

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO.: 7904/2015

In the matter between:

S S M obo B S M

Plaintiff

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, KWAZULU-NATAL**

Defendant

JUDGMENT

Olsen J:

[1] On 5th January 2012 the plaintiff, S S M, gave birth to a boy, B S M (hereinafter "B") at the Hlabisa Hospital, a public hospital operated by the defendant, the KwaZulu-Natal Department of Health. B is afflicted with cerebral palsy. The defendant accepts that B's condition is the product of negligence on the part of the hospital staff in their administration of the birth of B. The plaintiff claims damages on behalf of her son against the defendant totalling in all some R28 million.

[2] The plaintiff has claimed compensation for non-patrimonial and patrimonial loss. The broad headings under which damage is claimed for patrimonial loss are past and future medical expenses, future loss of earnings and a claim for the acquisition and alteration of a residential dwelling suitable for the accommodation of B. Although the particulars of claim use the term "future medical expenses", the term is not really descriptive of the range of claims brought under that heading. What the plaintiff seeks is compensation for the full ambit of costs of caring for B, to be incurred as a result of his unfortunate condition brought about through the negligence of the defendant's employees.

[3] Besides the usual denial of the plaintiff's claims as to what will be required in order to take care of B, and of the plaintiff's quantification of those claims, the defendant has pleaded what has come to be known as the "public health defence". The parties have agreed that they are not presently ready to deal with the merits of that defence. However the defendant has conceded that there are certain elements of the plaintiff's claims which would not be covered by the public health defence, and that they may and should be separated and dealt with first. Accordingly, by consent, an order was made that the following issues are separated from all other issues, and shall be decided separately and first.

- 3.1. The life expectancy of B.
- 3.2. General Damages.
- 3.3. Past medical and related expenses of B.
- 3.4. B's future loss of earnings.
- 3.5. The reasonable and necessary costs of caregiving for B.
- 3.6. The reasonable and necessary transport costs of B.

The court is required to make such declaratory orders with regard to those issues as will enable the parties, assisted by an actuary, to express the separated claims (other than general damages and past medical expenses) in money terms.

[4] Although I was presented with a great many expert reports, the number of witnesses called on each side was confined both by the narrowing of issues to be decided, and by the fact that, by the time the trial commenced, much of what would have appeared contentious had been resolved. The plaintiff called four expert witnesses, Ms S Hill, an industrial psychologist; Ms J Bainbridge, an occupational therapist; Ms G Karow, a psychologist; and Ms R Rich, a mobility consultant. In addition the plaintiff herself gave evidence as did a Ms N Gumede, one of B's caregivers. The defendant called two witnesses, Ms H Prinsloo, an occupational therapist; and Dr S Krishna, an industrial psychologist.

[5] The parties agreed that it was unnecessary to call the two medical practitioners who had advised them on the issue of B's life expectancy. They are doctors R Campbell and L Moeng. Their joint minute dated 3rd November 2024

contains the following neutral summary of B's condition which serves as a convenient starting point in understanding the difficulties involved in caring for B.

- “1. He is a 12.8- year-old boy (D.O.B. 5 January 2012).
2. He has mild generalised cerebral palsy, leaving him on GMFCS level II.
3. He has severe (RC) or profound (LM) cognitive/ intellectual impairment with microcephaly but does not have epilepsy.
4. He is in good general health.
5. His weight is above the fifth centile line on an appropriate growth chart and is satisfactory for his age and severity of cerebral palsy.
6. He is incontinent of bladder and bowel.
7. He can roll, sit, stand, and walk unaided.
8. He is entirely fed orally by others.”

[6] As to his physical impairments, B's legs are less affected than his arms, and the right-hand side is better than the left. The quality of his movement when he walks is not good. He is nevertheless mobile, although he has difficulty walking up or down stairs. He can rise from a prone position to sitting and standing without any assistance. Whilst his gait is abnormal he is nevertheless mobile.

[7] The limitations on the use of his arms and hands is more pronounced. B is unable to control the movement of a spoon to his mouth. He has to be fed. His food has to be softened.

[8] B cannot speak. Nevertheless his hearing and sight appear to be normal or near normal. He appears capable of understanding and responding to rudimentary commands. He likes watching television. But he has a grossly undeveloped sense of his relationship with his surroundings and the people in it. His behaviour is therefore inappropriate. He has been known to hit and bite his mother and carers. During the course of her evidence on the subject of the need for a night carer, Ms Bainbridge made the observation that dispensing with night care would be akin to locking up a three-year-old child alone in its room at night. Although there may be some difficulty in assessing the mental age of a person who cannot communicate, my lay impression is that in considering what is reasonably required for the daily care of B one must

approach matters upon the basis that B's trajectory is that of a three-year-old child in a man's body. Some opinions put his mental age at lower than that.

