NORTON ROSE FULBRIGHT

The Big Read Book series Volume 12

Norton Rose Fulbright South Africa's Review of Quantum of Damages in Medical Malpractice Cases

April 2023

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Introduction

Dearest Reader

This review covers the main issues in the assessment of quantum of damages in medical malpractice cases. We begin with a general introduction to quantum of damages, before our review of specific case law. There is an index of cases referred to, at the end.

We consider proof of special damages, especially in relation to contingency deductions, life expectancy, and loss of earnings. Then we look at quantifying general damages, contributory negligence, and apportionment of damages, as well as legal and expert witness fees. We will also discuss the recent development of the law relating to whether money should always be the measure of harm, whether payment in kind is allowable, and whether damages have to be paid in a lump sum.

In assessing a medical malpractice claim, the enquiry is first whether the defendant's negligent or intentional actions (fault) caused the harm. The extent of the harm is then considered, and relates to the final enquiry of how and to what extent the plaintiff should be remunerated. This is the quantum of the plaintiff's damages.

A plaintiff must prove the merits of the claim, which mostly relates to issues of negligence or intention, causation and harm, on a balance of probabilities. Once this is done, the quantum evaluation does not involve proof on a balance of probabilities but is, as the court said in *M S v Road Accident Fund* (2019):

> 'a matter of estimation which is a judicial task in which the judge, on the basis of the case as proved, determines how the plaintiff should be compensated for the loss. It involves the application of experience, intuition, and general right-thinking and is a matter where the court has a wide discretion'

In exercising its discretion, especially in relation to cases of medical malpractice, the court may be guided by expert opinions, such as medical reports (for example, relating to treatment required) and actuarial calculations (to assist in determining the financial impact of life expectancy, for instance). Contingency deductions or additions are considered and applied to cater for the uncertainty inherent in assessing future costs (for example, a contingency deduction may provide for the fact that the plaintiff may die earlier than expected, or for a surgery that may not be required). Expert evidence is meant to be an aid to the court and cannot replace or limit the court's discretion to make an award that it considers just in the circumstances.

If there is insufficient evidence to prove causation (that is, the link between the defendant's actions and the plaintiff's loss) this cannot be remedied by reducing the quantum of the claim by applying, for instance, a contingency deduction. If the merits portion of the claim is not proved on a balance of probabilities, there can be no damages and the quantum stage is not reached at all. This differs from the apportionment of damages, where causation is proved but it is found that the plaintiff or another party contributed to the harm. In such a case, damages can be determined but the final award will be distributed between all of the parties at fault.

Damages are claimed under the broad categories of past and future, special and general. Special damages require proof of expenses incurred (such as medical procedures already performed or loss of earnings), and an estimation of future costs, with reference to the patient's ongoing disability, life expectancy and the potential for their recovery or decline. Special damages, such as past and future medical expenses and loss of earnings or earning potential, can be assessed tangibly. General damages are assessed separately and are less easily quantifiable. General damages relate to pain and suffering and loss of amenities of life, and are assessed with reference to past awards in similar cases and the specific circumstances of the plaintiff's case. The court has a wide discretion to decide what is appropriate in each case. Even though money cannot perfectly compensate for losses that fall under the category of general damages, the courts have developed guidelines to determine the quantum of solace. However, neither special nor general damages are meant to enrich the plaintiff – the awards are aimed at compensation and a fair balance between the claimant and the wrongdoer.

In *L and Another v Minister of Police and Others* the court said regarding damages for pain and suffering that:

> "Damages are not there to enrich but to serve as some form of solatium to an injured person for the pain and loss suffered. The following words of Holmes J in the matter of Pitt v Economic Insurance Co. Ltd ring true today as they did in 1957:
>
> > 'The court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff but not pour out largesse from the horn of plenty at the defendant's expense.'"

If liability has been proved or conceded, but quantum has not yet been determined, the defendant can make an interim payment to the plaintiff. If the defendant does not do so, the plaintiff can make an application to court to order the defendant to make an interim payment while the quantum is finally determined (see for example *NM obo AM v Member of the Executive Council for Health, Eastern Cape Province*).

Where a minor child is injured, the parent or guardian will often sue in their representative capacity on behalf of the child and in their personal capacity for losses they have personally suffered due to the child's injury. Usually, given the inability of children, especially those afflicted with debilitating illnesses (such as cerebral palsy), to maintain their own affairs, part of the outcome of a quantum determination would include, either by agreement or court order, provision for the creation of a trust to protect the funds due to the child. Recent trends, designed to halt some rather nefarious activities, lean towards independent, institutional trusts, created by the defendant, at their cost. These often include both claw back and top up clauses to allow for situations where the afflicted child dies before or after the estimated life expectancy catered for in the award. The result is that either the trust returns any cash surplus to the defendant if the plaintiff dies early, or the defendant makes supplementary payments if the plaintiff outlives the funds available. Provisions may be built into the trust deed to ensure that the payment of attorney's fees, usually on contingency arrangements, does not affect the medical funds held by the trust, creating an artificial shortfall. The result is a ring-fenced medical fund to be used solely for medical expenses.

Against this background, we look at the details emerging from the case law.

Donald Dinnie, Paul Cartwright, and Lisa Kriegler
March 2023

Special damages

Special damages are usually itemised and relate to expenses already incurred and prospective pecuniary loss (such as future medical expenses or loss of earning capacity). Assessing expenses or losses already incurred is a question of fact – the plaintiff has to show that the expenses were reasonably incurred or actually lost and were related to the injury, that is, they are not too remote from the harm caused by the defendant. To this end, the plaintiff should produce real evidence to account for past expenses claimed. For future expenses or losses, the plaintiff must show that it is reasonably probable that the expenses or losses will be necessarily incurred. Awards for future expenses and future loss are approximate (and even speculative to some degree) and therefore they are adjusted for inflation, interest and contingencies. In medical malpractice cases, the issue of life expectancy is particularly relevant to determine the amount to be awarded for future loss.

Contingency deductions and additions

Contingency adjustments are meant to cater for the vicissitudes of life – those future events that are possible but cannot be predicted with certainty. For example, when calculating an award for future medical expenses of a child suffering from cerebral palsy, the court makes an assessment of the child's life expectancy based on expert evidence. In applying a contingency deduction, the court takes into account the fact that the child may die earlier than expected, from an event unrelated to the injuries relating to the claim. Contingencies may, on the evidence, be applied to future loss of earnings, for example the fact that the person may have lost their job in any event, due to an economic downturn.

Although adjustments for contingencies usually result in a decrease in the quantum of damages awarded, this is not necessarily the case. The facts of a case may warrant an increase in the amount awarded (*Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) 117 B - D*).

The task of deciding a contingency adjustment is difficult and imprecise. The court in *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980 (3) SA 105 (A)* noted that courts vary widely in applying contingency deductions or additions, and this emphasises that contingency adjustments must be related to the particular facts of each case often based on expert evidence. A court on appeal will be hesitant to adjust a contingency amount decided by a trial court, because it is a matter of judicial discretion, based on the facts of the case unless the facts are incorrectly applied. An appeal court will only interfere where this discretion was exercised improperly.

Previous percentage deductions or increases in similar cases are instructive (although not decisive) and therefore the application of a contingency deduction operates similarly to the court's discretion in awarding general damages (discussed later).

We often see contingency deductions of between 15 and 20 percent applied, but some cases warrant higher deductions. For example, in the case of *AA Mutual Insurance Association Ltd v Maqula 1978 (1) SA 805 (A)* the court applied a contingency deduction of 50% to the plaintiff's loss of earning capacity because it was found that he had experienced great difficulty in obtaining a job even before his injury.

The court in *Khoza v MEC for Health, Gauteng* acknowledged that while arriving at a fair percentage for a contingency deduction may be arbitrary at times, splitting the difference between the deductions suggested by the parties is not rational. Something more reasoned is required, even if the process cannot be done arithmetically. The usual range for contingency deductions is between 15 and 20 percent and departing from that range requires something more. While 'conjecture may be required in making a contingency deduction… it should not be done whimsically.'

Buys v MEC for Health and Social Development of the Gauteng Provincial Government (North Gauteng High Court)

Quantum: R8.35 million (R7.2 million for future medical expenses / R83 000 future loss of earnings / R850 000 general damages / R200 000 damages for the mother in her personal capacity)

Judgment Year: 2015

Keywords: cerebral palsy / birth injury / brain injury / contingencies / contingency deduction / future medical expenses

The parties had agreed on the quantum of damages at R9.6 million, which included future medical expenses, future loss of earnings, and general damages. The child had suffered a brain injury that led to severe cerebral palsy. The parties agreed that only the amount of R8.5 million, which was allocated to future medical expenses, was subject to a general contingency deduction to be determined by the court. Contingencies address the ordinary hazards of life, and therefore applying a contingency is a process of subjective impression or estimation rather than an objective calculation. Contingencies taken into account may include errors in the estimation of life expectation, illness or death caused by events unrelated to the injury claimed for, and the inflation or deflation in the value of money.

The actuaries had already accounted for inflation in their calculations. The plaintiff argued that a contingency deduction of 10% would be appropriate whereas the defendant put the figure at 25%.

The court looked at the fact that the child was severely injured with a limited life expectancy of 12.5 years. It was likely that he would use all the healthcare and other services accounted for, since he would never be able to care for himself. The court accepted that there was a high probability that these healthcare expenses would actually be incurred. However, the court noted that the possibility that the child would die earlier than expected should also be taken into account. Having regard to all the circumstances, the court applied a contingency deduction of 15%. The final amount awarded, taking into account the contingency deduction, was R8.3 million.

An award of around R200 000 was granted to the mother in her personal capacity for damages suffered as a result of the injury to the child, during labour and birth. The court accepted that mother's damages were inextricably linked to the damages suffered by the child.

The defendant argued for an order entitling it to pay for healthcare services to service providers directly, instead of in a lump sum to the plaintiff. This was not allowed on the basis that the court saw no compelling reason to put the plaintiff at the mercy of the defendant as far as future payments to services providers are concerned.

For comment on the issues surrounding payment in money and payment in kind, see the final section of this review, particularly the case of *MSM obo KBM v MEC for Health, Gauteng* below.

Gwambe (nee Tshabalala) and Another v Premier of the North West Province (North West High Court)

Quantum: R600 000 general damages (special damages to be calculated by actuaries based on the court order)

Judgment Year: 2010

Keywords: cerebral palsy / birth injury / brain injury / medical inflation / contingencies / general damages

The case involved the quantum determination for a child whose cerebral palsy was caused by negligent conduct of public healthcare staff.

The defendant was found liable for damages for loss of earning capacity and future medical expenses, but these amounts were not evident from the judgment. The court considered extensive evidence on the child's life expectancy, including the evidence of Professor David Strauss, a professor of statistics at the University of California (whose evidence is referred to in many cases relating to cerebral palsy, including the *Singh v Ebrahim case and the PM obo TM v MEC for Health, Gauteng* cases). The court considered expert evidence on loss of earning capacity and came to a conclusion on the grade of income the patient would have likely achieved had the injury not occurred. The court referred their decisions on life expectancy and loss of earning capacity to the actuaries, for calculation of the amount to be awarded.

The court provided guidance on how the award should be calculated by the actuaries and in this regard the judgment includes a discussion on medical inflation as a contingency. An economist expert witness looked at the rate of medical inflation from 1970 to 2007. From this evidence, the court concluded that medical inflation was at the time, on average, around 3% higher than ordinary inflation, and therefore should be added on to the calculation for inflation. This percentage was accepted, in light also of the findings of the SCA in *Singh v Ebrahim*, where medical inflation was held to be around 3.5% higher than ordinary inflation. The court allowed an additional 1.5% as a further risk factor to be incorporated into the inflation calculation.

The court awarded an amount of R600 000 in general damages.

Swardt v Member of the Executive Council for Health, KwaZulu-Natal Province (KwaZulu-Natal High Court)

Quantum: R4.3 million (R2.88 million future medical expenses / R1.4 million loss of earnings / R900 000 general damages)

Judgment Year: 2020

Keywords: above-knee amputation / loss of earnings / contingencies / general damages

The defendant's staff administered excessive radiation treatment to the patient, leading to the skin on her legs becoming shrivelled, resulting in partial immobility and causing immense pain. She underwent an amputation of her right leg (above the knee) as a result of the defendant's negligent treatment. The plaintiff claimed for loss of earnings as well as a loss of amenities of life due to the irreversible damage to her lower limbs.

The court accepted that contingency deductions for loss of income are usually between 5 and 15 percent. In considering what percentage deduction to apply, the court will look at factors such as the plaintiff's age and whether they would be able to find employment in the future. The plaintiff was 51 years old when the radiation treatment commenced and 58 years old when her leg was amputated. She became unemployable after the injury and an award of R1.4 million was made for loss of earnings, which included a contingency deduction of 9%.

The court awarded R2.88 million for future medical expenses, applying a 5% contingency deduction to this portion of the claim, having considered her life expectancy and the nature of the injury. Taking into account factors including the scarring, amputation, pain and suffering, the court awarded R900 000 in general damages. The total amount awarded was R4.3 million. An interim payment of R900 000 had already been made by the defendant.

Dani v MEC for Health (Eastern Cape High Court)

Quantum: R7.88 million (R6.1 million future medical expenses / R1.3 million loss of earnings / R500 000 general damages)

Judgment Year: 2013

Keywords: above-knee amputation / luxuries vs necessities / contingencies / settlement / loss of earnings / general damages

The plaintiff received negligent medical treatment for injuries sustained in a motor vehicle accident, resulting in an above-the-knee amputation of his left leg. The defendant conceded liability and the court had to determine quantum. The issues in dispute related to whether the plaintiff was entitled to compensation for the costs of a domestic worker and a handyman/gardener, and for secondary and sporting prostheses, as well as a wheelchair. The defendant argued that the extra prosthesis and household help were not necessities, but the court found that the plaintiff would need a domestic worker (but not a handyman/gardener). As an active young man who "had his sporting enjoyment rudely removed", he was entitled to the benefit of a sports prosthesis.

Life expectancy

The courts usually determine life expectancy with reference to expert opinions, including medical and actuarial experts. The assessment of life expectancy is ultimately within the court's discretion subject to the proved facts. Assessing life expectancy is crucial in determining future medical expenses and quantum awards, which can be affected greatly by the determination of life expectancy. Contingency deductions or additions are often applied to life expectancy figures to account for the fact that a patient may die earlier from causes unrelated to the injury, or may live longer due to medical advances in the future.

