. It cannot be judged on its own. It must be judged in its context as a component of a larger social security scheme by which all motorists contribute to a fund administered by the state; the fund compensates all road users who are injured and the dependants of those who are killed in motor accidents; and motorists are given immunity from liability for the injury or death of other road users in return for their funding of the scheme.

87. The 2005 amendments address the injustices and anomalies of the scheme and its growing deficit. The UPFS is merely one of the components of this reform which seeks to achieve the following purposes:

87.1. It standardises the compensation paid for medical expenses.

87.2. It affords all injured victims access to public healthcare or pays them its cash equivalent.

87.3. The reality is that upwards of 80% of road accident victims are treated at public hospitals. The minority who are treated in the private sector, are not dependant on their RAF compensation to enable them to do so.

92 Second applicant’s heads p 44 paras 90 to 94
The UPFS tariff accordingly does no more than to afford the same benefit to the affluent already enjoyed by those who are less so.
PRAYER

88. The first respondent ask that the application for leave to appeal or alternatively the appeal itself, be dismissed with costs including the costs of four counsel.

Wim Trengove SC

M R Madlanga SC

H J de Waal

K Pillay

First Respondents’ counsel
Chambers
Cape Town and Johannesburg
23 July 2010