[9] It is clear from the many expert reports put before me which were not dealt with either in evidence or in argument, that there are a number of treatments or processes to be gone through with specialist assistance during the course of the care of B in the future. These fall within the scope of the so-called public health defence on which the court must still adjudicate. I have not had the benefit of evidence concerning the purpose of these interventions, and in particular whether they are designed to improve B's capacities, or whether they are considered necessary in order to avoid deterioration in B's condition, or perhaps both. However I proceed upon the assumption that the defendant would have raised it if there was reason to believe that there is a prospect of an improvement in B's condition which would have a bearing on the decisions the court is asked to make at this stage.

Life Expectancy

[10] Doctors R Campbell and L Moeng produced medico-legal reports in which they considered B's condition and expressed opinions as to how it would probably impact on his life expectancy. They reviewed each other's reports and subsequently produced a joint minute dated 4th November 2024 to which I have already referred.

[11] In their independent reports they reached similar conclusions. Doctor Campbell expressed the view that B would survive to 53.8 years. Doctor Moeng expressed a view that he would survive to the age of 51.8 years. Paragraph 5 of their joint minute explains the discrepancy.

"The principle reason for the small discrepancy between our two estimates is the selection of different South African life tables when applying the "percentage of normal" method to adjust for the differences in the survival and mortality between the USA and South Africa."

[12] They concluded that it would be reasonable and fair for the court to accept a compromise between those two very similar estimates, upon the assumption that is it probable that B would survive to the age of 52.8 years.

[13] The parties considered and accepted this advise and agreed that in those instances where determination of the quantum of damages turns on life expectancy, calculations should be based on the age of 52.8 years. No evidence before me suggests that this estimate is not fair and reasonable. I find that it should be applied and assumed in computing the quantum of the damages under the headings which the parties have agreed must be adjudicated upon separately and first.

[14] Other heads of damages involving the so-called public health defence await a later decision. Some of them may prove to be affected by an assessment of B's life expectancy. It is not impossible that circumstances might arise in the intervening period which bring about that the best estimate now available as to B's life expectancy is no longer valid. I leave open the question as to whether the issue of life expectancy can be revisited in those subsequent proceedings.

Past Medical Expenses

[15] No evidence was led on this subject during the course of the trial. I was informed that files of vouchers were being considered by the defendant and that it was anticipated that agreement would be reached. I am informed that is has been reached.

[16] Interim payments on account of past medical expenses have been made by the defendant. The parties have agreed that the past medical and related expenses total R2 166 809.08. Interim payments of R620 419.63 (25th February 2021) and R750000.00 (14 July 2023) have been made. It is agreed that the plaintiff is entitled to payment of the balance in the sum of R796 389.45. By agreement between the parties an order for payment of that amount was made in advance of the delivery of this judgment.

Caregivers

[17] The parties are agreed that B requires trained caregivers. He has hitherto for most of the time been cared for by caregivers who work 12-hour shifts from 7am to 7pm. At night he is cared for by his mother. The principal issue between the parties under this heading is the plaintiff's claim that from when B turns 18 is just and

reasonable that B should be attended to also by caregivers working 12-hour night shifts from 7pm to 7am. This will of course double the cost of caregiving after B has turned 18. The defendant resists this claim.

[18] Insofar as the defendant's resistance to night care for B rests on opinion evidence, the defendant relies evidence of Ms Helene Prinsloo. Ms Prinsloo's report followed a three-hour consultation in October 2022 attended by the plaintiff, B, and one of the then caregivers who assisted with interpretation. A consideration of Ms Prinsloo's report suggests that most of that period of three hours was spent on an examination and assessment of B. During that assessment period she also interviewed the plaintiff "to get relevant background history as well as [B's] daily routine".

[19] Ms Prinsloo's opinion is that there is and will be no need to engage night-carers to look after B. Besides the costs that would be involved in allowing for night carers, which she stressed, Ms Prinsloo's reasoning is in my view neatly summarised in the joint minute put together by her and Ms Bainbridge where the following appears.

"Ms Prinsloo however asserts that he does not require a care giver present at night as he sleeps through the night and anticipates that with age will come maturity. He will however require the presence of an adult parent/ guardian at home."

[20] It became clear during the course of Ms Prinsloo's evidence that her views on the subject were shaped by her understanding, said to have been gleaned during her interview with the plaintiff, that B sleeps through the night till he wakes at 5am. That does not accord with the evidence given in this court by the plaintiff and by Ms Gumede, a care giver who had previously performed night duty looking after B. Ms Prinsloo was in court when the plaintiff gave evidence. Ms Prinsloo stated in evidence that she was "gob-smacked" when she heard the plaintiff's evidence. I found the evidence of the plaintiff and Ms Gumede on the subject of the night-care of B to be reliable and satisfactory. I do not for a moment believe that Ms Prinsloo deliberately misled the court in saying that her information was that B sleeps through the night. I wonder whether something got lost in the exchanges between Ms Prinsloo and the

plaintiff and the carer, when what was intended to be conveyed was that in B's case the night ended at 5am at which time all sleep was over.

