

South African
Medical Journal

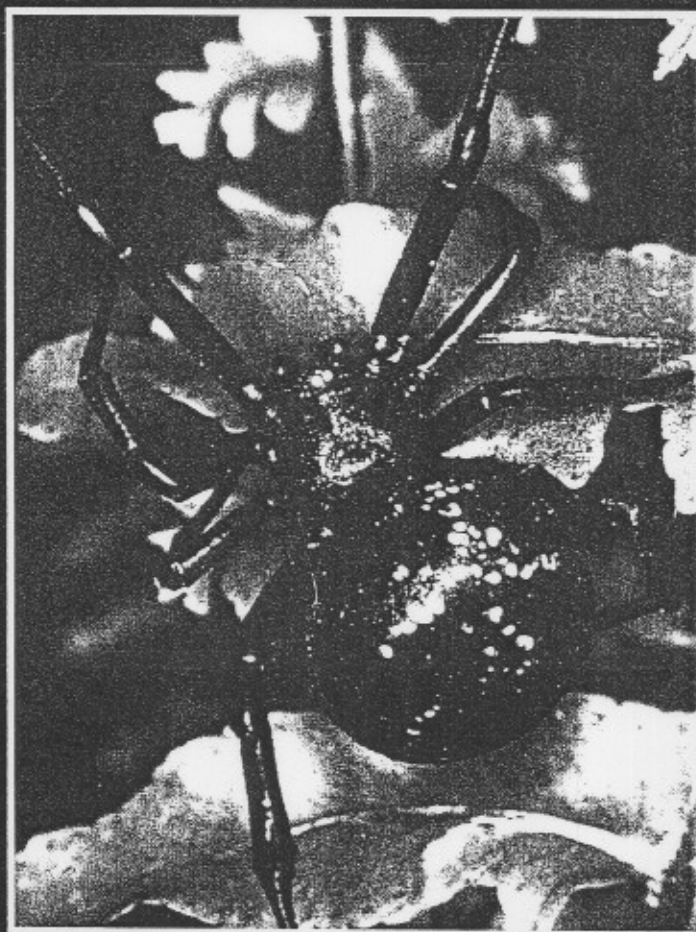


Suid-Afrikaanse
Mediese Joernaal

SAMJ

VOL. 83 NO. 6 379-458

JUNE/JUNIE 1993



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OPINION / OPINIE

Falling between two high stools

Innocent victims of motor vehicle accidents (MVAs) — the 'third parties' — are entitled to claim compensation for injuries sustained and the costs of treatment incurred. While this claim can be made against the responsible individual (in terms of common law), that individual might be unable to meet the costs of appropriate compensation.

Government, in recognising this dilemma, made third-party insurance of all motor vehicles obligatory. An initially incomplete and cumbersome system was replaced in 1986 by a universal insurance, funded by a levy on petrol sales but managed by commercial insurers on a fee-for-service basis.

Could we now hope that all the victims could get their costs of treatment funded more readily? No such good fortune. The law of delict continued to be applied, and liability continued to be energetically defended. The end result is a delay, sometimes of 4 or more years, before settlement is reached. Who pays the costs of treatment in this intervening period? The practical answer is that the victim has to bridge this gap financially. What about the medical aid society? They have no statutory obligation to pay for treatment where another party is liable. Some medical aid societies do indeed meet the claims, in a gesture of wholesome generosity, conditional upon reimbursement if the victim is successful in his claim against the insurer. Others do not.

Therefore, and not infrequently, the innocent victim of a motor vehicle accident can be left without funds to pay for treatment of his injuries, despite being notionally insured under the MVA legislation and despite having medical aid coverage. The situation is made worse when the injuries prevent the insured from working.

In the past, this gap in the cost of treatment was usually bridged by the provincial hospitals, which undertook the treatment of most victims of motor vehicle accidents, and effectively subsidised the treatment. This is no longer the case; many more victims are requesting — or being forced into — treatment in private hospitals. Even public hospitals now bill at market-related rates and are less tolerant of delay in payment.