A claim of a plaintiff who dies before an award has been made (but after the close of pleadings) is not precluded from an award for general damages if it is shown that those damages were already suffered. However, in that case, the issue of life expectancy falls away and any future loss claims fall away too.

Singh and Another v Ebrahim (Supreme Court of Appeal)

Quantum: R11 million for the injured child / R140 000 for the child's parents and sibling

Judgment Year: 2010

Keywords: cerebral palsy / birth injury / brain injury / life expectancy / claim for 'lost years' / loss of earnings / contingencies

The defendant admitted liability for negligence during delivery of a baby, which resulted in a brain injury that caused severe disablement by cerebral palsy. The parents claimed in their personal and representative capacities. This judgment is often quoted in cases assessing the quantum of damages for a brain injury (especially those resulting in cerebral palsy). The detailed discussion of the assessment of life expectancy is also often referred to in subsequent cases, especially with relation to the evidence of Professor David Strauss, a professor of statistics at the University of California.

Lost years

The plaintiffs claimed loss of earnings for the child for the period between his estimated date of premature death and what would have been his alleged normal retirement age of 65 years. This period 'from the date of premature death to the date on which a victim's earnings would have ceased had his life not been shortened, is commonly referred to as the "lost years"'. This type of claim is not allowed in South African law. A plaintiff can only claim loss of earnings up until the injured person's estimated date of death.

Life expectancy

Extensive evidence was led on life expectancy. The determination of life expectancy dramatically affects the amount of damages that can be claimed for future losses, such as future medical expenses. The issue of life expectancy is particularly fraught in cases where birth injuries have caused cerebral palsy. The child is often totally dependent on caregivers and may be confined to a wheelchair. In these cases, estimating the amount required as compensation for future medical and other care varies widely depending on the patient's life expectancy. Determining life expectancy must be done with regard to contingencies – there are always outlier cases, and the courts try to adjust for these eventualities. While it seems that the calculation of life expectancy is an exercise in speculation, the court has to use the best available information to make as informed a decision as it can, within its discretion. The use of expert witnesses, including medical experts and actuaries, is important in assisting the court to determine life expectancy and contingencies.

The evidence of Professor David Strauss, a professor of statistics at the University of California, has been cited in numerous judgments relating to the quantum of damages to be awarded for brain injuries that caused cerebral palsy. His evidence goes to determining life expectancy and is summarised here since it is relevant to many of these types of cases. Professor Strauss has created one of the largest databases recording the chances of survival of patients with brain injuries. The database includes information on around 300 000 people with mental disabilities (including cerebral palsy). In determining the life expectancy of cerebral palsy patients, the patient's health factors such as whether they can talk, walk, roll over, lift their head, feed themselves, respond to stimulus and more are put into the database. These factors are then matched with patients of similar symptoms, in order to calculate life expectancy. The calculation is then refined to cater more specifically to each individual patient's case.

However, it is important that Professor Strauss, being based in the USA, makes use of US data for his calculations. While he does make certain allowances for conditions in South Africa, it is doubtful that his adjustments go far enough in addressing the vast differences in standards of care and facilities available that arise in comparing a first world country with a developing country.

Mainstream criteria that are statistically significant are used as the basis for the initial estimate. Subsidiary criteria that are specific to each patient are then added as a contingency factor either negatively or positively affecting the life expectancy estimate. The contingency factors are used 'as an adjustment mechanism' dependent on the assessment of the individual patient and their specific condition.

Even though experts such as Professor Strauss are often called on to assist the court in determining the calculation of life expectancy, the court ultimately has to make the decision based on the available evidence and expert guidance.

The court must also decide whether the parties furnished the expert with correct information. The appeal court estimated life expectancy of 26 years. The trial court set the figure at 30 years. The appeal court said however that a 'difference of four years in a matter that is essentially speculative' does not warrant interference. The appellants asked for a re-evaluation of many individual items of damages related to the cost of future medical expenses. The court held that this was not permissible because the task of an appeal court in relation to discretionary damages 'is to assess whether the discretion has been properly exercised not whether each component making up the damages award has been correctly assessed.'

Contingencies

Contingencies make allowance for the possibility that some of the therapies or procedures proposed may not occur. The court has a discretion to decide whether a flat contingency rate should be applied to medical expenses as a whole, or whether the contingency should be limited to specific procedures, depending on the likelihood of the expenses actually being incurred. This may be done with reference to the therapies the patient has already received, and whether it seems feasible that the patient will have the time and energy to attend the various therapies.

Although the appeal court declined to reassess the detail in almost every item of medical expenses, the considerations set out by the defendant, which affect an award for specific expenses, are useful:

- Whether or not an item of medical expense ought to be awarded in principle;
- The tariff or cost of the item or therapy;
- Whether the item attracts normal inflation or medical inflation (the court noted that medical inflation was then usually 3.5% higher than normal inflation);
- The duration for which the therapy is required (this is related to life expectancy);
- How frequently the therapy or item is needed; and
- Whether and to what extent a contingency deduction ought to be applied.

PM obo TM v MEC for Health, Gauteng Provincial Government (South Gauteng High Court)

Quantum: R18.4 million for the injured child / R313 000 for the child's parent

Judgment Year: 2017

Keywords: life expectancy / contingencies / settlement / loss of earnings / general damages

The plaintiff claimed in her personal and representative capacity for the negligent conduct of the defendant's hospital staff in causing her child's cerebral palsy. Liability was admitted. This was an appeal against the lower court's quantum assessment.

The child was severely physically and mentally disabled. She was quadriplegic, had little voluntary functional movement and was dependent on others for all the activities of daily living. She could not talk. She required constant and permanent care, various therapies and assistive devices, and medical interventions and treatments.

An appeal court will not usually interfere with the trial court's discretion in determining the quantum of damages to be awarded. The court will only interfere if there was an irregularity or misdirection on the part of the trial court, if there was no sound basis for the award, or if the trial court's award is strikingly different from what the appeal court thinks should be awarded (*AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 *(A) and Singh v Ebrahim*).

Life expectancy

Life expectancy refers to "the additional years which a person is expected to live" from the date the calculation is done.

The expert witnesses disagreed on the plaintiff's estimated life expectancy and this had a considerable effect on the calculation of many of the plaintiff's claims. Professor Strauss, discussed above, estimated life expectancy at 29.2 additional years. Doctor Cooper, a paediatrician specialising in neonatology, estimated life expectancy at 18 additional years. The trial court rejected Professor Strauss' evidence in favour of Dr Cooper's evidence, because Professor Strauss is a statistician and not a medical expert. However, the appeal court noted that Professor Strauss has well-established and world-renowned expertise in the area of life expectancy, and this has been recognised by the courts in a number of cases, including by the SCA in *Singh v Ebrahim*. Therefore his evidence could not be rejected outright.

There is no mortality data in South Africa on cerebral palsy sufferers specifically, and the most extensive foreign data comes from Professor Strauss' database. Professor Strauss adjusted the estimate based on his database by comparing it to one of the South African Life Tables (a life expectancy table developed on the basis of actuarial calculations).

The court quoted *Singh* in stating that before statistical data was available to estimate life expectancy, the courts had to make a round estimate of what "seemed fair and reasonable in the circumstances". With credible statistical data, this no longer has to be done. The courts can now exercise their discretion with guidance from expert statistical data. The court still had to factor in the positive and negative clinical factors that did not form part of the life expectancy calculations based on Professor Strauss' database.

Compromise

The trial court did not give full effect to the expenses that had been settled between the parties. Compromises between parties cannot be set aside unless there are good reasons to do so, and therefore the appeal court found that the trial court did not have the discretion to exclude agreed items from the award.

Contingencies

The trial court applied different contingencies to different portions of the claim (10%, 15%, 25% in some instances, and 40% in one instance). The trial court did not give reasons for its application of the deductions or for using different percentages. However, in quoting Singh, the appeal court found that a contingency deduction of 25% is appropriate in the case where it is likely that the plaintiff will not undergo all of the therapies claimed for, because a multitude of therapeutic aids were claimed, and the plaintiff may not have the energy or time to fit in all of those therapies. The appeal court accepted the contingency deduction of 40% for renovations to the plaintiff's home, because of the likelihood that not all of the expenses would be incurred, and also because the estimated amount seemed inflated to the court.

The SCA in Singh did not interfere with most of the trial court's discretionary decisions. The court in PM quoted the trial court in *Singh*, stating that:

'adjustment should be made as part of a suitable contingency for the following:

> (a) that the maximum tariff may have been applied in some instances;
>
> (b) that the effectiveness of some of the therapies may be questioned;
>
> (c) whether the therapies will continue for the full proposed program, and in view of the relative lateness with which some of the therapies have been commenced;
>
> (d) the concern whether some of the therapies would be carried out with the diligence with which they have been claimed (although this might require merely a minor adjustment);
>
> (e) the difficulties of fitting in all the therapies as the patient's position might change from time to time;
>
> (f) the possible interruption of certain therapies if no benefit is to be gained from the continued application of those therapies;
>
> (g) to make allowance for some break (but not 12 weeks) per year [for caregivers];
>
> (h) It must also be remembered that the patient's performance fluctuates from day to day which would enable him to fit in less therapy in some days and more in others.'

Loss of earnings

Industrial psychologists estimated the plaintiff's loss of earnings. The trial court awarded a median amount between the two experts' assessments, and applied a 50% contingency to this amount. In justifying its contingency, the court said:

> "The relevant contingencies in this respect are the hazards of life including unemployment, illness, errors in the estimation of earnings and life expectancy, early retirement as well as other hazards of life."

The trial court found that the plaintiff was obliged to maintain her injured child for the rest of her life, and stated that the child would never be able to use a damages award for loss of income, and this factored into increasing the contingency deduction. On appeal, this was found to be incorrect. The appeal court held that a parent is not obliged to maintain the child for their entire life, and a damages award for loss of earnings may be used for her support, beyond the years of parental responsibility. The contingency deduction of 50% was found to be substantially different to deductions in previous similar cases and therefore it was changed to 20%.

General damages and the scope of parenthood

The court distinguished between unconscious patients and patients who have limited perception of their surroundings but can experience pain (known as "twilight cases"). Patients who are totally unconscious cannot be compensated with a monetary award for general damages. Twilight cases may receive general damages, even if the money is used to amuse the patient (the expense is for the patient's benefit, but the expense may be seen as frivolous). The court took previous awards in Singh and AD into account in making a similar award for general damages, of R1.8 million.

There was no evidence that the mother as plaintiff in her personal capacity suffered psychiatric injury or that she was depressed due to her child's condition. She did suffer from grief and sorrow over the situation, but this "inevitable

bereavement" is not actionable (compare the cases on emotional shock, related to general damages below, for example *Siwayi v MEC For Health, Eastern Cape Province*).

A claim for past caregiving and for caring for the child "beyond the scope of normal parenthood" was also disallowed. A parent cannot be compensated for "rendering services" to their children and if the child had been injured through no fault of anyone else the parents would still have had an obligation to care for the child. This can be compared to the *Lochner v MEC for Health and Social Development, Mpumalanga* case below, where the court allowed an award for caregiving beyond the normal scope of parenthood.

N obo N v MEC for Health, Gauteng (North Gauteng High Court)

Quantum: R571 879

Judgment Year: 2021

Keywords: caregiving beyond the normal scope of parenthood

The court awarded about R572 000 for past caregiving services, in relation to a mother who cared for her injured child. The mother was awarded the amount in her representative capacity. The child suffered from cerebral palsy and epilepsy and was almost 5 years old at the time of the trial. This case was distinguished from the PM obo TM case (above) because, in this case, the mother personally cared for the child, whereas in the PM obo TM case, outside caregivers care for the child. The court canvassed precedents allowing claims for caregiving by family members.

AD and Another v MEC for Health And Social Development, Western Cape Provincial Government (Western Cape High Court)

Quantum: R1.8 million general damages, special damages to be calculated by actuaries based on the court order

Judgment Year: 2016

Keywords :cerebral palsy / jaundice / failure to diagnose and treat / life expectancy / contingencies / loss of earnings / general damages

In a mammoth judgment of over 150 pages, the court went into detail about many issues relating to the quantum determination for a child afflicted with cerebral palsy, including life expectancy, loss of earning capacity and general damages. Life expectancy was determined with reference to the expert evidence of Professor Strauss and Dr Cooper (as in the *PM obo TM and Singh* cases above). The life expectancy tables developed by Professor Strauss, based on Californian data, was adjusted to take into account the South African context – this was done with reference to South Africa's life expectancy figures based on various census figures, the Koch life tables, and with reference to the impact that the HIV/AIDS pandemic has had on life expectancy rates in South Africa.

The case provides a detailed example of the manner in which a court assesses factual and expert evidence in order to come to a quantum determination. For example, the court looked at a number of international standard manuals regarding motor function of children suffering from cerebral palsy, to classify the child's level of impairment in relation to the facts regarding his ability to stand, walk and move. Many other factors were assessed, including: the child's ability to eat independently; whether the child would be incontinent for the rest of his life; speech and hearing ability; and the child's emotional state, including his ability to derive pleasure from play and other activities, and his displays of anger or unhappiness. The parties agreed on the necessity of appointing a case manager and a home facilitator/caregiver to coordinate and monitor therapies and other interventions. The use of orthotics and the need for a wheelchair was canvassed in detail with reference to the various expert opinions and the question of whether the child would likely develop scoliosis. Apart from physical therapies and the need for house adaptations, the court accounted for psychotherapy and the child's educational needs.

After looking at case law and the circumstances of the case, the court applied a 17.5% contingency deduction to the actuarially calculated lost earnings claimed.

In assessing conflicting expert evidence, the court noted that it must determine which (if any) opinions to accept based on the reasoning and reliability of the witnesses. Experts are meant to assist the court independently but the court noted in this case that:

> "It is disconcerting to a judge to be faced with opposing phalanxes of experts, on the one side supporting higher claims and on the other side supporting lower claims, with the gaps between them often very great. Is it mere coincidence that each side's experts, all supposedly trying independently and impartially to assist the court, reached conclusions favourable to the side that engaged them? This discomfort does not relieve me of the duty to assess each question of expert evidence on its individual merits but there are some instances, which I will identify when appropriate, where there seems to me to have been at least subconscious pro-client bias."