[21] Ms Gumede's evidence is to the effect that B does not sleep well. He will stay up until perhaps 10pm. Her experience was that when she tried to make him sleep he would be stubborn and refuse. And if she insisted he would get cross. B would sleep for perhaps 1 hour or 2. He would then wake up and want to watch television. At best he would sleep for 3 to 4 hours at a stretch. She pointed out that as a night time carer you could not go to sleep. You would have to watch him. If you went to sleep you might not hear him wake up. He is capable of walking off on his own. He gets angry and he breaks things.

[22] The plaintiff's experience of B's behaviour at night is that he sleeps for perhaps an hour at a time then wakes up and wants to watch television. If you do not allow him to do so he might break things. He has broken a window in the past. He has assaulted her and bit her. Ms Gumede's view is that the plaintiff is the person B least respects, and that he does not like to listen to her. She (Ms Gumede) found herself able to work with him.

[23] Ms Prinsloo's view that B would require the presence of an adult at home during the night appears to be founded upon an assumption that obviously things cannot always go well, and that if B does wake up he will need to be attended to. Counsel for the plaintiff argued that it is not that simple. He stressed more than once the undesirability of leaving B with a soiled nappy through the night. Leaving a person in B's condition to cope through the night unattended with the symptoms of even common ailments such as colds and flu seems to me to be unacceptable. The plaintiff's evidence, and that of Ms Gumede, establishes that the mere presence of an adult in the house is not sufficient. In her evidence Ms Prinsloo ultimately accepted that night carers would be necessary if drug therapy was not appropriate, by which I think she meant drugs such as sleeping tablets. No evidence in support of the suitability of any such drug regime was tendered. One is left wondering about the wisdom of administering any such therapy to a person whose brain in waking hours is that of a person 3 years of age, or, according to some of the expert reports, even younger; and indeed of administering such therapy to a person whose brain has

already sustained gross damage. (Other estimates of B's mental age, ranging from 9 to 24 months, were put to Ms Prinsloo, and she agreed with them.)

[24] Ms Prinsloo conceded that the cost of night care for B should be allowed for four weeks per year. That would be in the nature of annual leave for the plaintiff, or for any other family member burdened with the duty of providing night care for B because, for instance, the plaintiff is no longer capable of doing so. The concession implies acceptance of the fact that being the provider of night care for B cannot be regarded as anything but an extraordinary duty – not something which a person in the plaintiff's position would regard as an ordinary incident of life, or an ordinary disruptive element of the conduct of one's day to day existence.

[25] The plaintiff claims the cost of night time caregivers with effect from B's 18th Birthday. In the ordinary course one would expect an 18 year old to be able to take care of himself (questions of money aside) without the constant attention of his parents. On the evidence put before me, if the duty of providing night time care is to be shouldered by the plaintiff, the prospect of her ever enjoying the benefit of gainful employment are remote.

[26] Counsel for the defendant has stressed the significant increase in compensation payable by the defendant if two sets of carers are to be provided instead of one. (After argument in the case, and with the consent of the plaintiff's attorneys, the defendant's attorneys presented me with what must have been a preliminary assessment of the claim by the defendant's actuary. It suggests that allowing four caregivers will increase the claim under that heading by about R7 million.) It is argued that placing that extra burden on the defendant is neither just nor fair. Counsel's argument calls to mind the judgment of Holmes J in *Pitt vs Economic Insurance Co Ltd* 1957(3) SA 284 (N) at 287E.

"I have only to add that the court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense"

In my view allowing for carers to perform night duty is just compensation. It is expensive, but a consideration of the implications of not allowing it serves to illustrate that such an award is just, but not generous. It should not be overlooked that the concept of "fairness to the defendant" means fairness to the party who is responsible

for the condition of the claimant. Nevertheless, an award should not have a punitive element. (*Komape v Minister of Basic Education* 2020 (2) SA 347 (SCA) at para 59.)

[27] As to the cost of the caregivers, the plaintiff relied on the evidence of Ms S Hill and the defendant of the evidence of Ms S Krishna. Both are industrial psychologists. Their joint minute both narrowed areas of dispute and identified them.

[28] In argument counsel for the plaintiff abandoned certain elements of the plaintiff's claim for the cost of caregivers as a result of which, at the close of argument, there was only one issue outstanding. That is the issue as to whether the defendant should be made to pay the costs of training the caregivers.

[29] The rates of pay which are to be allowed are rates of pay for qualified caregivers. The defendant argues, correctly in my view, that it would be unfair to expect the defendant to finance whatever training is required for a caregiver to achieve the "qualified" status required to justify the receipt remuneration as a qualified caregiver. No evidence was led to explain what training is required. In the computation of compensation for the cost of caregiving no discount has been allowed, or claimed by the defendant, for any lesser rate of pay for the employment of a caregiver "in training".

[30] In the circumstances the actuarial calculation for the cost of caregiving shall be based on the following rates calculated as at 1st January 2024.

- (a) The basic monthly cost per caregiver shall be R7053.64. Two caregivers shall be allowed until B's 18th birthday, and thereafter four shall be allowed.
- (b) A public holiday premium of R827.76 per caregiver shall be allowed.
- (c) An additional cost of R1138.19 per caregiver per month shall be allowed to cover the cost of a relief caregiver when the permanent caregiver is on leave.

