



**IN THE NORTH WEST HIGH COURT
(MAFIKENG)**

CASE NO. 1264/2006

In the matter between:

M L M

o.b.o, K I M

PLAINTIFF

and

**THE MEC FOR EDUCATION, NORTH WEST
PROVINCIAL GOVERNMENT**

DEFENDANT

JUDGMENT

LANDMAN J:

Introduction

[1] On 30 September 2010 I found that the defendant was responsible for the harm suffered by the minor child, K I M and the plaintiff, as a result of an incident that occurred on the 18 September 2003 at Connie Minchin Primary School, Mmabatho, when a falling goal post struck the minor child on the side of his head resulting in an injury. This judgment concerns the quantum of those damages.

[2] The plaintiff does not claim past medical expenses. However, the plaintiff claims general damages and future medical expenses.

[3] The evidence presented to prove the quantum of damages consisted of:

- (a) the testimony of the minor child given in chambers;
- (b) the testimony of the plaintiff; and
- (c) the medico-legal report of Dr Jaap Earle, a neurosurgeon.

Dr Earle

[4] The parties agreed at a pre-trial conference to accept the contents of the medico-legal report of Dr Jaap Earle, a neurosurgeon. Dr Earle's report is to the effect that:

- (a) the minor child was treated by Dr Snyckers for a depressed fracture of the skull around the right temporal bone area;
- (b) Dr Earle, conducted an EEG which revealed normal results. This precludes the possibility of post- traumatic epilepsy, which is unlikely after a period of almost eight years as at the time when the report was compiled;
- (c) the type of injury will result in fewer chances of post-traumatic educational disabilities;
- (d) the scar in the right temporal region is only just visible with no cosmetic defect at all;
- (e) it is unlikely that the minor child will develop scar formation at the site of the injury;
- (f) he may have a residual risk of about 10% to develop epilepsy because there could be scar tissue where the facial injury occurred;

- (g) should the child develop a fit it would cost R1 500 a month to treat it for a period of certainly four years and quite possibly over a much longer period;
- (h) an EEG would costs R2000; and
- (i) a craniotomy and a scar excision may be necessary. There is a 3% of this being necessary. The cost would amount to R120 000.

General damages

[5] The approach to the assessment of damages has been restated in **Minister of Safety and Security v Seymour** 2006 (6) SA 320 (SCA). Nugent JA opined at para 17 that:

"The assessment of awards of general damages with reference to awards made on previous cases is fraught with difficult. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that."

And see **Pitt v Economic Insurance Co Ltd** 1957 (3) SA 284 (D) at 287E-F where the court stated that:

"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 it must not pour out largesse from the horn of plenty at the defendant's expenses."

[6] Plaintiff claimed general damages in the amount of R800 000,00 representing pain and suffering, loss of amenities, shock, emotional trauma and disability. However, Ms Zwiendelaar suggested during argument that R 190 000 would be just compensation.

[7] Mr Charwo, who appeared for the defendant, in his useful heads, referred me to a number of cases concerning the quantum for general damages for injuries sustained by minor children but submitted that only one was relevant. This is the judgment in **Van Oudtshoorn v Northern Assurance Co Ltd** 1963 (2) SA 642 (A) where the Appellate Division awarded an amount of R750-00 in respect of general damages suffered by a minor child under the age of seven following an injury which was described by the court as follows:

"Die seun was teen die pad geslinger en het heelwat beserings opgedoen waarvan die aan die kop die ernstigste was. Die getuienis bewys dat daar 'n skedelbreuk was. Hoewel beweer is dat daar ook breinbeskadiging was, is die getuienis in hierdie verband nie oortuigend nie. Die kopbesering het o.ffi., as gevolg gehad dat een van die ooglede nie normaal funksioneer nie, en in hierdie verband blyk dit dat die seun later 'n operasie sal moet ondergaan om die posisie reg te stel, en dat hy dus nog verdere pyn en ongerief sal moet verduur. Hy het ook verskeie kneusings en 'n snywond opgedoen wat egter nie van 'n ernstige aard was nie, Die seun was nie bewusteloos nie, of ten minste nie vir langer as 'n paar sekondes nie, Hy is na die hospitaal vir behandeling vervoer. Hy het fluks herstel en is na dertien dae ontslaan.