In coming to a decision on general damages, the court looked at previous awards in similar circumstances, and then itemised the specific pain, suffering and loss of amenities of life that it found to have arisen from the child's injury. The court concluded that an award for R1.8 million in general damages would be fair in this case.

Loss of earnings

R v MEC for Health (North West High Court)

Quantum: R7.77 million future medical expenses / R1.77 million loss of earnings / R800 000 general damages

Judgment Year: 2017

Keywords: brain injury / gangrene / drip incorrectly inserted / loss of earnings / contingency deduction / general damages

The plaintiff was successful in proving that her child's brain injury was negligently caused by the hospital staff. The consequence of the injury was that the child was unable to talk and suffered various other cognitive and behavioural impairments.

The parties agreed on the amount of future medical expenses at R7.7 million. The amount of R2.5 million was agreed for loss of earnings but the contingency deduction to be applied to this amount was disputed. The court applied a 30% contingency deduction because the child had neurological and growth issues before the injury due to being on ARV medication and therefore held that a higher than normal contingency should be applied.

Therefore, loss of earnings was awarded at R1.7 million. The award for general damages was R800 000, based on the facts of the case and awards made in similar cases.

Pietersen v MEC for Health, Province of Gauteng (South Gauteng High Court)

Quantum: R3 million general damages / R5 million medical expenses / R1.9 million loss of earnings

Judgment Year: 2021

Keywords: blindness / loss of earnings / general damages

The plaintiff received negligent medical treatment from hospital doctors. She was treated since 2005, when she experienced her first epileptic seizure. She was treated with medication to which she had an allergic reaction. A doctor negligently prescribed a drug that resulted in her developing Stevens-Johnson syndrome, a rare but serious disorder of the skin and mucous membranes. This also resulted in her blindness. The plaintiff was 39 years old at the time of the injury.

The plaintiff claimed general damages, loss of earnings and future medical costs, which included assistive devices and a home suitable to her special needs.

The parties agreed on the amount of R5 million for future medical expenses, assistive devices and the adjusted home. The court had to determine general damages and whether the probable scenario was that she would have remained unemployed for the rest of her life but for the incident.

The plaintiff lost her sight completely, has reduced hearing in the left ear, and impaired senses of smell and taste. These rank as serious disabilities, especially the plaintiff's complete loss of sight. She also had scars from lesions on her face, torso and extremities. The plaintiff's pain and suffering, disfigurement, disability and loss of amenities of life were ongoing. In addition to her physical injuries, the plaintiff alleged that she suffered post-traumatic stress disorder and major depressive disorder as a result of her medical condition.

Having regard to these facts and after looking at comparable case law, the court awarded an amount of R3 million for general damages.

The expert witnesses agreed that the plaintiff could not participate in the open labour market. However, they disagreed on her pre-incident earning capacity and whether she would have remained unemployed despite the incident.

The court looked at the plaintiff's employment history. She had a grade 8 level of education and worked in a number of jobs including as a security guard and as a mail processor. She stopped working when her daughter was 7 years old in order to stay home with her, because it was agreed with her husband that the area they lived in was not safe enough to leave their daughter unattended. She was still at home caring for her daughter at the time of the incident, and her child subsequently left school after grade 11. However, her uncontested evidence was that she sold clothes and ice cream during this time, from home, and also did some hairdressing, earning around R5000 per month.

The plaintiff argued that at the time of the incident she was unemployed by choice and not unemployable. She had never been dismissed or retrenched from former employment but resigned for her own reasons. The only factor that would have diminished her prospects of employment as a semi-skilled employee, according to the plaintiff's expert witness, was her age (she was 39 years old at the time of the negligent act).

The defendant's expert argued that it was highly unlikely that the plaintiff would have returned to formal employment, given her low level of education, limited work experience and having been unemployed for ten years prior to the incident. The plaintiff would have found it difficult to compete with younger, more experienced job seekers in the open labour market. The defendant's expert did concede that, pre-incident, the plaintiff was employable, but post-incident she was rendered unemployable.

The court weighed the expert evidence and sided with the plaintiff, reasoning that the plaintiff remained economically active, even though not formally employed, in order to personally care for her only child, who was school-going. The court noted that many mothers who elect to leave their formal employment to care for their children before and while they are school-going, elect to return and find formal employment once their children leave school.

Therefore, the claim for loss of future income was allowed.

The parties agreed on contingency deductions of 20% for past loss of income and 30% for any future loss of income. The total loss of earning calculation amounted to R1 926 760.

Van Der Merwe v Premier Mpumalanga (Gauteng High Court)

Quantum: R5.3 million (R2.1 million future loss of earnings / R2.5 million future medical expenses / R700 000 general damages)

Judgment Year: 2005

Keywords: blindness / loss of income / loss of earning capacity / general damages

The child was born prematurely and the hospital failed to diagnose and treat what is known as retinopathy of prematurity, which caused the child to become blind. The defendant conceded liability, and the court decided quantum in the amount of R5.3 million. The facts of this case are similar to that of *Lochner v MEC for Health and Social Development, Mpumalanga* (below) and was quoted extensively in that case.

A damages award should place the plaintiff in the position they would have been in, had the injury not occurred. If there are a number of possibilities or scenarios regarding what the plaintiff's position would have been, the court does not automatically have to choose the possibility least favourable to the plaintiff because she bears the burden of proof and could not prove that a more favourable possibility should be applied.

This judgment illustrates the intricacies of applying contingency deductions to quantum claims. For example, regarding special equipment that caters to the needs of a blind person, the court applied a 5% contingency deduction to account for the fact that similar items would have been required had the plaintiff been sighted, but in a less expensive form. Different contingency deductions were applied to different areas of the claim. For example, a 20% deduction was applied to the expense of employing a domestic worker, 35% to the employment of a gardener, and 30% to the amount claimed, in the event that the child ever needed childcare (if she had children). No contingency deduction was applied to the employment of a caregiver for the child.

A 20% deduction was applied to the calculation of the minor's pre-morbid income and earning capacity, and this was compared to the child's post-morbid earning capacity, to which a graded 60-65% contingency deduction was applied.

Lochner v MEC for Health and Social Development, Mpumalanga (North Gauteng High Court)

Quantum: R13.3 million (R1.2 million general damages / R7 million future medical expenses / R3.6 million loss of earning capacity / R300 000 past caregiving / R900 000 cost of protection of the award)

Judgment Year: 2013

Keywords: blindness / past caregiving / loss of income / loss of earning capacity / general damages

Like in Van Der Merwe above, the child was born prematurely and the hospital failed to diagnose and treat what is known as retinopathy of prematurity, which caused the child to become blind. The defendant accepted liability, but quantum was contested.

The court considered whether the child's parents and other family caregivers could be compensated for their caregiving. These family members made considerable sacrifices to care for the child. The defendants argued that the child seemed relatively untouched by her blindness, but the court noted that this was a result of all of the effort that her family put in. The uncontested evidence showed that the child's parents had to go far beyond what would have been required of them if the child was not blind and therefore they should be compensated for that. Around R300 000 was awarded for past caregiving.

The plaintiff claimed for the cost of hiring a "case manager" to manage the child's treatment. This person would assist with sourcing items the child needed, provide guidance on the appropriate therapy she required, and also "act as a buffer between her and the world", since the child "will always be vulnerable" due to her disability. The case manager would be someone who is knowledgeable about the blind, and it was therefore argued that the child's parents could not fulfil the role that a case manager would play. The defendant argued that a case manager was not necessary but the court held that necessity is not the test to be applied when determining whether the expense should be allowed. The test is what would be reasonable under the circumstances, and the court allowed the expense.

This case also contains a detailed explanation of how the court applied a contingency deduction to the patient's loss of income and earning capacity, setting out the calculations relating to pre-morbid and post-morbid scenarios, and the applicable contingency deductions.

The court stated that contingency deductions are usually applied to loss of earning or earning capacity calculations, but contingency deductions in relation to future hospital, medical and related costs, as well as costs for equipment and assistance do not necessarily follow. Whether a contingency deduction should be applied is dependent on the evidence of each case. The purpose of contingency deductions is "to fine tune an underlying scenario to take account of the extent to which it might be overly liberal or conservative" and its application is within the discretion of the court. The court applied a 20% deduction to the calculation of the child's pre-morbid earning capacity. The pre-morbid earing capacity must be compared to post-morbid earning capacity, in order to calculate the loss. A 75% deduction was applied to the child's post-morbid earning capacity.

This judgment refers extensively to the case of Van Der Merwe v Premier Mpumalanga (above) which had similar facts.

Molete v MEC for Health, Free State (Free State High Court)

Quantum: R2.5 million (R831 189 for future medical expenses / R1.3 million loss of earning capacity / R400 000 general damages)

Judgment Year: 2012

Keywords: arm fracture / failure to diagnose and treat / loss of earning capacity / contingency

The child's fractured arm was not diagnosed and treated adequately, and resulted in a permanent disability in his left elbow and arm. He did however have limited use of his left arm. Future loss of earning capacity relates to the effects of the injury on the child's ability to earn an income in the future. An educational psychologist, an industrial psychologist, and an occupational therapist assessed the child. They concluded that he would find it difficult to execute double handed tasks and that his job opportunities would be limited. Using the expert evidence and an actuarial assessment (determined with reference to the Koch Quantum Yearbook 2011) the court found that the child's loss of earning capacity was around R1.3 million.

This amount reflected a 7.5% contingency deduction because the court said that a higher rate of deduction was not warranted due to the difficulty in "projecting what the future possibly holds for a claimant injured so early in his childhood". Therefore, a conservative contingency deduction was applied. This is different to the court's reasoning in *DEM obo KOM v MEC* where it was found that since "many years had to lapse and that many uncertainties exist" a 20% deduction was to be applied to loss of earnings.

DEM obo KOM v Member of the Executive Council of the Department of Health, North West Province (North Gauteng High Court)

Quantum: R5,6 million (R3.6 million loss of earnings / R847 274 future medical expenses / R1.2 million general damages)

Judgment Year: 2015

Keywords: birth injury

The plaintiff's son suffered a brain injury and a severe injury to his arm during birth, due to the negligence of the hospital staff. Liability was conceded.

Loss of earnings was measured at R5 million based on the child potentially matriculating and obtaining a three-year degree or diploma had the injury not occurred. This was reduced by a 20% contingency deduction due to the fact that the child was very young at the time of the award. The court held that since many years had to elapse, more uncertainties regarding his future employment existed. It was also argued that the child retained a residual earning capacity of around 10% (perhaps being able to gain "sympathetic employment") and therefore a further deduction of 10% was made, bringing the amount to R3.6 million.

The parties were unable to present case law relating to injuries similar to the patient's, but the court considered the cases presented relating to arm amputations. This, coupled with the harm from the brain injury, resulted in a general damages award of R 1.2 million.

Bane and Others v D'Ambrosi (Supreme Court of Appeal)

Quantum: R2 million past and future medical expenses and R400 000 general damages / loss of earnings (to be calculated based on the court order)

Judgment Year: 2009

Keywords: loss of earnings / loss of earnings comparison to United Kingdom earnings / adjustment for lower cost of living in South Africa / medical aid / contingency deductions and additions

The appellant doctors admitted liability in the course of rendering medical and surgical services to the patient.

The claimant was an exceptional salesman and planned to emigrate to the UK, where he had received a number of job offers. He planned to begin a job in London in January 2001. In December 2000, he underwent surgery for an oesophageal hernia, with catastrophic results. The surgery severely injured his health and physical ability, and he was constrained to cancel his plans and decided to stay in South Africa to be near his family.

The trial court awarded an amount for loss of earnings based on a pounds sterling conversion. The appeal related to whether the loss of earnings should be subject to a deduction based on the lower cost of living in South Africa. The argument on future medical expenses related to whether the amount awarded should be limited to the claimant's current and future obligations for medical aid premiums, since he was classified as a chronic sufferer and covered by medical aid.

The court said that compensation for loss of earnings must focus on earning capacity, and what is done with the money afterwards is irrelevant. In other words, the court must look at turnover, not profit. The court did not look at the lower cost of living in South Africa as a collateral benefit, but rather sought to look at the actual loss. Therefore, instead of calculating the cost of living, the court decided to make a contingency deduction to cater for any advantage the claimant would receive from the calculation of the award in pounds sterling. The trial court applied a 20% contingency deduction to cater for the uncertainties associated with the plaintiff's prospects of making a success of his London venture. The appeal court applied a further 20% deduction to the notional past and future London income, to cater for the cost of living adjustment.

The medical scheme argument failed because members of the public are not obliged to take up membership of a medical scheme and a defendant cannot dictate how a plaintiff should structure their expenditure – the fact that the claimant was a member of a medical scheme at the time of judgment did not mean that he would continue to be a member in future.

Venter v MEC for Health Gauteng Provincial Government (North Gauteng High Court)

Quantum: R450 000 for loss of support

Judgment Year: 2015

Keywords: loss of support deductions and additions

The plaintiff claimed for loss of support resulting from the death of her husband. The court found that the deceased's death was negligently caused by the defendant's employees and therefore allowed the claim. The amount calculated by the actuaries, based on the deceased's salary, was accepted as correct.

Benjamin v De Beer (Supreme Court of Appeal)

Quantum: R303 000 (which includes general and special damages)

Judgment Year: 1997

Keywords: incorrect treatment / unnecessary surgery / thyroid injury / Hashimoto's thyroidosis / thyroidectomy

The case involved an unnecessary surgery that resulted in the patient's thyroid gland being removed entirely, whereas her condition should have been treated without surgery. She suffered complications and required further surgery. Liability was conceded but the defendant vigorously challenged the quantum determination of the trial court. The appeal court reassessed the quantum award, especially in relation to contingency deductions and loss of earnings, and decided not to interfere with the trial court's award.

Interest

Premier of Gauteng v Van Deventer (Gauteng High Court)

Quantum: R1 275 700 (of which R300 000 was for general damages)

Judgment Year: 2004 (and 2005 appeal on interest issue)

Keywords: knee injury / above knee amputation / interest

On appeal, the court found that the defendant did not have to pay interest on amounts awarded for the plaintiff's prosthetic limb (from date of demand to date of judgment) because no expenses had been incurred by the plaintiff prior to being compensated for the prosthetics by the defendant. She did not pay for the prosthetic limb herself, but waited to receive the award before buying it.