[31] Counsel for the defendant has argued that the calculated capital sum should be subjected to a contingency deduction of 25 percent. He has referred me in this regard to the case of *Maseko vs Passenger Rail Agency of South Africa* [2023] ZAGPJHC 477 (15 May 2023). As far as can be seen that case concerned future

medical expenses of the ordinary variety. The defendant suggested a contingency deduction of 50 percent and the plaintiff made no submissions on the subject. The court concluded that 50 percent was too high but allowed 24 percent, working upon the basis of 0.5 percent per annum of the plaintiff's remaining life expectancy. The case was peculiar. No submissions were made by the plaintiff on the subject.

[32] Counsel for the plaintiff has argued that there should be no contingency deduction made from the calculated sum for the provision of caregivers. He relies in this regard on the judgment in *AD & Another vs MEC for Health and Social Development, Western Cape Provincial Government* [2016] ZAWCHC 181 (7 September 2016) at paragraphs 600 to 603. I am in respectful agreement with the analysis in those paragraphs of the judgment leading to the conclusion that there would be no contingency deduction against future medical expenses in that case.

[33] Here we are dealing solely with the costs of caregiving. It is going to be calculated to cover the expense up to the end of B's predicted life expectancy, and not beyond. The claim does not involve things like allowances for future potential medical conditions which will introduce additional costs. The effect of inflation is to be brought to account in the actuarial calculation. There is no evidence of any special considerations which arise in this case, and which generate a qualification to the agreed estimate of life expectancy which calls for a contingency factor to be applied one way or the other. Here, as was the case in *AD*, the court is confronted with the situation that things "may turn out differently, but that could cut both ways". B's life may be shorter or longer than is presently predicted. Accordingly, as was the case in *De Jongh v Du Pisanie N.O.* 2005 (5) SA 457 (SCA) at paragraphs 49 and 50, the position is that the allowance for the cost of caregiving may be higher or lower. In *De Jongh's* case the High Court had allowed a 10 percent deduction to be made from both the costs of caregiving and other future medical expenses. On appeal the application of the contingency factor to caregiving was set aside. Of course the relevant factors were different, but the proposition that a contingency deduction is not inevitable was recognised.

[34] I conclude that no contingency deduction should be made against the calculated amount required for providing B with caregivers.

Loss of Earnings

[35] There is precious little information available upon which to base an assessment of what B's income earning potential might have generated had he not suffered the injuries he did at birth. Counsel for the defendant has argued that the plaintiff has not proved what should have been proved, and that the claim under this heading should be dismissed. In the alternative he argues that if the decision is that the court should work with the figures reflecting the opinions of the expert witnesses, a deduction of 50 percent must be applied. Counsel for the plaintiff argued that a contingency allowance of 20 percent would be appropriate. It is of course common cause that in his injured condition B has no earning capacity.

[36] The figures the plaintiff asked me to work with are those settled upon in the joint minute provided by Ms Hill and Ms Krishna on the subject of loss of earnings. Ms G Karrow, an educational psychologist, also expressed some views on the topic.

[37] Ms Hill and Ms Krishna recorded their view that what they call the "career development progress" of B can be based on "a variety of factors including his ante-natal functioning, psycho-social background, scholastic performance, and general information regarding careers and employment." There is no evidence, besides what brings this case to court, of any events or circumstances which may have detrimentally affected B prior to his birth. There is of course no record of any scholastic performance on the part of B. The information under the heading "Psycho-Social Background" is sparse. Once the enquiry proceeds beyond B's immediate family (his mother, father and older brother) the information the experts worked with is uncorroborated hearsay and very vague.

[38] The plaintiff herself left school when she was in grade 11, after the birth of her eldest child. She worked for a short while as a machinist in a clothing factory. (Her position may have been part-time.) Otherwise she was and remains unemployed. B's father has been employed as a taxi driver, but was unemployed at the time that the assessments were made. He reached grade 11, but it is not clear that he passed that grade. B's older brother, A, is still at school. He had to repeat grade 1 but has progressed each year since then. A number of his grade 7 reports were handed in. They illustrate that A's performance at school is a little below class average.

[39] To this information the experts add the “well-accepted trend” that most children in South Africa achieve higher levels of education than their parents, as a result of which they agree that B would have likely passed grade 12 with a capacity for post schooling training. In reaching these conclusions they do not take any account of a school drop out rate of 58 percent and an unemployment rate of 34.5 percent in the case of persons under the age of 30 (these figures being provided by Ms Krishna). Ms Hill’s evidence was that we are confronted with an unemployment rate of 42 percent.

[40] The plaintiff has made laudable efforts to ensure that B is properly cared for and that his unfortunate condition is managed as best as can be done. It is difficult to judge what might have been done in ordinary circumstances by looking at what is done in extraordinary circumstances. Nevertheless I accept the proposition that had B been able to go to school, and perhaps advance a little further than that, he would have enjoyed the benefit of at least adequate parental encouragement, and, depending on the financial circumstances of his parents, reasonable support in his endeavours.