An attempt to bridge this gap 'between the two stools' of MVA and medical aid insurance has been addressed in the past, but so far ineffectually. The MVA Act of 1986 states that the MVA Fund (or agent, with approval) 'may make an advance payment to the claimant out of the amount to be awarded . . . in respect of medical costs and loss of income', but this is discretionary and apparently infrequently implemented.

The Uniform Rules of the Supreme Court (34A) are that, in an appropriate case, the Court could order an interim payment for medical expenses (and related loss of income). It must be noted that the Court's discretion applies only when the defending insurer has admitted liability in writing, or a judgment for damages has been obtained, and then only a 'reasonable proportion' of these costs.

The key to this unacceptable situation is reducing the time between accident and admission of liability. Once liability, or a proportion of liability, is acknowledged, the mechanisms for meeting the costs of treatment come into effect.

The Multilateral Motor Vehicle Fund continues to defend its liability, using the legal process. This it will do even where all outward circumstances indicate complete innocence on the part of the victim. A typical, and common, example is the rear-end collision, where the victim is stationary, in a vehicle, when struck from behind. It is quite true that in an extreme minority of cases the driver of the moving vehicle may not be guilty — he may have had brake failure, hypoglycaemia or a heart attack. Despite the rarity of these exceptions, because each case is carefully defended, the victims must wait their turn in the litigatory processing queue for years.

It is ironical that the pith of insurance is that the 'misfortunes of the few are distributed without onerous burden on the many'. With regard to costs of treatment the reality now is that insurance constraints, caused by a minority of cases, are placing 'an onerous burden on the many'.

Surely, it may be asked, the insurance industry itself could insure against these rare circumstances? If this was done liability could be rapidly concluded by assessments based on the face of the matter (*prima facie*).

This letter therefore requests that the Motor Vehicle Fund address a particular aspect of its functions. It is not a request for 'no-fault insurance', but rather asks that conventional techniques of insuring be used to ensure that insurers meet their liabilities in the treatment of the injured promptly. In those unusual situations where first impression (*prima facie*) liability ultimately proves to be incorrect, the insurers should, among themselves, arrange for potential losses to be covered. In so doing what is at present an 'onerous burden on the many' could be alleviated.

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Brain death and organ transplantation — an Islamic opinion

For religious people, in this case Muslims, brain death and organ transplants dramatically challenge a critical aspect of an individual's deeply ingrained world view, namely death.

Phenomenal advances in biomedical technology have radically altered traditional perceptions and definitions of death. This in turn resulted in new ethical questions being raised as to the status of ventilator-sustained bodies and the use of organs.

From an Islamic viewpoint it generates debate at several levels. The theological, cultural and juristic perspectives would certainly be the most important ones. The majority of Muslims believe in bodily resurrection

in the hereafter. In the material world, human beings have fiduciary or contractual relationship with the Creator and thus their bodies are also viewed as a trust (*amanah*) from God. Coupled to this is the view that life is an appointed time (*ajal*) decreed by Divine wisdom. Given the dogmatic formulas, the entire question of life and death is based primarily on belief and faith premisses, rather than on rational grounds. It is perhaps the theological argument, more than any other, that clouds the debate. Patients fear mutilation of their bodies after death. This was the same reason Muslims resisted autopsies in the past. Today, however, such opposition from a religious perspective is rare.

OPINION / OPINIE

Cultural norms and practices also play a very decisive role in influencing public perceptions. In a culture where science and a scientific consciousness is highly visible, conversion to modern practices is relatively easier compared to cultures where this is less visible. Many of the Muslim countries fall within the category of underdeveloped and developing countries, where science and technology have not sufficiently penetrated the prevailing cultural ethos. A study of public attitudes to kidney donations in Saudi Arabia states that 'social, cultural and religious factors are prime determinants of public attitudes towards organ donation'.¹

Muslim jurists in the past and present, however, were largely actuated by the concrete events in human life and less constrained by theological abstractions. Over the centuries, it has been the jurists who maintained an impressive tradition of ensuring a synthesis of the religious law (*Shari'ah*) and the changing social contexts. It is to the credit of one of Islam's most outstanding philosophical and juristic minds, Abu Hamid al-Ghazzali (d. 1111) who said: 'A change in realities necessitates a change in definitions.' Classical jurists conducted research into what constituted the needs of public welfare and necessity, examined the social milieu and prevailing customary practices, as well as fulfilling the broadest ethical requirement when formulating new rulings of positive law (*fiqh*).² While Islamic law certainly has elements of flexibility, it goes without saying that law as a discipline is more prone to conservation than innovation.