Life expextancy, Death, and the Transmissibility of a general damages claim

Nkala and Others v Harmony Gold Mining Company Limited and Others (South Gauteng High Court)

Judgment Year: 2016

Keywords: transmissibility of general damages to deceased estate

This case is notable in that it developed the common law rules on the transmissibility of general damages. The common law on general damages was that it was a claim of such a personal nature that it could not succeed to the estate of the claimant if the clamant died before close of pleadings.

This class action was brought on behalf of past underground mineworkers who contracted silicosis or tuberculosis, and on behalf of the dependents of mineworkers who died of silicosis or tuberculosis contracted while employed in the relevant gold mines.

The court said that on the facts of this case a huge injustice would result if the general damages that would have been due to the now-deceased class member is denied simply because they succumbed to the disease before the case had reached the stage of close of pleadings. Furthermore, the loss of the general damages claim would,

> "in this case, be borne by the widows and children of the deceased class member, as they would have benefited should their primary provider not have died pre-litis contestatio."

Therefore the court allowed claims for general damages to succeed to the deceased estates even before pleadings had closed.

This judgment was handed down in May 2016, but as will be seen from the following cases, the court has not applied the rule consistently in medical negligence cases. Some courts, such as the court in Oliver (below), held that the *Nkala* judgment went too far in developing the common law generally and that the judgment in *Nkala* should be limited to class actions only. Other cases such as *Booyse and H v MEC* (below) did not refer to *Nkala*, even though they were decided in 2019 and 2021 respectively. The jurisprudence regarding transmissibility of general damages claims to deceased estates is therefore not settled.

Oliver N.O. v MEC for Health: Western Cape Provincial Department of Health and Another (Western Cape High Court)

Quantum: R2.2 million special damages / R950 000 general damages

Judgment Year: 2022

Keywords: death of patient before close of pleadings / general damages

The plaintiff, now deceased, sued the defendant for alleged negligent actions of its medical staff that resulted in her leg being amputated. The claim included past medical expenses, loss of earnings, future medical expenses and general damages.

The original plaintiff amended her particulars of claim a number of times between 2015 and 2017. The last amendment was filed on 4 October 2017. The defendant therefore had fifteen days to file an amended plea, replying to the amended particulars of claim. However, the original plaintiff died on 9 October 2017, before the amended plea was filed.

The original plaintiff was substituted by her daughter, as executor of the deceased estate.

The defendant argued that since pleadings were not closed at the time of the deceased's death, the claim for general damages had fallen away. The plaintiff argued that the deceased had not amended any aspect of the particulars of claim beyond the quantum claimed for future medical expenses. The cause of action and basis for the claim for general damages remained as it was on the date of issue of the summons.

The court found for the defendant and upheld the original common law position that claims for non-pecuniary loss do not succeed to the estate of a deceased claimant, if pleadings have not closed at the time of the claimant's death.

The court noted that general damages claims are meant to compensate an injured party personally for the deterioration of "highly personal legal interests that attach to their body and personality". General damages are not intended to increase the value of an estate that has not suffered a pecuniary loss, nor to benefit heirs who have not experienced this loss.

Wie obo G v MEC for Health and Social Development of the Gauteng Provincial Government (South Gauteng High Court)

Quantum: R4.9 million

Judgment Year: 2016

Keywords: cerebral palsy / birth injury / brain injury / death of patient before judgment / capacity to contract

The case was brought by a mother in her representative capacity, as guardian of her minor child who suffered from cerebral palsy. She alleged that the child's condition was caused by the negligence of the defendant's staff at a public hospital. The claim was for about R4.9 million.

The minor child died before the plaintiff had accepted a settlement offered by the defendant, and before an executor had been appointed. The plaintiff then issued a notice of substitution to the effect that she became the representative of the deceased child's estate, after letters of authority were issued by the Master in terms of the Administration of Estates Act.

There was debate around whether the Master dealt with the appointment correctly in terms of the Act and in relation to the value of the estate, but for the purposes of the judgment the court accepted that the Master's decision would stand until set aside

The court noted that when the minor child died, all of the relevant issues were placed before the court (the pleadings had closed), and therefore her claim was transmitted to her estate.

The executor had not been appointed when the offer was accepted, and the question of whether the plaintiff had the legal capacity to accept the offer was raised.

The defendant argued that the plaintiff had instituted action as the guardian of the minor child and when the child died, that guardianship was terminated. Therefore, the acceptance of the offer was a nullity. The court noted that despite the notice of substitution:

> "A minor cannot incur contractual liability without the assistance of her guardian. Since legal cap9*acity to conclude contracts terminates on death, the guardian has no capacity after the death of the minor to provide the contractual capacity which the minor lacked in life."

The acceptance of the settlement offer was not binding since the plaintiff had no capacity to represent the deceased estate at the time of acceptance. Therefore, the application for judgment in terms of the settlement relied on was dismissed.

Booyse and Another v MEC for Health, Gauteng Province (North Gauteng High Court)

Quantum: R1.5 million general damages (for deceased patient) / R60 000 general damages for each parent / R85 000 in special damages

Judgment Year: 2019

Keywords: cerebral palsy / birth injury / brain injury / death of patient before judgment / life expectancy / twilight mental state / general damages / special damages

The plaintiffs sued a public hospital in their personal and representative capacities, on behalf of their minor son who was diagnosed with cerebral palsy as a result of negligent treatment of the hospital staff. The defendant was found 100% liable for the plaintiffs' damages. The child died before judgment was handed down and therefore many of the claims fell away, including claims for future medical expenses and future loss of earnings. The plaintiffs each claimed R60 000 in general damages for the trauma and shock relating to their child's condition. The court found this amount to be fair. The claim for past medical expenses in the amount of R60 000 was also awarded. Finally, the court awarded R25 860 for the parents to attend counselling.

The court also allowed an award for the child's general damages, since it was shown that the child had suffered while he was alive. General damages in the amount of R1.8 million was claimed on behalf of the child. The plaintiffs proved that the child was not in a persistent vegetative state (for example, they were able to show that he experienced joy and sadness to some extent) and he was therefore entitled to an award for general damages. The court noted that the mere fact that the child had died did not exclude his right to claim general damages. When the trial was heard, not much of the child's life remained and most of the general damages had already been suffered. The defendant had already made an interim payment of R1.5 million to the plaintiffs, as ordered by the court after the merits trial, before the quantum trial was heard. The plaintiffs argued that the interim amount be regarded as compensation for the child's general damages and that no further amount be paid in that regard. The court agreed with this as a fair and reasonable amount of compensation for the child's general damages.

Note: *this judgment is an anomaly in relation to the evolution of general damages and is not in keeping with current legal trends. The matter should have been appealed but was not, and therefore it should be viewed in isolation.*

H v MEC for Health, Gauteng Province (North Gauteng High Court)

Quantum: R500 000 general damages for the plaintiff and R600 0000 general damages for the deceased child / R136 000 special damages

Judgment Year: 2021

Keywords: general damages / psychological harm / death of baby / failure to diagnose / hydrocephalus / public health institution

The patient sued a public health institution for medical negligence resulting in the death of her minor child. The patient alleged that the death could have been avoided but for negligent treatment and failure to diagnose her child's hydrocephalus (swelling of the brain due to the build-up of fluid). The defendant denied liability and alleged that the death of the baby was a result of prematurity at birth.

The plaintiff claimed damages in her personal capacity and in her representative capacity as the executor of her deceased child's estate. The child had passed away at age two, before close of pleadings, but the defendant abandoned its argument that the claim in respect of her general damages could not be transmitted to the plaintiff. Therefore, the court did not consider that argument and allowed the claim for the child's general damages. It was shown that the child had suffered while she was alive.

The child was diagnosed with hydrocephalus a while after birth and a shunt was inserted in her skull. The shunt was displaced a few months later so the baby underwent further surgery to revise the shunt. A few months later, a neurosurgeon examined the baby and ordered an urgent CT scan. The results suggested a blocked shunt and extensive hydrocephalus. He referred the child back to the public hospital for urgent shunt revision. The mother attended the hospital on a number of occasions for follow-up visits over the course of nine months, but the shunt repair was not done prior to the child's death. The plaintiff claimed that the delay in diagnosing and treating her child led to the child's death. On the evidence the court found that the defendant's employees were negligent in their treatment of the child and held the defendant liable for the child's death.

The plaintiff initially claimed R1 500 000 in general damages but at the conclusion of the trial it was submitted on behalf of the plaintiff that an award in the amount of R500 000 would be appropriate for the plaintiff's general damages.

The plaintiff chose not to testify in the trial, and the defendant sought to hold this against her in relation to her claim for general damages. The court, however, accepted the explanation that the plaintiff was unable to testify due to her severe depression and mood disorder resulting from the child's death, and held that the lack of personal testimony did not preclude the award of general damages.

The court looked at previous awards for general damages relating to deaths of close family members. Those judgments awarded amounts between R185 000 and R280 000 in general damages. In the circumstances of this case, the court accepted that the general damages the plaintiff suffered was in excess of the amounts awarded in those previous cases and taking all of the factors of the case into account, made an award of R400 000 in respect of the plaintiff's general damages.

As part of the claim for general damages for the child, the plaintiff alleged that the baby had suffered extensive burns arising from negligence on behalf of the defendant's employees as a result of her being placed near, or very close to, a heater while in the care of the defendant at hospital. The defendant conceded liability for this part of the claim and the parties settled the quantum of damages in this regard, at R100 000.

The court then had to determine an award for general damages for the deceased child for the pain the child suffered as a result of her hydrocephalus. In light of the circumstances of the case, the court awarded R500 000 in general damages for the deceased child's suffering.

Harmse NO obo Jacobus v MEC for Health, Gauteng Province (South Gauteng High Court)

Quantum: R269 500 (of which R250 000 was for general damages)

Judgment Year: 2010

Keywords: leg injury / above knee amputation / failure to diagnose and treat / general damages

Quantum was limited to special damages for past losses (funeral expenses, past medical expenses, past loss of earnings and general damages for pain and suffering) because the original plaintiff died before judgment. The claim was finalised by the executor of the deceased estate.

The parties agreed that the claim for general damages succeeded to the deceased estate, because the pleadings had closed before the original plaintiff's death. General damages for pain and suffering were awarded for loss of amenities of life including severe pain, needing to use crutches, discomfort and depression.

General damages

The courts adopt a flexible approach to general damages, determined by the broadest general considerations, depending on what is fair in all the circumstances of the case. The court does not have to determine what the award will be used for (its purpose or function). The court must consider the victim's loss of amenities of life and pain and suffering. The courts recognise that while money cannot compensate for everything lost, it does have the power to enable those caring for the victim to try things that may lessen their pain and suffering.

The courts generally look to past awards in cases with similar facts, in order to determine what a fair award could be. Past awards are merely a guide and are not to be followed slavishly. They remain a guide, nevertheless. Court awards, where the sequelae of an accident are substantially similar, should be consonant with one another and similar across the land. Consistency and predictability are important to the rule of law. This also facilitates settling disputes of quantum.

While some aspects of pain and suffering cannot be awarded outright, such as a claim for grief or sadness, claims for general damages for emotional shock or trauma are awarded, based on the factual and psychological evidence led by the claimant. The line between bereavement and emotional trauma is murky.

Madela v MEC for Health, Kwazulu-Natal (Kwazulu Natal High Court)

Quantum: R1.6 million general damages / R4.95 million loss of earnings

Judgment Year: 2021

Keywords: general damages / cerebral palsy / birth injury

The plaintiff's baby suffered a brain injury during birth, due to the negligence of the defendant's hospital staff. The child was diagnosed with cerebral palsy as a result of the brain injury.

The court found the defendant liable for 100% of the plaintiff's proven or agreed damages. The parties agreed to separate the heads of damages, and the trial dealt with general damages and loss of earnings. The issue of future medical expenses stood over for determination at a later stage.

The parties agreed, based on one of the expert reports, that the child's life expectancy was an additional 47.2 years from the date of the trial (she was 8.8 years old at the time). The expert report relied on Koch's Table 2 as a reference life table in order to estimate life expectancy.

Based on expert reports, it was agreed that the child would never be able to receive vocational training of any kind, would only benefit from specialised schooling to provide stimulation, would never be employable, would never be able to manage her finances or determine her needs, and would be reliant on someone else for her safety and care constantly. She required constant supervision and a caregiver. The child was capable of movement and could comprehend simple instructions and she was capable of play.

The court said that in arriving at an appropriate award, the court does not have to determine what the award will be used for, but must consider the child's loss of amenities of life, and her pain and her suffering. The court was referred to comparative cases in considering the award of general damages. Those awards provided a range of R1.2 million to R2.2 million for similar brain injuries.

The court noted that many counsel in medical negligence matters rely on the 2017 decision of *PM obo TN v MEC for Health, Gauteng Province*, which sets the bar for general damages in cerebral palsy cases at R1.8 million. However, the injuries that the minor child suffered in *PM* were greater than the injuries suffered in this case, and each case must be decided on its own facts. Taking all of the circumstances into account, the court made an award of R1.6 million in general damages.

The court summarised many previous judgments in assessing the expert evidence relating to loss of earnings. The defendant's expert report did not involve any assessment of the child or her mother, and the report was based purely on the review of the other expert reports. Much of the information was unverified, and therefore the court found this report to be unreliable, given the lack of facts and collateral information. The parties agreed with the court's approach to accept the plaintiff's expert report in assisting it in its determination of loss of earnings. The defendant was given the opportunity to cross-examine this expert witness, but declined to do so, and chose instead to argue for a higher than normal contingency to be applied.

The plaintiff's expert concluded that it was likely that the child would have completed grade 12 and tertiary education and would have reached a skilled level of employment. She used the Deloitte National Remuneration Survey in her calculations.

The court found the plaintiff's expert report extremely conservative in its approach and in respect of its projected scenario for the child's future. The court noted that adding an appropriate contingency would give the award balance and fairness, by taking into account various factors.

Using the approach of Mr Robert Koch in his book Quantum of Damages, would result in a contingency of 22%. However, the plaintiff submitted that a lower contingency should be applied because the child's mother would not be able to advance in her career, since she had to look after the child, and because the expert report applied such a conservative approach in its calculation. The defendant argued for a higher contingency, citing factors such as the family history of careers, the current economic climate in South Africa and the effect of the Covid-19 pandemic.