[41] Working on this basis Ms Hill and Ms Krishna agreed on the following earnings trajectory, postulating, as I understand them, a semi-skilled level of employment. The figures they use are 2023 values.

- (a) B would have completed grade 12 at the end of 2030 at the age of 18 years.
- (b) He would have enrolled for some post-school training thereafter. During the period of such training (i.e. during 2031 and 2032) he could have worked and competed for part-time jobs as a student earning an average of R1744.00 per month with no benefits.
- (c) In 2033 (at the age of 21 years) he would commence competing for work at a total remuneration package of R12 106.00 per month.
- (d) He would have reached his career ceiling at the age of 45 years at a total package of R23 270.00 per month. (I assume, although it was not canvassed, that the experts postulate a linear progression from R12 106.00 at 21 years of age to R23 270.00 per month at 45 years of age.)

(e) He would thereafter have received inflationary increases until retiring at 65 years of age.

[42] When pressed on the question as to how these findings flow from the available evidence, especially Ms Hill stressed that the conclusions the experts have come to are conservative. As to the exigencies of life, according to their professional opinions, that is a matter for the court in determining a deduction for contingencies. The submission of counsel for the plaintiff that in considering a contingency deduction it should be born in mind that it is to be applied to an already conservative estimate requires closer examination.

[43] The conclusions just tabulated above suppose that B would have been employed throughout at a lower end of the employment market. To that extent what is proposed is conservative, although the defendant argues that it is unsupported by the available evidence. The prospect of B being a higher achiever at school, or in the workplace, is ignored. So too, is the prospect of him turning out to be a low achiever in these fields. What is postulated is a linear progression, that is to say constant improvement one year after the next, uninterrupted by any set-backs or failures. In my view that is not a conservative approach. It supposes that B would realise his full potential throughout his years at school, and in the postulated post-school education period, and that insofar as his employment prospects are concerned, he would at the least always be in the right place at the right time. I would not classify that prediction as conservative. There is a dearth of expert opinion, and rational argument, to support a supposition that, given the statistics, it may be assumed that B would not have fallen on the wrong side of the school drop-out rate or our unemployment figures. Although I do not now have the benefit of actuarial evidence, it strikes me that any mis-steps in the progression of B's educational and working life postulated by the experts would have a material impact on the calculated figure from which a contingency deduction must be made.

[44] The defendant's argument that I should dismiss the claim for loss of earnings can only be upheld if I am satisfied that the available evidence does not establish that B would have had any earning potential at all. Once it is accepted that

B would have had a potential to earn from employment the court has a duty to do what it can with the available evidence.

[45] I do not have the advantage of being able to record in this case what Rogers J did in paragraph 586 of the judgment in *AD & another vs MEC for Health and Social Development*.

“Since I have done my best to determine a probable career path, I see no basis for taking into account as a contingency, that IDT would not have had the ability to do as well as I have assumed. While that is reasonably possible, it is also reasonably possible that he would have done better. I have tried to steer a middle course.”

I find myself in a position where for want of evidence I am unable to express full confidence in the figures agreed between Ms Hill and Ms Krishna as suitable for the calculation of loss of earnings. However, I have no other figures with which to work. For reasons I have already discussed I take the view, employing the terminology of market predictors, that the risk in the prediction of the experts lies more on the downside than it does on the upside.

[46] To the extent that the suggestion of counsel for the plaintiff of a 20 percent deduction was presented as a norm, I respectfully agree with his submission. In *NK vs MEC for Health, Gauteng 2018 (4) SA 454 (SCA)* the court recorded that the normal range is between 15 percent and 20 percent. There is no evidence in this case that the ordinary vicissitudes of B’s life would probably be worse than the norm if he were to achieve what the experts have postulated. That was the finding also in *NK’s* case, where a deduction of 20 percent was allowed. In paragraph 16 of the judgment the court added this observation.

“Conjecture may be required in making a contingency deduction, but it should not be done whimsically.”

In my view it would not be whimsical to direct a higher contingency deduction than the norm in this case in order to compensate for what I regard as the unduly optimistic career path laid out in the agreement between the experts, given that those are the only figures available to me for the purpose of laying the basis for the required actuarial computation. As I understood counsel for the defendant, this reasoning is what justifies the elevation of the contingency deduction due in this case to 50 percent. In my view

such a deduction would be too high and unfair on B. I consider a 30 percent deduction for contingencies to be appropriate.

General Damages

[47] Counsel for the plaintiff argues for an award of general damages in the sum of R2 600 000.00, although, with reference to *Kriel N.O. obo S v Member of the Executive Counsel for Health, Gauteng* [2020] ZAGPJHC 273 (4 November 2020) he conceded that an award of R2 450 000.00 might be right. (In *Kriel* the condition of the patient was similar to that of B. An award of R2 million was made, and counsel has allowed for inflation in suggesting that its present equivalent will be R2 450 000.00.) Counsel for the defendant has argued for an award of R1 800 000.00.

