REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: YES / NO
[2] OF INTEREST TO OTHER JUDGES: YES / NO
[3] REVISED
DATE SIGNATURE

CASE NO: 27452/2009

DATES HEARD: 3/8, 5/8, 6/8/2015

In the matter between:

C S. (obo T G S.) Plaintiff

and

THE MEC FOR HEALTH, GAUTENG Defendant

JUDGMENT

J W LOUW, J

[1] The plaintiff in his capacity as father and natural guardian of T. G. S. ([.....]) instituted action against the defendant for damages arising from the fact that T. was born with brain damage at the Kalafong hospital on [….]. It was alleged that T's brain damage was caused by negligence on the part of employees of the Gauteng Department of Health before, during and after T's delivery.

[2] The defendant initially denied liability, but the parties subsequently settled the merits of the claim on the basis that the defendant accepted liability for 50% of T's proven damages. What remained to be decided is the quantum of the damages.

[3] The plaintiff claimed damages under six headings:

- Past medical expenditure
- Past caregiving
- Future hospital, medical and related expenditure
- Loss of income
- General damages
- Costs of protecting the award.

[4] By the time the trial commenced, the parties had managed to settle the first, second, fourth and sixth heads of damages. The matter stood down with the leave of the court to afford the parties the opportunity of settling the remaining issues. When the matter recommenced, everything had been settled save for general damages.

[5] T was born with cerebral palsy. The injuries from which he suffers are the following:

- Severe brain damage resulting in severe motor and cognitive impairment in the form of quadriplegia complicated by contractures. The condition is permanent.
- Muscular scoliosis deformity which has to be surgically addressed.
- A permanently dislocated hip. Because he cannot walk, there is no need of repairing it.
- A claw type deformity of the right hand.
- Ventricoloperitoneal shunts, of which he has had three.
- His hearing has been severely affected.
- He is not able to speak.
- He has radically reduced vision.

- He has a pulmonological disability resulting in frequent ear infections.

- He faces a number of surgical procedures in future, including orthopaedic, gastro-enterological, neurosurgical and dental.

[6] The experts are agreed that T has no insight into his condition, but he does suffer pain, discomfort and frustration. He has been permanently disabled and disfigured and has suffered a permanent loss of the enjoyment of the amenities of life. His life expectancy has been substantially reduced. He is presently eleven years old and the parties are in agreement that he is expected to live another nineteen years.

[7] Adv. Mullins SC, who appeared for the plaintiff with Adv. Van der Westhuizen, submitted that the award for general damages should be the sum of R1 800 000.00. He relied for the submission on the awards made in *Sgatya v Road Accident Fund,*[1] *Megalane NO v The Road accident Fund,*[2] *Zarrabi v The Road Accident Fund,*[3] *Bonesse v Road Accident Fund*[4] and *Singh and Another v Ebrahim (1),*[5] in all cases adjusted to present day values.

[1] (2001) 5 QOD A2-1 (E)
[2] 2006 (5A4) QOD 10 (W)
[3] 2006 (5B4) QOD 231 (T)
[4] 2014 (7A3) QOD 1 (ECP)
[5] [2010] 3 All SA 187 (D)

[8] In *Protea Assurance Co. Limited v Lamb*[6] Potgieter JA said the following:[7]

"The further question that arises is to what extent, if any, this Court should be guided in its assessment of general damages by awards in previous decided cases. In the case of Sigournay v. Gillbanks, 1960 (2) SA 552 (AD) at p. 556, SCHREINER, J.A., is reported to have said:

"Nothing like a hard and fast rule or definite standard is to be found in a matter so closely linked with the particular circumstances of each case, but some guidance is to be derived from the notion that fairness to both parties is likely to be served by a large measure of continuity in size of awards, where the circumstances are broadly similar. As was said by INNES, C.J., in Hulley v. Cox, 1923 AD 234 at p. 246, a comparison with other cases though never decisive is instructive. I respectfully agree in this connection with the statement of ORMEROD, L.J., in Scott v. Musial, (1959) 3 W.L.R. 437 at p. 446, that there emerges 'a general idea of the sort of figure which, by experience, is regarded as reasonable in the circumstances of a particular case' to which general idea a Court of appeal should give regard."

In the case of Capital Insurance Co. Ltd. v. Richter, 1963 (4) SA 901 (AD) at pp. 907 in fine, 908, WESSELS, J.A., said:

"I am of the opinion that there is no justification for the recognition by this Court of any hard and fast rule of general application (such as was contended for by appellant's counsel), requiring a trial Court (or this Court on appeal) to proceed to a consideration of past awards in vaguely comparable cases. Comparison can only be usefully undertaken where the circumstances are clearly shown to be broadly similar in all material respects. To give any wider degree of recognition to a rule of this nature would render the difficult task of determining the quantum of damages even more burdensome and liable to error than is already the case without any real advantage to the Court or the litigants."