Based on the expert report, the submissions of the parties and the family history, the court applied a contingency deduction of 25% to the calculation of loss of earnings.

The court ordered that a trust be created to administer the funds for the benefit of the minor child.

Siwayi v MEC For Health, Eastern Cape Province (Eastern Cape High Court)

Quantum: R250 000 general damages

Judgment Year: 2018

Keywords: general damages / psychological harm / birth injury / death of baby / public health institution

The patient sued a public health institution for medical negligence resulting in the death of her minor child. The patient alleged that the death could have been avoided but for negligent treatment during labour and delivery of the baby. The baby's skull was fractured during labour and the baby died a few days after birth. The court found that the continued attempts of the hospital staff to proceed with a vaginal delivery after an instruction from the doctor on duty for the patient to deliver by caesarean section was negligent. The patient's claim was successful.

Apart from recovering damages for medical expenses and loss of earnings, the circumstances warranted a general damages award of R250 000.

In determining the award for general damages, the court looked at the fact that the patient suffered psychological problems after the traumatic events surrounding her baby's death. She became socially withdrawn and her work began to suffer. The experts agreed that the patient showed symptoms of major depressive disorder and post-traumatic stress disorder following the traumatic loss of her baby.

The patient persisted with a claim of damages in the sum of R900 000. However, there was no proper motivation for the amount. The court had regard to the expert evidence relating to the patient's psychological distress, as well as

previous awards in similar judgments, in order to determine a reasonable and fair amount of general damages. Referring to relevant comparable case law, the court found that awards for general damages made in similar cases ranged from R120 000 to R250 000.

Since the patient suffered more severe consequences than the litigants in the cases considered, and there was evidence that she suffered lasting trauma, unresolved mourning, severe stress disorder and depression, the court found it reasonable and fair to award general damages in the amount of R250 000.

Mbhele v MEC for Health for the Gauteng Province (Supreme Court of Appeal)

Quantum: R100 000 in general damages

Judgment Year: 2016

Keywords: general damages / emotional shock / psychological harm / death of baby / stillbirth / claim for constitutional damages based on the right to rear a child (not sustainable)

The court found that the negligence of the medical staff at a public health institution caused the plaintiff's baby to be stillborn. The stillbirth resulted from lack of optimal care, which included negligently failing to adequately monitor the patient and failure to respond to foetal distress.

After delivering the stillborn baby, the plaintiff was inappropriately taken to a ward with mothers and their new-born babies, whereas she had to contend with an empty cot. She was compelled to identify her stillborn baby despite fainting on first site of her stillborn child. The plaintiff alleged that she suffered from emotional shock and subsequent depression and anxiety.

The plaintiff's claim for emotional shock succeeded and she was awarded an amount of R100 000 in general damages.

However, the court found that her other claim, based purely on the right to rear a child (who was not born alive) is not recognised in our law and therefore could not succeed.

Mtiki v Member of the Executive Council for the Department of Health (Eastern Cape High Court)

Quantum: R350 000 special damages / R350 000 general damages

Judgment Year: 2019

Keywords: back injury / general damages

The patient was involved in a motor vehicle accident. The clinic failed to diagnose and treat her back injuries properly, leading to costly surgery being required. The defendant conceded liability. The court had to determine the quantum of damages.

Special damages had been agreed and confirmed by the court (future medical expenses for the treatment of the plaintiff's spinal cord had been agreed at R350 000).

The plaintiff sought an amount of R400 000 for general damages and the defendant suggested that R200 000 was a reasonable amount.

When a court assesses general damages it must exercise its own discretion. General damages relate to intangible harm such as pain and suffering, which is not easy to quantify Therefore the courts rely on flexible principles in coming to a fair award.

Previous awards made by other courts in similar situations must be taken into account (but without a comparative analysis being made since there are no strict rules in determining general damages). Recognition has to be given to the fact that awards being made in recent times have been progressively higher than they were in the past, owing to the value placed on individual freedoms and opportunity, and rising standards of living.

The court must determine what a reasonable award in the circumstance would be and also "must ensure that the award that it finally makes is not tantamount to an enrichment scheme serving only to prejudice most defendants who are already confronted with the ever-increasing vulnerabilities of the country's weak economy".

Having regard to the specific circumstances of the case and comparable cases from the past, the court awarded an amount of R350 000 for general damages.

M obo L v Thibedi and Another (North Gauteng High Court)

Quantum: R450 000 general damages / R110 000 future medical expenses

Judgment Year: 2019

Keywords: general damages / scarring

The defendants admitted 100% liability for the plaintiff's proven damages as a result of injury and scarring sustained by her minor child. The defendants admitted the costs of future medical expenses in the amount of R110 000 based on expert evidence by plastic surgeons.

The court had to decide the appropriate award of general damages and whether the defendants were liable for the minor's loss of earning capacity, if any.

It was agreed that the scar was cosmetically unsightly and disfiguring, conspicuous and difficult to conceal and also permanent (with some prospects of improvement by way of scar revision techniques). The patient would feel self-conscious in social settings, and it would affect his social life.

However, the effect on the child's future work prospects was not properly argued and no evidence was brought in that regard. The plaintiff did not obtain any expert reports regarding the minor child's loss of earning capacity.

Therefore, on the evidence, the court could not find that the minor child's capacity to be employed was diminished due to the scarring on his head, and therefore made no award for loss of earning capacity.

In looking at previous awards in similar cases as a guide and at the particular facts of this case, the court found that an award of R450 000 for general damages was appropriate (the defendant argued that R100 000 would be appropriate, the plaintiff argue for R400 000, so the court's award was unusually high).

The comparable case law considered was related to a dog bite on the cheek (R64 000 awarded), a dog bite on the face (R101 000 awarded), a scar on the forehead due to a motor vehicle accident (R 400 000 awarded) and injuries due to burns on the wrist, knee, arms and breast (R450 000 awarded).

The court confirmed that previous awards made in similar cases must be used as a guide in determining general damages. But this must be done with reference to the facts of the specific case as a whole, and few cases are directly comparable. Inflation must also be taken into account.

Expert evidence is useful in determining loss of earning capacity, but the court noted that those enquiries are speculative by nature, because they involve predictions as to the future "without the benefit of crystal balls". All the court can do in such a case is make a rough estimate of the present value of the loss.

Khoza v MEC for Health, Gauteng (Supreme Court of Appeal)

Quantum: R19 million (R1.8 million in general damages increased on appeal from R200 000)

Judgment Year: 2018

Keywords: general damages / twilight mental state / birth injury / baby case / brain injury / cerebral palsy / public health institution

The plaintiff was successful in her case against a public health institution. She claimed on behalf of her minor child, who suffered a brain injury during birth which resulted in the child suffering from cerebral palsy.

This case was an appeal against the quantum of damages awarded by the court. The appeal court substantially increased the amount of general damages awarded to the plaintiff.

The lower court awarded general damages in the amount of R200 000, as well as damages for past and future medical expenses. The plaintiff appealed this award, arguing that the amount for general damages should be increased. General damages are awarded for pain and suffering and loss of amenities of life.

Evidence was led that justified an increase in the award, including factual and expert evidence related to the child's experience of pain and discomfort, and unhappiness and frustration with his situation. The child would be incontinent for his entire life, and this would result in the perpetual use of nappies, and the need for the assistance of caregivers. He would have to undergo physiotherapy, requiring the regular use of a hoist in later years. He disliked being

moved by others. He would lose his entire mobility when he was about 37 years old. He had difficulty eating and, at least to some extent, he was force-fed. This evidence was not disputed. The child was not in a state of "unconscious suffering".

The child's awareness of his suffering, albeit diminished by his reduced mental faculties, puts him in the "twilight" situation discussed in the often-quoted case of *Marine & Trade Insurance Co Ltd v Katz NO [1979] AD*. That case held that in awards arising from brain injuries, although a person may not have "full insight into her dire plight and full appreciation of her grievous loss", there may be a "twilight" situation in which she is not a so-called "cabbage" and accordingly an award for general damages would be appropriate. This case has been followed in numerous instances and confirms that the child in these circumstances is entitled to an extensive award for general damages.

The court had regard to what the lower court considered in coming to its decision – the lower court had said that the figure agreed between the parties relating to past, future and related medical and hospital expenses took the child's loss of amenities of life into consideration. Accordingly, the lower court held that a further award in that regard would be a duplication of compensation.

However, the appeal court said that compensation for pain and suffering, to the extent that one can ever "compensate" for it, is neither a duplication of the amount awarded for past and future medical and hospital expenses, nor for loss of amenities of life. Therefore, the appeal court held that the lower court was clearly wrong in this regard and accordingly, its award could be interfered with. There was a striking disparity between what the lower court had ordered and what the appeal court thought should have been awarded.

Based on the evidence and with the use of comparative judgments, the court increased the award for general damages from R200 000 to R1.8 million.

With regard to the percentage contingency deduction that should be applied to the award for future loss of earnings, even though the discount rate often cannot be assessed on any logical basis, the court said that nevertheless, in context, something more reasoned is required, especially if a court is to depart from the normal range of between 15 and 20 percent. Simply taking the median of what the respective parties asked for is also not logical. Conjecture may be required in making a contingency deduction, but it should not be done whimsically. A 20% contingency deduction for future loss of earnings was therefore applied.

Past medical expenses were awarded, as well as future medical expenses (R15 million) and future loss of earnings (R1.4 million).

S obo S v MEC for Health, Gauteng (North Gauteng High Court)

Quantum: R1.8 million

Judgment Year: 2015

Keywords: general damages / past awards / twilight mental state / cerebral palsy / consumer price index

A child was born with severe cerebral palsy and the parties settled the merits and most of the quantum issues, with the defendant accepting liability for 50% of the proved damages. The only remaining issue for the court to determine was the quantum of general damages.

The experts agreed that the child had no insight into his condition but that he did suffer pain, discomfort and frustration. He suffered a permanent loss of amenities of life and his life expectancy was substantially reduced. The plaintiff argued for an amount of R1.8 million as an appropriate award for general damages. They relied on case law that dealt with awards for similar injuries, adjusted to present day values.

The court reiterated that the reliance on comparisons with awards in previous cases is appropriate if the comparison is used as a guide and is not decisive. Comparison is only useful where the circumstances of the cases are "broadly similar in all material respects". Looking at past awards should not dominate the enquiry. The court must exercise its discretion, based on the facts of the case, to make an appropriate award.

In this case, the court looked at the judgment of *Singh* in which the facts were similar and in which an award for R1.2 million was made. Adjusted for inflation, the amount would have been R1.8 million at the time of the judgment. The court noted that "generally, it is not advisable to make an

adjustment for the depreciated value of money by slavishly applying the figures of the Consumer Price Index as that would unduly limit the court's discretion to determine the quantum of general damages." However, in this case the injuries were found to be even more serious than those dealt with in the Singh case, and so the court found that adjusting the amount in this manner would not unduly benefit the plaintiff. Therefore an award of R1.8 million for general damages was awarded.

Nzimande v MEC for Health, Gauteng (North Gauteng High Court)

Quantum: R76 000 special damages and R500 000 general damages

Judgment Year: 2015

Keywords: scarring / psychological harm / birth injury / general damages / special damages / res ipsa loquitor

The patient sued a public health institution for medical negligence during labour and delivery of her baby. The baby's arm was deeply cut during delivery via a caesarean section and the baby was left unattended in a malfunctioning incubator for at least three days before the patient was allowed to see and attend to the child. The child's injuries were only treated during surgery a number of days later, and took around 3 months to heal due to infection, causing pain and suffering to the child. The child will need surgery when she is older, in order to remove the scars left by the injury. The patient's caesarean wound was also treated poorly, becoming infected and requiring a second surgery to re-close the wound. Apart from physical pain and discomfort, the patient suffered psychological trauma due to these events. No witnesses were called by the defendant, despite the relevant witnesses being available. No expert evidence was presented by the defendant either. The defendant's position was merely a bare denial. The plaintiff was a credible witness and she called two expert witnesses, a clinical psychologist to deal with her emotional and psychological trauma and a plastic surgeon, to address the child's injury.

Negligence was proved in respect of the psychological harm suffered by the mother and the injuries to the child's arm. However, evidence was not led specifically in relation to the mother's physical wound, and therefore the court had to consider whether negligence could be inferred from the facts of the case to conclude that negligence was also present in respect of her wound. The case is notable because the rule of res ipsa loquitor (facts can speak for themselves, leading to a presumption of negligence) is very rarely applied to cases of medical negligence. However, due to the nature of the defendant's defence (or its lack of defence and its obstructive nature towards this claim) the court found it appropriate to apply the maxim and found negligence in respect of the plaintiff's caesarean section wound as well (see paragraphs 17-21 of the judgment for more on the issue of res ipsa loquitor, which is not directly relevant to this discussion on quantum). In applying res ipsa loquitor the court said that:

> "The mere fact that the plaintiff's wound began to bleed may not in itself be ascribed to negligence and there is no expert evidence to suggest that this complication arose as a result of a failure to perform the caesarean section according to accepted medical standards. But the subsequent failure to perform the operation that was necessary to repair the bleeding wound with due expedition, and to subject the plaintiff to days of pain, suffering, worry and disability while being parted from her child does not require expert evidence to establish a strong prima facie case of grave negligence by doctors and nurses alike."

The plaintiff's claim was for R7 million in damages, which the court found to be completely unrealistic. The defendant suggested amounts of R300 000 as general damages for the child and R150 000 as general damages for the mother. These amounts were accepted as realistic but somewhat low in respect of the mother's claim.

The court therefore awarded:

- R40 000 in respect of the mother's medical expenses for future psychological treatment;
- R36 000 for the child's future medical expenses;
- R200 000 as general damages for the mother's pain and suffering;
- R300 000 as general damages for the child's pain and suffering;

Matlakala v MEC for Health, Gauteng Provincial Government (South Gauteng High Court)

Quantum: R1.5 million general damages / R1.6 million special damages for loss of earnings

Judgment Year: 2015

Keywords: cerebral palsy / birth injury / loss of earnings / general damages

The defendant's hospital staff allowed the plaintiff to undergo a prolonged labour for an unacceptable length of time when a caesarean section was indicated. The child suffers from cerebral palsy due to the negligence of the defendant's employees.