[48] In support of these arguments I have been referred to a plethora of cases upon the footing that by virtue of their greater or lesser similarity to the present case, they are suitable as guidelines. I have considered these cases. Citing all of them, and summarising their facts, will not in my view advance an understanding of the basis upon which I reach a conclusion as to what is appropriate in the present case. There is in fact a relatively narrow band of awards of general damages in serious instances of cerebral palsy. The position was put as follows in *NK v MEC for Health, Gauteng* paragraph 13.

“It is trite that past awards are merely a guide and not to be slavishly followed, but they remain a guide nevertheless. It is also important that awards, where the sequelae of an accident are substantially similar, should be consonant with one another across the land. Consistency, predictability and reliability are intrinsic to the rule of law. Apart from other considerations, these principles facilitate the settlement of disputes as to quantum.”

[49] In the field in which we are in this case comparisons are difficult. B is relatively mobile. However the use to which he can put his mobility is restricted by the fact that he is trapped in a mental age of 3 years more or less, and by the fact that there is a disconnect between his upper limbs and those reaches of the brain which control them and react to the experience of touch. It is legitimate to ask how someone with no personal experience of such conditions is to make a comparison between B's

condition and that of another patient who is not mobile, but has not suffered the level of brain damage that B has. It is arguable that once one gets into the range of cerebral palsy cases which are as serious as that of B, comparisons become odious.

[50] Having said that I agree with the submission by counsel for the plaintiff that *Kriel's* case is similar to this one. The need for consistency in awards, already discussed above, suggests that it is perhaps more suitable as a guide than the others to which I was referred. The principles which the court in *Kriel's* case applied in reaching its conclusion that an award of R2 million was the correct one are set out in paragraphs 18 to 21 of the judgment. They may be summarised as follows, and I am in respectful agreement with them.

- (a) The learned Judge observed the general tendency in awards of general damages to children suffering from cerebral palsy of between R1 800000.00 and R2 200 000.00.
- (b) The learned Judge endorsed the observations of Watermeyer JA in *Sandler v Wholesale Coal Supplies Ltd* 1941 AD 194, that there are no scales by which pain and suffering can be measured and no relationship between pain and money. Compensation must be determined "by the broadest general considerations".
- (c) The learned Judge endorsed the observations of Rodgers J in *AD's* case that general damages may empower those caring for a patient suffering from cerebral palsy to try things which may alleviate the pain and suffering, and provide the patient "with some pleasures in substitution for those which are now closed to him".
- (d) Awards in previous cases offer broad and general guidelines, given "the differences that inevitably arise in each case". A "meticulous examination of awards" should not interfere with the court's general discretion.
- (e) Warnings against a rigid application of consumer price indices must be taken into account.
- (f) With reference to *De Jongh's* case at paragraph 60, the learned Judge drew attention to the Supreme Court of Appeal's reaffirmation of conservatism as one of the factors to be taken into account when awarding general damages. (The Supreme Court of Appeal affirmed in

De Jongh that the conservatism spoken of is that employed in achieving fairness to the wrongdoer as well.)

[51] Applying those principles to the present case I conclude that the appropriate award for general damages for B is R2 200 000.00. I have made some allowance for inflation.

Transport Costs

[52] The plaintiff claims an order that an actuarial calculation be done to establish the cost of B's transport requirement for the next six years. For the purposes of the calculation it is to be assumed that a Renault Tribes is purchased at a cost of R228 990.00, of which the defendant must pay R122 640.00 (the price of the vehicle less its trade in value at the end of the six year period. The defendant shall pay for the annual licensing of the vehicle for the next six years, and also pay the running costs of the vehicle at a rate of R1.60 per kilometre subject to a maximum of 6000 kilometres per year. The plaintiff asks that B's transportation needs from the end of the six year period to life expectancy be held over for determination at the hearing involving the public health defence, presumably upon the basis that at that stage B's need for transport in the long term, especially for medical treatment and the like, and the extent of it, will become clearer than it is now.

[53] B presently resides in New Germany, a suburb at some 10 kilometres distance from Westville where he attends an institution providing remedial therapy for persons affected by conditions of the type suffered by B. That is all the information I have allegedly supporting a conclusion that travelling expenses of 6000 kilometres per year should be allowed at the defendant's expense. He travels at all times in the company of the day caregiver on duty. She attends the institution with him. B can use public transport. His mobility extends to that. This was conceded in evidence. The difficulty with public transport lies in the fact that B is no better socialised than a child of three years or younger. Counsel for the defendant argues that nevertheless, as B is capable of using public transport, that is what should be used for the next six years.