Organ transplantation continues to stir debate among Islamic scholars. Slowly some form of consensus is emerging. In the Middle East jurists have approved both organ transplants and the concept of brain death. In fact, ethical guidelines and religious opinions in this region have been favourable to the donation of organs for transplantation from both living and cadaver donors. Contrast this with opinions emanating from the Indo-Pak sub-continent, where organ transplantation was only recently debated by a group of the mainstream Islamic scholars, with diverging viewpoints. While some sections of the Muslim community in South Africa may take their directives from the sub-continent, it is by no means a rule.³ Some take rulings from Pakistan, while others follow Middle Eastern or local rulings. Muslim jurists in South Africa have not issued a unanimous verdict on either organ transplants or brain death. For many years the Islamic Medical Association of South Africa has prodded the religious bodies to issue a verdict, with partial success.

Brain death possibly poses the greatest challenge to jurists and scholars. Death in most religious viewpoints until very recently was decided upon the cessation of cardiopulmonary functions. However, the diagnosis of brain death while breathing is being sustained by means of a ventilator introduces an entirely new definition of death. In terms of the prevalent religious view the cessation of respiratory functions is an indication that the soul (*ruh*) no longer inhabits the body. Islamic anthropology, namely the view of the nature of man, is not particularly clear on the matter of the soul. The word *ruh* means *pneuma*, 'breath'. It is usually described as the subtle breath that is controlled by the brain, the locus for the 'mind' in metaphysical terms. At this point we enter the realm of metaphysical uncertainty. Based on

these premisses it could be assumed that if brainstem function was irreversibly damaged, then the subtle breath, *ruh*, connected to the brain would also be affected. Since the soul is the criterion for human personality in religious terms, its absence would imply the absence of moral personality. In medical terms it is reasonably certain that all mental functions, and hence rational functions pertinent to human personality are irreversibly affected on a rapidly degenerating scale. In terms of Islamic law and ethics full moral personality is also diminished when rational faculties are impaired beyond average functional levels, in which mild mental retardation and brain death are the two extremes.

It is on the basis of the above and similar legal and ethical bases that the Third International Conference of Islamic Jurists meeting in Amman, Jordan, on 16 October 1986 in its resolution No. 5 declared: 'A person (is) considered legally dead, and all the principles of the *Shari'ah* can be applied, when one of the following signs is established:

1. Complete stoppage of the heart and breathing, and the doctors decide that it is irreversible.
2. Complete stoppage of all vital functions of the brain, and the doctors decide that it is irreversible, and the brain has started to degenerate.⁴

In response to the World Health Assembly resolution WHA 40.13, on the question of organ transplants, the 12th session of the Council of Arab Ministers of Health at their meeting in Khartoum on 14 - 16 March 1987, proposed a Unified Arab Draft Law on Human Organ Transplants. The relevant article states: 'Specialist physicians may perform surgical operations to transplant organs from a living or dead person to another person for the purpose of maintaining life, according to procedures laid down in this law.'

It is clear that in large parts of the Muslim world organ transplants and brain death are accepted on religiously approved criteria. Studies among Muslims abroad have shown that public education programmes supported by health and religious authorities can allay the misguided fears of mutilation after death and the treatment of organ donors.

This is the challenge South African Muslims and their religious authorities are faced with today. Scholars of Islam at South African universities have already presented arguments in favour of organ transplantation and brain death.⁵ However, it would be in the interest of all Muslims, and the country at large, if the various *'ulama* groups (Councils of Muslim Theologians) in the different provinces could come to some consensus decision on these issues.

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