The plaintiff claimed R1.5 million in general damages for the child. The child was totally uncommunicative and not alert. He could not make eye contact, talk or communicate with facial expressions. He would not be able to walk or stand and could not be educated. He needed constant care and his condition was irreversible. The court found that the child suffered substantial levels of pain and disablement with a "devastating loss of amenities of life" and therefore awarded the full amount claimed by the plaintiff for general damages.

Special damages in the amount of R1.6 million was awarded for future loss of earnings, which was an actuarial calculation made by the plaintiff's actuary, including a 20% contingency deduction. This amount was not contested by the defendant.

The cost of two permanent caregivers was allowed. In order to account for annual leave of these caregivers, 14 months' salary per year per caregiver was awarded in order to provide for relief caregivers, and the cost of residential care for the patient after the age of 30. The cost of medical expenses was also awarded. These amounts were not evident from the judgment, because the judge referred calculations in respect of these items to be made based on one of the actuary's expert reports.

Mokhethi and another v MEC for Health, Gauteng (South Gauteng High Court)

Quantum: R21.4 million

Judgment Year: 2013

Keywords: arm injury / amputation above the elbow / punitive costs order

A five-year-old child underwent surgery for a growth on his neck, resulting in his right arm becoming lame and requiring eventual amputation. Liability for negligence was admitted. The court had to determine quantum.

The plaintiff alleged that apart from physical pain and discomfort, the child suffered taunting and emotional trauma at school. The plaintiff also alleged reduced intellectual capability caused by the injury.

The plaintiff filed 18 expert reports. The defendant filed none, and seemingly did not prepare for trial despite numerous reminders by the plaintiff's attorney. The defendant did not admit any of the plaintiff's expert reports, forcing the plaintiff to call many expert witnesses to trial merely to confirm their reports, a lengthy and costly exercise. The defendant unsuccessfully applied for a postponement of the trial. The plaintiff's experts argued that the matter had to be dealt with quickly, since the child required an urgent amputation of his arm, due to the worsening of his condition.

Even though the expert reports were not admitted by the defendant, the plaintiff's experts attended the trial to confirm their reports, and they were admitted into evidence unchallenged because the defendant did not cross-examine any of them, or provide any of its own evidence. Therefore, those reports stood uncontested. That, along with the precedent of the Rens case, which dealt with a similar injury (discussed below), resulted in the extraordinarily large quantum awarded to the plaintiff, based mostly on the plaintiff's own unchallenged calculations:

- R2.27 million for loss of earnings, less a 15% contingency deduction;
- R17.8 million for future medical expenses, less a contingency deduction of 15%;

- R700 000 in general damages;
- The cost of administration of a trust to protect the award, at 7.5% of the total award.

The total amount awarded was R21 480 394 (slightly less than the amount awarded in Rens).

These large awards are surprising especially compared to awards made in cases of cerebral palsy. However, the absence of any substantial defence by the defendants played a significant role in the outcome. In many cerebral palsy cases, where the injured children are left severely disabled and often paraplegic, the awards are sometimes lower, perhaps due to the vigorous defences put up by the state in those cases, or at the very least, a genuine effort to contest the plaintiff's computations.

The court expressed its displeasure at the defendant's handling of the case by making a punitive costs award on the attorney/client scale.

Rens v MEC for Health: Northern Cape Provincial Department of Health (Northern Cape High Court)

Quantum: R25.6 million

Judgment Year: 2009

Keywords: arm injury / amputation up to the shoulder / punitive costs order

A ten-year old child fractured his left elbow and received negligent treatment at a state hospital, resulting in the amputation of his arm up to his shoulder. Liability was conceded, and quantum had to be determined.

Apart from pain and suffering, and disfigurement and disablement, the child also suffered from self-consciousness, lack of self-esteem and depression. He was no longer able to obtain a technical qualification and was limited in his work opportunities.

The defendant failed to defend the matter at all, and the award was based on the plaintiff's claims, adjusted by the court for contingencies with the help of an actuary. The amount awarded was therefore surprisingly large, as in the Mokhethi case above (which referred to this case extensively).

The quantum was:

- R18 million in medical and related expenses;
- R2.4 million in loss of earnings;
- R4.3 million for the costs of administering a trust to protect the award;
- R600 000 in general damages

The total award made was R 25.6 million.

Joubert v Meyer (North Gauteng High Court)

Quantum: R390 000 (of which R180 000 was for general damages)

Judgment Year: 2017

Keywords: tummy tuck / abdominoplasty / infection / corrective surgery / general damages

The defendant agreed to 90% liability for a botched tummy tuck. The plaintiff required corrective surgery and suffered from pain and discomfort. She claimed for psychotherapy, physical therapy, past medical expenses and general damages.

The court awarded R210 000 for past and future medical expenses and R180 000 in general damages. The court included the 10% reduction in its award (due to liability being conceded at 90% of the proved damages).

However, the plaintiff was liable for costs incurred after the date of a settlement offer made by the defendant – the plaintiff had rejected this offer, which was in the amount of R480 000.

Gibson v Berkowitz & Another (Witwatersrand Local Division)

Quantum: R133 850 (R70 000 in general damages / R63 850 special damages)

Judgment Year: 1996

Keywords: acid / vagina / general damages

The court had to determine quantum for the plaintiff's injuries, caused by the negligent placing of undiluted acid into her vagina. She suffered from medical complications, scarring and pain as well as emotional shock and trauma. The psychological consequences of the injury were

canvassed in detail with reference to the facts and expert opinions. The court allowed the claim for psychological trauma despite the defendant's argument that the plaintiff was prone to a psychological breakdown due to her inherent personality traits.

The thin skull rule was applied, with the defendant being liable to compensate the victim as they found her, "with all her personality traits which played an important although unquantifiable role in causing the [emotional] collapse".

The court said that a distinction should be drawn between a party's conduct pre-delict and after the delict: actions pre-delict could lead to a reduction of damages under the Apportionment of Damages Act, while post-delictual negligence related to causation and whether an intervening action occurs that sufficiently interrupts the chain of causation to absolve the defendant from liability. In this case, the plaintiff's refusal to attend counselling was post-delict and was not unreasonable in the circumstances, because the possibility of psychotherapy and what it could mean for her was never properly discussed with her.

Clinton-Parker v Administrator, Transvaal and Dawkins v Administrator, Transvaal (Witwatersrand Local Division)

Quantum: unknown

Judgment Year: 1995

Keywords: switched at birth / nervous shock / psychiatric illness

The court had to decide whether it could make an award for nervous shock resulting in psychiatric illness, which arose due to the hospital staff negligently swopping two babies at birth. The parents discovered the error two years later and decided to keep the children they had taken home. They sued for psychological harm and the court allowed the claim.

Apportionment of damages and double compensation

Apportionment of Damages Act, 1956

The Act allows a plaintiff to sue joint wrongdoers in one action. If joint wrongdoers are not all sued at once, the Act limits the plaintiff's ability to later sue the wrongdoer he or she failed to pursue initially.

Contributory negligence is also addressed. If a person suffers damages caused partly by their own fault and partly through the fault of another, the plaintiff is entitled to sue the wrongdoer, but the damages recoverable must be reduced by the court, in proportion to the plaintiff's own negligence in causing the harm.

If judgment is granted against one wrongdoer in full, that wrongdoer may recover a contribution from any other joint wrongdoer in proportion to that wrongdoer's negligence in causing the harm. That is the subject of the *Life Healthcare Group (Pty) Ltd v Suliman* case (below).

Life Healthcare Group (Pty) Ltd v Suliman (Supreme Court of Appeal)

Quantum: R20 million (apportionment of 40/60 between hospital and doctor)

Judgment Year: 2018

Keywords: apportionment of damages / birth injury / baby case / cerebral palsy / private health institution / private doctor / covering doctor / negligence

The patient sued a private hospital for medical negligence in her personal capacity and on behalf of her minor child, who suffered a brain injury during birth, which resulted in the minor child being diagnosed with cerebral palsy. The injury could have been avoided but for negligent treatment during labour and delivery. The hospital settled the patient's claim in the amount of R20 million and then sought a contribution from the doctor who attended the patient's delivery. The hospital was successful in proving that the doctor was contributorily negligent and therefore partially liable to pay the claim.

In determining whether the doctor was liable, the court said that the real issue between the doctor and the hospital was not whether earlier attendance on the patient would have prevented the harm, but whether he was under an obligation to attend earlier. All the evidence showed that it was more probable than not that had the doctor attended the hospital earlier, the injuries would have been avoided. The hospital succeeded in proving factual causation on a balance of probabilities.

The court said that the attitude of the doctor, that he had no doctor-patient relationship with the patient (since he was merely covering for a colleague), was too lackadaisical and legally and morally indefensible.

The doctor's duty of care to the patient arose when the patient was admitted to the hospital and the doctor responded positively to that notification. A reasonable obstetrician would have visited the patient shortly after admission and conducted their own observations.

On the evidence, the court found that the doctor's negligence was also causative of the cerebral palsy. Therefore, the court found that there was contributory negligence on the part of the doctor, but the damages were not divisible. It is in the discretion of the court, based on the evidence, to assess the relative degree of fault of the parties. The court found that the doctor's negligence was greater than that of the nursing staff, because the nursing staff had to make the proper observations, but the doctor had to provide instructions and hands-on care. He was "the specialist who abdicated his duties" and therefore his greater responsibility for the loss should be reflected in the apportionment. A 40-60 apportionment of the damages in favour of the hospital was made.

Shushu v Member of The Executive Council for Health, Gauteng Province (North Gauteng High Court)

Quantum: 1.72 million

Judgment Year: 2022

Keywords: double compensation / motor vehicle accident

The plaintiff was admitted to a public hospital for injuries sustained during a motor vehicle accident. This included a compression fracture at the L1 to L2 level of her vertebrae and an injury to her knee. The defendant hospital's employees negligently performed an unnecessary fusion on the T10 to T12 vertebrae of the plaintiff's back.

The plaintiff was not aware of the erroneous back operation. She therefore claimed only against the Road Accident Fund for the injuries sustained during the accident. That claim was settled, but in the course of the RAF claim the defendant hospital's negligent operation was discovered. The plaintiff then sued the hospital for their negligence.

The court found the defendant negligent, but the issue of double compensation then arose. The defendant argued that since the RAF paid compensation for the injuries, the plaintiff was not entitled to compensation by the defendant.

Compensation for delictual damages should be calculated on the difference between the plaintiff's patrimonial situation before and after the commission of the delict, and the plaintiff should not generally be in a better or worse position after the delict. The court needs to balance a number of principles in deciding an award for damages. Advantages that the plaintiff received as a result of the delict can be taken into account in some circumstances, but the wrongdoer should not be allowed to benefit by the fact that someone else has discharged the liability. Monetary awards ordered by a court should be compensatory and not penal. The plaintiff should not be compensated for their loss twice.

The RAF settled the claim by paying a lump sum of R980 000, which was inclusive of general damages and 20% future loss of earning capacity. The RAF also gave an undertaking to pay future hospital and medical treatment.

The court stated that whether compensation payable by the defendant would amount to double compensation depended on it being established that the payment made by the RAF was in respect of the same injuries for which payment against the defendant was sought. The court found that the plaintiff would not be doubly compensated if the defendant was ordered to pay damages because:

- It was not explicitly stated for which injuries the plaintiff was compensated by the RAF. The medico-legal reports in that case referred to both the motor vehicle accident and the medical negligence.
- The defendant did not call a witness from the RAF to clarify whether compensation for the RAF included injuries related to defendant's the medical negligence.
- The only clarity found in the RAF case was one explicit mention that future medical treatment costs for injuries relating to the motor vehicle accident would be paid. From this it was concluded that the RAF compensation was for injuries sustained in the motor vehicle accident.

The court had to compute the defendant's liability, and did so from the starting point of R2.6 million, which was the amount agreed between the parties as being inclusive of the plaintiff's claims against the defendant.

The plaintiff suggested that the amount be apportioned 50/50 between the defendant and the RAF, but the defendant refused to offer a suggested calculation, insisting on the double payment argument.

The court did not apply a 50-50 split. The court found that R2.6 million was inclusive of all aspects of the plaintiff's claim against the defendant. Therefore, the court subtracted the amount of R980 000 (what was paid by the RAF) to award an amount of R1.72 million payable by the defendant. The court said that any other method of calculating the plaintiff's damages would be vague or disadvantageous to the plaintiff.

Costs of Medical malpractice litigation

Medical malpractice cases often take years from summons to final judgment, and therefore the costs incurred for legal fees are considerable, especially due to the extensive use of medical and other experts.

The following case dealt with taxing a bill of costs in relation to a medical negligence case.

It provides useful insight into how much medical malpractice litigation costs and what costs a successful party can actually recover from the other side.

The general rule is that legal and expert fees must be reasonable. South African courts do not usually make punitive costs awards.

When a court awards costs against one party, the Taxing Master is charged with ensuring that the costs recovered are reasonable. A Taxing Master assists in giving effect to a costs order.

Usually the parties agree to the determination made by the Taxing Master, but this case is an example of a party appealing the Taxing Master's decision. The court usually makes a general award for costs to be awarded to one of the parties, and then leaves it to the Taxing Master to determine what specific amount of costs should be paid. The Taxing Master is an expert in assessing a reasonable amount for a costs award and the courts generally defer to their expertise, although they can intervene if need be.

There is a difference between attorney/own client costs and party/party costs. Attorney/own client costs are theoretically the actual costs incurred or charged by an attorney, based on the attorney's fee structure and as agreed between the attorney and the client, but usually fall short of that amount. Party and party costs are those costs recoverable from the other side based on the court tariff, provided there is a costs order or agreement to pay the costs. Courts often award costs based on the party and party scale, and rarely allow for the full attorney/own client costs to be recoverable.

Naidoo v MEC for Health, KwaZulu-Natal, Naidoo v MEC for Health, KwaZulu-Natal, Phewa v MEC for Health, KwaZulu-Natal, Govender v MEC for Health, KwaZulu-Natal, Nthombela v MEC for Health, KwaZulu-Natal (KZN High Court)

Judgment Year: 2018

Keywords: fees and costs in medical negligence cases

Costs recovered from the opposing party must be reasonable.

Fees requested by one party can be adjusted by the Taxing Master. For example, in this case, the court said that it may have been overcautious for the attorney to have instructed counsel to draft some of the documents and those costs fall squarely into attorney/client costs.