[54] Measured against the other claims upon which I am asked to adjudicate, the claim for travelling expenses is a minor one. I think it is for that reason that its quantification received little attention during the trial, and especially during argument. The fact that it is a relatively minor claim does not mean that a judgment for payment of the claim can be granted when the evidential foundation for the award is incomplete, with the result that too great an element of guess work, which could have been avoided, must be employed in order to reach a conclusion on the quantification of the claim. By way of example, the impression I have is that the institution attended by B is in the nature of a remedial education facility or school. The evidence did not reveal whether he attends the institution 52 weeks per year or whether, like a school, it is closed for periods of vacation. The answer to that question might have a material bearing on the question as to whether the purchase of a vehicle is necessary, and the amount of annual travel which the defendant may legitimately be called upon to finance. Another example emerging from the evidence of Ms Rosslyn Rich, the mobility consultant called by the plaintiff, is the fact that if B is not going to need a wheelchair in the next six years, a Toyota Vitz at a cost of about R190 000.00 would be suitable. I was not furnished with the trade-in figure for that vehicle at the end of the six year period. There is no evidence about the running costs of that vehicle. That is material because no evidence was led to suggest that there is reason to believe that B would become wheelchair bound at any time in his life. On the contrary, the fact that he would retain his mobility for the rest of his life was a central feature of the argument in support of the need for night time carers.

[55] Of more concern to me, is the fact that there are two features of the claim about which there is no evidence, and about which, more especially, I have not heard argument. They are related, although the second one comes into play when considering B's transport needs from his 18th birthday onwards.

- (a) The first is this. The claim for loss of earnings is premised upon the proposition that B would have attended school until his 18th birthday. Would transport have been required for him to get to school and back? If so, how much would it have cost? If it was required the expense would have been carried not by B, but by his parents. Is it legitimate in the circumstances to burden the defendant with the claim for B's transport, especially his transport to the institution he attends, to the extent that

the expense would have been incurred even if the sad events which have led to this trial had not occurred?

- (b) The second issue relates to the period after B turns 18, but may be affected by any principle which emerges from a consideration of the first issue. The defendant is required to compensate B for his loss of earnings. B would have inevitably incurred transport costs to and from his place of work every day of the year except during his annual leave. Those would have been payable out of B's earnings. Is the position that, unless it is proved that B's transport costs incurred as a result of his present unhappy condition exceed those which he would have incurred in necessary travel to work and back, the costs of such transport up to his life expectancy must be paid out of the compensation for his loss of earnings?

[56] I express no view on these issues. I have heard no argument on them and the evidential basis for argument on them, especially the first of the two issues, has not been fully laid.

[57] In an ordinary case I would be confronted with a choice between two courses. One would be to grant absolution from the instance. The other would be to indulge in the guess-work with which I am not comfortable, and a risk of overstating or understating the claim to the disadvantage, and perhaps the material disadvantage, of one or the other party would arise. Neither of those courses strikes me as in accordance with justice. Until B turns 18 we are dealing with the future of a child. Thereafter we are dealing with the future of an extremely vulnerable member of our society. Fortunately, in my view, we are in a trial which is not yet over. In my view there is a third option, which is to order that the claim for B's transport expenses stands over for final adjudication together with the remaining issues in this case. That will mean B's claim for travelling expenses up to the final conclusion of the trial will have to be dealt with as historical expenditure. Given the order to be made at this time there will be a sufficient cash flow to finance those reasonable travelling expenses incurred in the meantime, for which the defendant may ultimately be held liable. An amendment to the pleadings may be required to accommodate this arrangement. In my view such a course is just and fair to both parties.

Conclusion

[58] As agreed between the parties the order I make will include an order as to costs to date, directions to the actuaries, and a money judgment for general damages. The parties are optimistic that the actuarial calculations will be agreed. Upon the assumption that money judgments must follow those calculations, the parties may submit an agreed order in writing, which may then be made in chambers if the summary of the actuarial work which must accompany the proposed order supports the grant of it. If agreement cannot be reached on the actuarial calculations the matter will have to be set down for further hearing on that issue. I will make a declaration as to past medical expenses as the amount is material to the usual basis for calculating the amount to be awarded for the formation and administration of a trust.

[59] The parties are agreed that a trust must be established to take care of the B's awards arising out of this litigation. That task will be left to the plaintiff's attorneys. I will make provision for payment of the amounts due to be made to the plaintiff's attorneys pending the commencement of a trustee's appointment. The parties are agreed that a premium of 7,5 percent of the net capital amounts payable by the defendant to the plaintiff must be added to the capital amounts, as a contribution to the cost of the formation and administration of the trust.

[60] The plaintiff has asked for mora interest at the statutory rate on the awards from date of judgment to date of payment. Given the provisions of s 3 of the State Liability Act, 1957, which provide that the default position is that an order for payment of money must be satisfied within 30 days of the date of the order becoming final, and given that the claim is for mora interest, interest should run from 30 days after the date upon which the order for payment of money becomes final. The provisions of the order which follows relating to interest must be read in conjunction with s 3 of the State Liability Act, and with regard to the definitions of the terms "day" and "final court order" in s 4A of that Act.