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[6] 1971 (1) SA 530 (A)
[7] At 535A-H

In the case of Marine Trade Insurance Co. Ltd. v. Goliath, 1968 (4) SA 329 (AD) F at p. 333H, VAN BLERK, J.A., said:

"In Sigournay v Gillbanks, 1960 (2) SA 552 (AD) at p. 556B, the opinion was expressed that regard should be given to a general idea of the sort of figure

which by experience is regarded as reasonable in the circumstances of a particular case. This suggests that a court need merely draw on its own experience and does not require to be reminded of earlier awards by the citation of an array of decisions."

And at p. 334B:

"In theory it may sound well that regard should be had to previous awards in comparable cases but in practice, as was pointed out by this Court in London Assurance v. Cope, 1963 (1) P.H. J6, the difficulty is to find comparable cases. Moreover, to ascertain whether particular cases are similar in material respects the facts in regard to the degree of pain suffered by the claimant in each particular case and the amenities of life of which he was deprived must be known before a comparison is justified. This would entail at least a study of the full judgment in each case. Mere knowledge of the nature of the injuries would not be sufficient."

The above quoted passages from decisions of this Court indicate that, to the limited extent and subject to the qualifications therein set forth, the trial Court or the Court of Appeal, as the case may be, may pay regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of

previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration."

[9] Particular reliance was placed by Mr. Mullins on the judgment in *Singh* which, he submitted, was directly comparable with the facts in the present matter. The award in *Singh,* made on 20 March 2008, was R1 200 000.00. Adjusted for inflation, the award as at August 2015 would, according to the calculation of the parties' joint actuaries, be approximately R1 808 000.00. It was therefore submitted on behalf of the plaintiff that the award for general damages should be the sum of R1 800 000.00.

[10] The life expectancy of T and that of the minor Nico in *Singh* are virtually the same (a total of 30 years in the case of T and 29 years in the case of Nico). The *sequelae* from which they suffer are broadly similar. Certain of the *sequelae* in the case of Nico are, however, less serious than in the case of T. It appears from the judgment of Koen J that Nico had quadriparetic dyskinetic cerebral palsy with elements of truncal hypotonia. He had elements of spasticity and was fully dependent on the care of others. He had sensation and cognition and it appeared an understanding of events around him. The matter went on appeal to the Supreme Court of Appeal[8] and in the judgment of Snyders JA it is mentioned[9] that Nico did not suffer from mental retardation and that (unlike in the case of T)

[8] [2010] ZASCA 145 (26 November 2010)
[9] At para [158]

his quadriplegia was predominantly dyskinetic as opposed to spastic, that he did not suffer from epilepsy, that

he made attempts to verbalise, that he had expressive non-verbal communication ability and that his receptive language ability was appropriate to his age. The court did not question the amount awarded for general damages by the court *a quo.*

[11] Adv. Cassim SC, who appeared with Adv. Mpshe and Adv. Tsele for the defendant, submitted that *Singh*'s case was distinguishable from the present matter because of the differences in the condition of T and that of Nico to which I have referred. She nevertheless submitted that an amount of R600 000.00 would be a reasonable award for general damages.

[12] An award of R600 000.00 would not be in line with any of the judgments to which I have referred and would, in my view, be inappropriate. The amount of R1 800 000.00 suggested by Mr Mullins is based on what was awarded in *Singh*, adjusted for inflation to present day value. I am mindful of the judgment of the Appellate Division in *AA Onderlinge Assuransie Assosiasie Beperk v Sodoms*[10] in which it was stated that, generally, it is not advisable to make an adjustment for the

[10] 1980 (3) SA 134 (AD) at 141G-H

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. In the present matter, however, the *sequelae* from which T suffers are more serious than those suffered by Nico. Adjusting the amount of the award in Nico's case would therefore not unduly benefit T. I am accordingly of the view that an award of R1 800 000.00 for T's general damages is appropriate and justified in all the circumstances.

[13] In the result, an order is granted in terms of the draft order prepared on behalf of the plaintiff which I have marked "X". The amount of R7 634 984.91 to be paid by the defendant in terms of the order represents 50% of the total of the plaintiff's claim, including 50% of the award of R1 800 000.00 in respect of general damages.

Counsel for the plaintiff: Adv. J F Mullins SC; Adv. A van der Westhuizen.
Instructed by Ilzé Eichstädt Attorneys.

Counsel for defendant: Adv. N Cassim SC; Adv. H Mpshe; Adv. R J Tshele
Instructed by: The State Attorney, Pretoria.