Some costs relating to accommodation for experts from out of town attending at court were removed by the Taxing Master. The court agreed with the Taxing Master's deduction of travel and accommodation costs, except for one expert, because similar experts could have been found locally.

The overall balance between the interests of the parties should be maintained. The attorney's rate may be reasonable enough, and the time spent may be reasonable enough, but in the ultimate assessment of the amount to be allowed on a party and party basis, a reasonable balance must still be struck. The inherent anomaly of assessing party/party costs should be borne in mind. One is not primarily determining what constitutes proper fees for attorneys to charge their clients for the work they did. That is mainly an attorney and client issue and, when dealing with a party/party situation, it is only the first step. When taxing a party and party bill of costs, the object of the exercise is to ascertain how much the other side should contribute to the reasonable fees the winning party has paid on their own side. Or, to put it differently, how much of the client's payment in respect of their own attorney's fees would it be fair to make recoverable from the other side? In this case, the court considered the taxations of the bills of costs in five matters, and referred those bills of costs back to the Taxing Master to be taxed afresh in accordance with the principles set out in the judgment.

Member of the Executive Council for Health, Gauteng v Lushaba (Constitutional Court)

Judgment Year: 2016

Keywords: costs / punitive costs

The trial judge sought to make the MEC personally liable for the plaintiff's costs, alternatively, the medical advisors and attorneys responsible for handling the matter. The strange costs order was found, on appeal, to be invalid and was therefore set aside. This curious judgment highlights some of the debates around punitive costs orders in medical malpractice matters.

Settlement

Member of the Executive Council for the Department of Health, Eastern Cape v Mbokodi (Supreme Court of Appeal)

Judgment Year: 2022

Keywords: settlement / autonomy of the litigants

The defendant was found liable for damages suffered by the plaintiff in her personal and representative capacities as mother of a minor child who suffered harm caused by the negligence of the defendant's employees.

Determination of the quantum of damages was postponed on a number of occasions, for settlement purposes. The attorneys agreed on settlement figures but the defendant's attorneys did not have authority to agree on the settlement amount.

The plaintiff applied for an order, aiming to compel the defendant to explain to the court why the amount agreed between the attorneys was not appropriate.

However, the procedure was incorrectly used in this case. The court can apply a punitive costs order for litigants who are dilatory or obstructive, but the court cannot compel the parties to settle the matter.

Moreover, the fact that evidence regarding quantification of the claim was not before the court made it impossible for the court to determine whether the settlement figure was an appropriate quantification of the loss.

Monetary awards/Payment in kind/ Periodic payments

Payment of damages is usually made in money in a lump sum but a string of cases, where various Provincial Members of the Executive Council for Health argued for compensation in kind and periodic payment of damages, has led to development of the law, where payment in kind (such as the provision of future medical goods and services) may be allowed in some cases, if a compelling case is made to justify payment in kind. The courts have indicated that periodic payments may be appropriate in some cases, but while this is now theoretically open for argument, there has not been sufficient case law to illustrate how and in what circumstances this can be done. Payment in instalments may go some way to limiting the arguments around life expectancy, because the courts may not have to spend as much time on determining whether future medical expenses will actually be incurred if payments are made periodically. The legislature is looking at this issue in relation to a proposed amendment to the State Liability Act, so reform in this area in relation to State bodies may come in the form of statute if not in case law first.

The courts still generally consider upfront money to be "the measure of all things" especially in relation to civil claims. This is appropriate especially in the case of awards made for general damages, which relate to intangible harm such as pain and suffering, and loss of amenities of life. The idea is that monetary relief can provide some measure of comfort, even if it is not an exact method of providing compensation, since it is the most readily available way to provide restitution. Courts are also hesitant to move away from the once-and-for-all rule, which holds that all damages, past and future, must be claimed and will be awarded in one indivisible action. Therefore, while the law is developing around periodic payments, these types of payments will probably only be allowed in compelling cases and would likely be an exception to the norm of lump sum payments.

The following cases illustrate the debates around these issues.

Member of the Executive Council for Health, Gauteng Provincial Government v PN (Constitutional Court)

Quantum: not determined by the court (this judgment dealt with other courts' ability to develop the law on quantum)

Judgment Year: 2021

Keywords: payment in kind / payment in money / interpretation of "pay" / development of the common law

The Constitutional Court held that the order for the defendant 'to pay to the plaintiff 100%' of the plaintiff's agreed or proven damages does not preclude the High Court from considering whether to develop the common law relating to whether the MEC for Health, Gauteng, may compensate the plaintiff in a manner other than exclusively in an immediately paid lump sum payment.

The plaintiff argued that since the High Court ordered the defendant to 'pay' damages, the compensation had to be in money. The defendant said that this interpretation (that the order to 'pay' only means payment in money) precludes the judge who will determine quantum from developing the common law, something they would ordinarily be entitled to do. The judge who ordered payment was tasked with determining liability and not quantum and therefore it was not open to him to limit the method of payment – he had only to determine liability and the extent of it. The quantum court would determine the amount and manner of compensation. To fixate on the word 'pay' was not appropriate in the context of the liability judgment.

The Constitutional Court preferred the interpretation that would allow the defendant to lead evidence in support of an argument to develop the common law to allow for the defences of public healthcare and undertaking to pay.

The Constitutional Court therefore interpreted the liability judgment in a way that leaves it open for the quantum court to deal with the manner of payment, and possible development of the law if sufficient evidence is led to warrant deferred payment.

A summary of the High Court judgment, which the Constitutional Court interpreted, below.

Ngalonkulu Phakama obo Ngalonkulu Endinayo v Member of the Executive Council for Health of the Gauteng Provincial Government (Gauteng High Court)

Quantum: to be determined (this judgment dealt with the principle of payment in kind)

Judgment Year: 2019

Keywords payment in instalments / provision of medical services as compensation / payment in kind / birth injury / cerebral palsy / public health institution

The patient brought a claim in her representative capacity as the mother and guardian of a minor child, who suffered harm during birth due to the negligence of staff at a public health institution, which resulted in the child suffering from cerebral palsy.

The patient's claim was successful on the merits, and the court ordered the defendant 'to pay to the plaintiff 100%' of the plaintiff's agreed or proven damages. The court had to consider whether compensation for future medical expenses had to be made as an upfront monetary payment or whether medical services could be provided in future. The court opened the door for defendants to argue for compensation by way of services instead of payment in money.

The court found that a defendant can argue for compensation by way of providing medical services. However, the court did not determine in this case whether it was appropriate to compensate by way of services or not, which would still have to be argued and proved. Determining which of the defendant's hospitals were suitable, if any, was also left open.

The court also said that payment in instalments, by the State, is not prohibited by the Public Finance Management Act. The judgment dealt with whether the regulations of that Act prohibited an argument regarding periodic payment (it was held that it does not). However, the judgment does not deal with the actual development of our common law to allow for periodic payments.

Member of the Executive Council for Health, Gauteng Provincial Government v PN (Constitutional Court)

Quantum: R23 million

Judgment Year: 2017

Keywords: periodic payments / payment in kind / cerebral palsy / birth injury

The plaintiff successfully sued for damages on behalf of her minor child, who suffered from cerebral palsy caused by the negligence of public hospital staff during the child's birth. The MEC agreed to the amount of R23 million as compensation, with R19 million of that amount being for future medical expenses. However, the MEC argued that she did not have to pay the expenses in a lump sum, but should be allowed to pay service providers directly in future, within 30 days of presentation of a written quotation.

The court stated that the current common law rule is that compensation for civil claims should be made in money. The once-and-for-all rule holds that all damages that arise from a single cause of action (that is, past and prospective harm) must be claimed for in one action. This rule prevents the repetition of law suits and allows for an end to litigation. The corollary to this rule is that the court must award damages in a lump sum.

However, the court held that development of the common law to allow periodic payments is not fatal to the once-and-for-all rule.

Claims for future medical expenses are somewhat speculative in nature and this is often addressed by adjusting the claim based on a contingency deduction or addition (to take into account, for example, that the claimant may die much earlier than their projected life expectancy). The court said that periodic payments subject to top up or claw back clauses may reduce the speculative nature of such claims.

However, facts relevant to the specific case must be presented in order for a court to develop the common law (unlike the legislature, a court cannot develop the law in a vacuum, but can do so only in relation to the facts of the case before it). In this case the MEC presented no evidence to ground the development of the common law, apart from the fact that the child was born in a public healthcare

institution and that is where the medical negligence occurred – this was inadequate reason to develop the law to allow for periodic payments.

Nevertheless, the court opened the door for the development of the law in an appropriate case, if cogent factual evidence is presented to substantiate the claim. Therefore, periodic payments may be awarded on a case by case basis if that form of payment best meets the particular circumstances, and sufficient factual evidence is led to prove this.

The MEC also led no evidence to prove that the claim for future medical expenses was not reasonable, and therefore the amount claimed was not reduced. However, there is authority for reducing a claim that is proved to be unreasonable. The court cited the case of *Ngubane* as authority for allowing a defendant to produce evidence that medical services of the same or higher standard and at no, or lesser, cost than private medical care, will be available to a plaintiff in future. If that evidence is of a sufficiently cogent nature to disturb the presumption that the cost of private healthcare is reasonable, the plaintiff will not succeed in the claim for the higher future medical expenses. This approach is in accordance with general principles in relation to the proving of damages (the court dismissed the SCA ruling of *Kiewits* which differed on this point, because the *Kiewits* court was not referred to the *Ngubane* judgment).

MSM obo KBM v MEC for Health, Gauteng (South Gauteng High Court)

Quantum: R4.8 million plus the special provision of medical services

Judgment Year: 2019

Keywords: periodic payments / payment in kind / cerebral palsy / birth injury

The plaintiff successfully sued for damages on behalf of her minor child, who suffers from cerebral palsy caused by the negligence of public hospital staff during birth. The court developed the common law to permit 'compensation in kind' and ordered the MEC to provide certain medical services to the plaintiff's child at the Charlotte Maxeke Academic Hospital. There was insufficient evidence in this case to develop the common law to permit periodic payments.

The MEC argued that the court should develop the common law to allow for compensation in kind, that is, that medical services be provided to the child at the Charlotte Maxeke Academic Hospital. The MEC contended that the award should not be based on the cost of these medical services in the private sector. The MEC also asked, insofar as a monetary award was made, that periodic payments be allowed instead of a lump sum payment.

The Constitutional Court considered similar issues in 2017 in the case of *MEC, Health and Social Development, Gauteng v DZ*. In that case, the court opened the door for the law to be developed by way of a deviation from the long established "once-and-for-all" rule, in relation to compensation in a form other than money. Secondly, the court found that periodic payments (or services) that are subject to a 'top-up/claw-back', will fit in with general principles of compensation for loss. Factual evidence has to be led to substantiate a case for the development of the common law by the courts in this regard, however.

The plaintiff pointed out that there is a draft bill before Parliament that aims to amend the State Liability Act to allow for the State to make periodic payments and payment in kind at public health institutions. The judge noted that she had to decide the case before her, in the interests of justice. The court would prefer the matter to be dealt with by legislation. However, legislation had not been passed, and therefore this MSM case, following on from the DZ case, addressed the issue of developing the law.

Courts now refer to these types of defences as 'DZ defences'. The DZ case dealt with the "public health care defence" (the idea that medical services could be provided at a public health institution, instead of compensation in monetary form) and the "undertaking to pay defence" (that medical expenses would be paid as and when they arose in future). This MSM case only dealt with the public healthcare defence. Generally, the MEC proposes to set up a trust into which an award would be paid, subject to top up if the funds are depleted or claw back if the patient dies before the funds are exhausted.

The current once and for all rule that obliges courts to deal with matters all at once and not in a piecemeal fashion (and therefore to award lump sums), and the rule that awards must be monetary, are affected by this judgment. Even though the Constitutional Court confirmed that these rules

still exist, in the case of future medical expenses the plaintiff has to prove that the amounts claimed are reasonable. If the defendant can prove that a public health institution can provide the same or better treatment cheaper (or at no cost to the patient), the amount claimed in terms of private healthcare costs would be unreasonable, especially if the particular patient would more likely use public healthcare.

The MEC proposed that an order in kind would allow the child to receive all her treatment at Charlotte Maxeke Academic Hospital, where she would be regarded as a special patient. The hospital would also acquire all other medications through its procurement system.

The court first had to determine whether the defendant led sufficient evidence to establish that the "identified services" would be available in the future for the child, at the same or higher level and at no, or less, cost to the child, than those available in private sector. Services that the hospital could not provide fell outside of the "identified services", and would be compensated for in money, for example the need for special schooling and home caregivers. The evidence provided was accepted as detailed and sufficient to found a case for payment in kind. The court's on-site inspection helped to confirm that the hospital had adequate facilities.

The court therefore found that the common law should be developed to allow for compensation in kind. However, this applies to the limited context of specific cases, where the evidence presented warrants an order for compensation in kind.

The MEC requested that payment be made periodically, instead of in a lump sum. The court agreed that in principle there is no reason why periodic payments would not be allowed in appropriate cases. However, in this case, insufficient evidence was led by the MEC to explain how the payments would work. Therefore the court did not need to (and did not) rule definitively on the issue of periodic payments.

As to the issue of potentially opening the "floodgates" to other similar patients, the court said that it is clear that more patients like this would put a strain on the hospital's resources. However, the State role players were aware of this and confirmed that a broader planning exercise was underway to ensure that resources would be made available to cover more litigants of this nature.

The court noted that binding the State to provide compensation in kind in this specific case does not bind courts in other matters to follow suit – each matter has to be judged on its own merits. In each case, for example, the State will have to prove that proper resources are available to provide appropriate compensation in kind.

Therefore the court ordered compensation in kind for the identified services to be provided by the Charlotte Maxeke Academic Hospital. The plaintiff was also awarded a lump sum for general damages for pain and suffering (R2 million), loss of earning capacity (R1.38 million) and future medical expenses that could not be provided by the State (R1.39 million).

VD obo MD v MEC for Health, Eastern Cape (Eastern Cape High Court)

Quantum: interim award of R81 000

Judgment Year: 2021

Keywords: interim award / public healthcare costs / payment in kind / public healthcare defence

A plaintiff who has proved liability (or where liability is conceded) can apply for an interim payment from the defendant in terms of Rule 34A. This helps a plaintiff in dire need of medical assistance to cover those costs while the full quantum is yet to be determined.