[61] The plaintiff has formulated an order for costs in her favour which in my view in certain respects involves unwarranted interference in the discretion of the

Taxing Master. Insofar as the costs of expert witnesses are concerned I propose to confine the order to those who actually gave evidence. The exception is Dr Campbell whose work rendered it unnecessary for him to be called on the subject of B's life expectancy. An order for the costs relating to actuarial services will be made when that work is done. A suitable provision for such costs should be included in any proposed order following completion of the actuarial work on the award for the costs of caregivers and loss of earnings.

[62] Counsel for the plaintiff have asked for an order directing the set-down of the case on the trial roll for 15 days. The issues relating to the "public health defence" were separated because neither party was ready to run a trial on those issues. This case must return to the case management roll until it meets the required level of preparedness for certification as trial-ready.

ORDER

- (1) The defendant shall pay R2 200,000 as and for B's general damages.**
- (2) It is declared that the defendant is liable for B's past medical expenses in the sum of R2 166, 809.08. It is recorded that interim payments of R620 419.63 and R750 000.00 have been made, and that an order has already been made by consent for payment of the balance in the sum of R796 389.45.**
- (3) It is declared that the defendant is liable for the costs of providing caregivers for B, and that the amount of such compensation shall be calculated actuarially in accordance with the following directions.**
 - (a) Two caregivers shall be allowed from B's age 11 to 18, whereafter four caregivers shall be allowed until B reaches the age of 52.8 years.**
 - (b) The following amounts, expressed in January 2024 money values, shall be allowed.**
 - (i) A basic monthly cost per caregiver of R7 053.64.**

- (ii) A public holiday premium of R827.76 per caregiver.
 - (iii) An additional cost of R1 138.19 per caregiver per month to cover the cost of a relief caregiver when the permanent caregiver is on leave.
- (4) It is declared that the defendant is liable to compensate B for his loss of earnings, and that the amount of the award shall be actuarially calculated on the following basis.
 - (a) During his 19th and 20th years B would have earned an average of R1 744 per month.
 - (b) In his 21st year B would have earned R12 160 per month whereafter
 - (i) his income would have increased in a linear fashion from that sum to R23 270 per month in his 45th year; whereafter
 - (ii) it would have increased in line with inflation until he reached the age of 52.8 years.
 - (c) The amounts stated above in respect of loss of earnings are expressed in 2023 money values.
 - (d) The amount calculated for loss of earnings shall be subjected to a deduction of 30 percent for contingencies.
- (5) The claim for B's transport costs stands over for later determination.
- (6) If then unpaid, the capital sums payable in terms of any order for the payment thereof shall bear interest at the statutory rate from 30 days after such order becomes final.
- (7)
 - (a) The plaintiff's attorney is directed to attend to the formation of a trust, and the appointment thereto of a trustee who is independent and suitably qualified. B shall be the sole beneficiary of the trust.
 - (b) After the receipt by the trustee of letters of authority from the Master of the High Court monies due to B in consequence of orders already made, or orders subsequently made, shall be paid to the trustee.

- (c) The plaintiff's attorney shall draft the provisions of the trust deed after consultation with the plaintiff and the defendant's attorneys.

(8)

- (a) A premium of 7,5 percent, to cover the costs of the formation and administration of the trust, shall be added to each capital award in favour of B in terms of this order, and in terms of any subsequent order made in this action.
- (b) Each premium shall be payable at the same time as the capital award to which it relates.
- (c) In the case of the past medical expenses which are the subject of paragraph 2 of this order, the premium shall be payable 30 days after the date upon which this paragraph 8 of this order becomes final.

(9)

- (a) Until the issue of letters of authority to the trustee all amounts payable in terms of this order, or any subsequent order in this action, shall be paid to the plaintiff's attorneys.
- (b) Amounts thus received shall be retained by the attorneys in an interest bearing trust account from which payments may be made to meet the reasonable costs already incurred, or to be incurred, for the purpose of B's care.
- (c) The plaintiff's attorneys shall maintain a vouched account of all their transactions with regard to monies held by them in trust for B, which shall be presented to the trustee upon the issue of the trustee's letters of authority together with the balance of the monies then held in trust.
- (d) The reasonable cost incurred by the plaintiff's attorneys in administering the funds shall be allowed as a charge against the funds.

(10)

- (a) The defendant shall pay the plaintiff's costs incurred to date in this action, including any that may have been reserved.

- (b) The costs of two counsel shall be allowed where incurred. Counsels' fees which post-date the introduction of the current structure for the taxation of counsels' fees shall be allowed on scale C for senior counsel, and scale B for junior counsel.
- (c) The qualifying fees of the under-mentioned expert witnesses, including the costs of preparation of their reports and joint minutes, and any other reasonable and necessary expenses incurred in respect of the engagement of such expert witnesses which the Taxing Master finds appropriate, shall be allowed on taxation.
 - (i) Ms S Hill.
 - (ii) Ms J Bainbridge.
 - (iii) Ms G Karrow.
 - (iv) Ms R Rich.
 - (v) Dr R Campbell.



Olsen J

Case Information:

Date of Trial: 4, 5, 6, 7, 11 November 2024
Date of Argument: 19 November 2024
Date of Judgment: 18 June 2025

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