In this case, where it was found that the hospital's negligence caused a child's cerebral palsy, the plaintiff claimed an interim payment of R8 million. The full claim for damages was R30 million, and the portion for medical expenses was R20.65 million.

However, it was evident that the defendant aimed to keep its options open in terms of arguing the public healthcare defence, and for payment in kind, at the quantum trial. The defendant therefore argued that the plaintiff can access the required medical care from the public sector at no cost, or at little cost, at a standard equivalent or better than that provided in the private sector. The defendant offered to provide those medical services and supplies from the public healthcare system.

The defendant lamented the crippling effects that lump sum payments have on public healthcare, noting that medico-legal claims against the MEC for Health, Eastern

Cape stood at R100 billion at the time. He attributed this large amount to plaintiffs calculating and claiming medical expenses based on amounts above even private healthcare rates. The court said that they cannot imagine this type of argument prevailing over a plaintiff's need for an interim payment if the requirements for the claim are met. The argument that interim payments will cripple the Department of Health financially does not fall within the ambit of the exclusion in the court rules, provided that the court can decide not to order an interim payment from a defendant that does not have the means at their disposal to make an interim payment. The means of the defendant in this case were not in issue.

Apart from the argument that the plaintiff could procure the relevant health services in the public sector, the defendant argued that the plaintiff did not provide sufficient detail to enable the court to quantify a fair interim payment. The plaintiff merely referred the court to its expert reports in the liability trial (and these were not even placed before this court).

The court noted that the standard of proof for an interim payment, while lower than that of the actual quantum trial, must still enable the court to make a decent rough and ready calculation of the interim amount required. In this case, the only amount provided with sufficient detail, and which was proved to be necessary and not available from the public healthcare sector, was the cost of a physiotherapist for the year, in the amount of around R80 000.

An application for an interim payment fulfils a specific purpose and is not there for the asking simply because liability has been conceded.

The sweeping generalisation that the defendant was ill-equipped to provide services in kind was not accepted.

Even though the standard of proof is not as high when it comes to assessing an interim need, the requirement cannot be met "by just cobbling together random reports, or by referring to reports in general".

The plaintiff should have placed more information before the court, proving its need for the interim amount. Claiming a percentage of the overall claim as a reasonable proportion of what should be advanced on account of what the plaintiff may ultimately be awarded, is also not sufficient. The court noted that the "public healthcare defence renders the base figure on which that calculation is premised somewhat less exacting so the detail of what is required pending the trial ought to be engaged with more extensively than the plaintiff did."

Therefore the public healthcare defence, while not even argued for and allowed yet, may also affect the argument in relation to interim awards.

The court ordered an interim payment of R81 000. It was left open to the plaintiff to approach the court for a further interim payment, supplemented by sufficient evidence.

Ngubane v South African Transport Services (Supreme Court of Appeal)

Quantum: R 867 000

Judgment Year: 1990

Keywords: reasonableness of claim / public healthcare costs / private healthcare costs

This case dealt with a railway accident, but is authority for the argument that an amount claimed for future medical expenses must be reasonable. The amount claimed was based on the premise that the plaintiff would be treated by private medical practitioners and in a private hospital, and therefore expenses were based on the rates found in the open market.

The defendant argued that the medical services could be provided at public hospitals free of charge, or at a nominal cost, and therefore it would be reasonable to expect the plaintiff to make use of public healthcare facilities.

The court stated that although the onus of proving damages is correctly placed

on the plaintiff, it is reasonable to expect that the amount is usually calculated based on private healthcare costs. The court found it 'legitimate' and 'customary' to calculate quantum on the basis of private healthcare costs. Providing evidence of these costs, on a private healthcare scale, discharges the plaintiff's duty to prove their claim for future medical expenses. However, a court can consider evidence in support of alternative and cheaper medical services, in support of a defendant's allegation that the amount claimed by the plaintiff is not reasonable and is excessive. The defendant has to provide evidence that services of an acceptably high standard are available at no cost or at lesser cost than that claimed.

The *Constitutional Court in DZ [2017]* used *Ngubane* as authority on this point.

Member of the Executive Council for Finance, Economic Development, Environmental Affairs and Tourism (Eastern Cape) and Others v The Legal Practice Council and Others (Eastern Cape High Court: Makhanda)

Quantum: none

Judgment Year: 2022

Keywords: periodic payments

The MEC for Finance, Economic Development, Environmental Affairs and Tourism, Eastern Cape sought to interdict various respondents, who had obtained judgments against the MEC for Health for delictual damages arising out of medical negligence, from executing against the movable and immovable property of the Eastern Cape Department of Health. They also sought to interdict attorneys from recovering more than R125 000 from their clients, in regard to these judgments.

The interdicts were sought in order to allow the applicants to vary the orders made in favour of the respondents, to allow the judgment debts to be paid in instalments.

The court had to consider provisions of the State Liability Act and the Public Finance Management Act to determine what property could be attached to satisfy a judgment debt against the state. The SLA allows for the attachment of any moveable property and the court in Ikamva found that moveable property includes incorporeal property (which includes bank accounts). The process of execution also protects a debtor from having their property immediately removed – this provision will avoid the potential for disruption of service delivery if accounts of state are attached.

The court accepted that the Eastern Cape health department was under severe financial pressure, but this did not justify the award sought.

With regard to varying multiple orders of court, the court noted that the applicants gave no indication as to the nature of the variations they would seek, had no plan for the payment of instalments and no indication of where funds would be sourced from, since these liabilities are not budgeted for. The various court orders also differed from case to case, although the majority of them related to judgments in cerebral palsy cases. Even if it was ordered that payments in instalments should be allowed, quantification for each claim's first instalment would be required, and this is untenable.

The court canvassed the judgments relating to periodic payments and payments in kind, and noted that the

> "prayer for periodic payments constitutes a special defence to the "once and for all" rule, and must be properly pleaded. Evidence must be led to substantiate the defence and the court must, after consideration of all the relevant evidence, craft an appropriate remedy for the individual plaintiff. This will require an assessment of medical evidence as to the nature and condition of the injured party, the extent of the immediate need, which would vary from one victim to another, the time of the likely future need and the extent and time of the relevant instalments. Each individual case must be considered on the basis of the particular circumstances pertaining to it."

The defendant did not raise the periodic payments defence at trial and it would require reopening the trials in each case to consider the defence at that stage, which of course could not be done. The court therefore found that the application was ill-advised and could not succeed.

TN obo BN v Member of the Executive Council for Health, Eastern Cape (Eastern Cape High Court: Bhisho)

Quantum: R3.9 million lump sum: R2.1 million special damages (R386 000 loss of earnings / R650 000 adapted vehicle / R1.1 million adaptation to home); R1.8 million general damages

And the "public healthcare remedy" and the "undertaking to pay remedy" allowed for future medical expenses

Judgment Year: 2023

Keywords: periodic payments / payment in kind/ public healthcare defence / development of common law / cerebral palsy

This judgment is a culmination of the development of the jurisprudence relating to the ability of a defendant to practically use the "DZ defences".

The plaintiff sued the defendant in her representative capacity, on behalf of her child who suffers from cerebral palsy. The defendant conceded that the child's condition resulted from the negligence of the defendant's employees, during the birth of the child. The case dealt mainly with whether the defendant's claim that the public healthcare remedy and the undertaking to pay remedy (referred to as the "DZ defences") were appropriate in this case.

The child was 11 years old at the time of the judgment, with a 22.8 year life expectancy. He is on the most disabled end of the spectrum, being a spastic quadriplegic, with hearing and visual impairment, fed through a tube, unable to sit, stand, walk or speak. He is completely dependent on caregivers for the general activities of daily living. He has extremely low cognitive function and is not expected to improve. He is unemployable and has suffered a total loss of earning capacity. Despite all of this, "he remains a child that deserves to play and learn". The plaintiff sought R1.8 million in general damages, R386 000 for loss of earnings, R30 million for future medical expenses and R2.7 million to "protect and administer the award".

General damages and loss of earnings were settled at R1.8 million and R386 000 respectively. The defendant also agreed to pay R650 000 for an updated motor vehicle to ensure that the child will be able to attend his medical appointments.

The case therefore proceeded with regard to the claim for future medical expenses.

The burden of proof

The plaintiff usually bears the onus of proof in proving their claim, on a balance of probabilities. The question arose regarding whether the onus of proof shifts in a case such as this, where the defendant seeks the development of the common law and the application of a novel remedy.

The court held that the plaintiff still bore the onus of establishing its case, on the face of it, and this burden does not shift to the defendant – the defendant then bears an evidentiary burden to rebut the plaintiff's case and support its claim.

The case proceeded with the plaintiff presenting its evidence relating to its common law claims which remained in dispute. The defendant then led evidence to rebut those claims, together with evidence in support of the constitutional defences. The plaintiff was then entitled to lead evidence to rebut the constitutional defences.

Should the common law be developed?

The court considered evidence on whether it was appropriate to develop the common law in this case. The court considered extensive evidence, including the fact that the contingent liabilities of the Eastern Cape Department of Health was around R38.8 billion in March 2020. This was up from around R3.5 billion in 2014, and the bulk of the increase is attributable to the rise in cerebral palsy claims in the past decade.

The proportion of claims in the Eastern Cape was also found to be considerably higher than in most other provinces. This rise in medical negligence claims presents a threat to the state's ability to provide and improve health service delivery.

This liability severely affects the rights of the rest of the population to access healthcare services, because damages claims are not budgeted for by the department of health, and therefore these awards come out of the budget already allocated for other health services. It was suggested that the department's liquidity problems may threaten the liquidity of the rest of the provincial government.

The defendant's experts also presented evidence of the mismanagement of trusts that were supposed to be set up to administer awards in cerebral palsy cases.

The plaintiff's experts argued that the failure to compensate victims of medical negligence with lump sum awards would unjustly transfer risk to the victims, would represent a departure from social solidarity, and would increase the risk of medical negligence occurring. They also questioned the defendant's ability to provide an adequate standard of healthcare. They cited poor management of the department of health, stating that the department was the author of its own downfall.

The court did not accept that risk would be transferred to the plaintiff, since the medical services provided by the defendant would be provided for free, and the draft order made detailed provision for the protection of the rights of the plaintiff. The public healthcare remedy reduces the risk of funds being misappropriated. It also reduces the risk of over- or under-compensation associated with the complexities of calculating life expectancy. Evidence was also presented by the defendant that the state was involved in a national coordinated attempt at improving its health care service delivery and that the Eastern Cape was "moving in the right direction in this regard".

The court noted that the judgment of DZ opened the door for the development of the common law, but that the evidence in that case could not support that development at the time. The court questioned whether it should be left to the legislature to make such an important change to the law, but concluded that the draft legislation dealing with this issue has been stalled for a number of years and therefore it was not reasonable to wait for parliament to amend the law in these cases, since the amendment could take many years to pass (if it is passed at all).

The court therefore held that it was appropriate to develop the common law, and

> "as emphasized in DZ, the development would be limited in ambit as it would be confined to the case of a child with CP injured at a public hospital and would not affect all medical negligence cases".

The judgment in DZ allowed for the development of the common law on a case by case basis, and the court noted: "This is such a case. We now have the evidence". The interests of justice necessitate allowing the courts to adjudicate medical negligence claims within the broader remedial framework that includes the remedies called for in the DZ defences.

The draft order proposed by the defendant set out in articulate detail how the remedy would operate in this case. It is worth looking at the annexures to the judgment to see the itemisation of expenses and the provisions made for both lump sum payments and payment in kind. Annexure A provides a list of future consultations, therapies and surgeries and the projected frequency of these therapies. Annexure B sets out the list of supplies and medical services needed in the future. Annexure C is a list of items in respect of which the undertaking to pay applies. Annexure D set out the list of claims in respect of which lump sum damages are payable (these were loss of earnings, an adapted vehicle and adaptations to the plaintiff's home).

The court noted that the public healthcare and undertaking to pay remedies need to work in tandem, since awards in cerebral palsy cases often need to account for the payment of caregivers, and this is something that the state is unable to provide in kind. Therefore an undertaking to pay remedy should usually be granted in tandem with an undertaking to provide public healthcare.

The standard of care to be provided by the defendant

The court interpreted the judgment of *Ngubane* in assessing what standard of care the defendant should be held to, and concluded that a "reasonable standard" is the standard against which the court must assess future medical services available in the public sector. The court noted that the standard of healthcare in the private sector is itself not universal and the standard of reasonableness would allow the plaintiff to benefit from the strengths of

healthcare services in both the public and private sector.

The defendant provided extensive evidence, corroborated by its experts, that the standard of healthcare services it would provide to the plaintiff met the required standard. The experts included evidence of their site visits to the relevant hospitals and evidence from the CEO of one of the hospitals on the plan for improved operations, as well as progress they had already made towards improving health services.

Caregivers

One aspect remaining in dispute was the need to employ caregivers for the child. The plaintiff asserted that five caregivers were required, whereas the defendant maintained that one would be sufficient (with a relief caregiver stepping in while the primary caregiver is on annual leave), since the mother should continue to play a significant role in the child's care. The court noted that the plaintiff had already suffered extensive psychological harm as a result of the child's incapacity and that she should not be burdened with the additional formal responsibilities of a caregiver. The court therefore allowed the expense of two caregivers, with the provision of an alternate caregiver when the full-time caregivers are on annual leave, taking into account the fact that the child would be properly cared for while at the day care centre that he attended during the week.

Expert witnesses

This case is a good example of how expert witnesses ought to assist the court. The evidence of the defendant's expert witnesses was accepted because both the written reports and oral evidence presented was found to be "measured and objective". The experts were properly qualified, technical issues were explained in an accessible way, careful reasoning supported any opinions expressed, and concessions were readily made when they were necessary and appropriate.

Award

The common law was developed.

The court awarded a lump sum for general damages and loss of earnings, and allowed the public healthcare remedy and undertaking to pay remedy to be applied to future medical expenses.

The annexures to the judgment set out in detail how these remedies would operate, including provision for both public and private case managers to be appointed to liaise with healthcare service providers and the plaintiff, to ensure the proper administration of the award. Clauses were included to deal with "unforeseen developments" and provision was made for mediation in the event of any disputes arising in relation to these developments.

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