Hy het toe nog gereeld hoofpyn gekry en moes pille gebruik om die pyn te verdof. Sy een oog was nog toe. Hy was vir 'n geruime tyd deur dubbel visie gepla. Volgens eiser se getuienis sou die seun wat sy verstandelike vermoë betref ook skade gely het. Sy geheue en sy konsentrasie-vermoe het verswak, en dit word beweer dat hy nou in 'n mate verstandelik vertraagd is. Voor die verhoor moes die seun pyn en ongerief verduur toe X-straal fotos van sy brein geneem is teneinde te bepaal of daar tekens van breinbeskadiging is. By die verhoor is getuienis gelei wat daarop dui dat die moontlikheid dat hy in die toekoms epileptiese aanvalle mag kry in geringe graad verhoog is. (Die kans is op 5 persent gestel indien daar geen breinbeskadiging aanwesig is nie en op soveel as 15 persent indien daar wel sodanige beskadiging is.)"

[8] The current value of the amount of R750-00 awarded in the above case is R50 000-00. See Robert J Koch in *The Quantum Yearbook*, 2013.

[9] Mr Charwo submitted that under the circumstances and having due regard to the injuries actually sustained by the minor child, the sequelae and his chances of educational abilities, an appropriate award in respect of general damages would be an amount between R60 000 and R100 000.

Evaluation

[10] I take the following into account in determining the quantum:

- (a) the minor child suffered pain, which from the description must have been severe, at the time of the incident, during the trip to the Victoria Hospital, at Mill Park Hospital until the operation, thereafter moderate pain until his discharge two weeks later.
- (b) the pain was relieved to an extent by painkillers.
- (c) the minor child underwent to medical procedures with its accompanying pain and discomfort;
- (d) he had brief post-traumatic amnesia for less than 24 hours.
- (e) he recognised his parent after about 2 days.
- (f) the minor child suffered anxiety and feelings of isolation during the two weeks following the incident.
- (g) the removal of the staples was uncomfortable.
- (h) the minor child has a scar of about 45-50 mm on the right side of his head above and forward of his ear. This is not disfiguring. The scar, however, reminds him of the incident and brings back unpleasant memories when he is asked by school mates to explain it. He is not teased about the scar. He does not find it disfiguring and he is not self conscious about it.
- (i) the injury has not impaired his educational disabilities. He was and remains an above average student.
- (j) he lost some amenities for the period of hospitalisation as well as two weeks on his return to school.
- (k) he feels his parents have become over-protective as a result of the incident.

[11] The minor child also complained of some jerkiness which interrupts his sleep at night. He experiences headaches when he plays soccer and tennis. He attributes this to heat even though he wears a hat or cap. He feels dizzy when rising or standing up after sitting or lying down. This can happen three times in a day and occurs several times a week. He says he did not have these symptoms before the incident. He says he can cope with these symptoms. Dr Snyckers apparently did not consider this indicative of epilepsy.

[12] The minor child has not received medical attention specifically as regards these symptoms. When he had flu he had headaches and was treated for that. But it is well known that flu is accompanied by headaches. The minor child appears to be taking painkillers from time to time and seems to be a frequent visitor to the sick bay.

[13] The plaintiff says he has asked the house master at the minor child's school to monitor the frequency of the events. However, the plaintiff confirms that he has not specifically sought medical assistance as regards these symptoms.

[14] I am troubled by this. So much so, that I suggested to counsel that this ought to be investigated before I ruled on the extent of the quantum. It is not consistent with the minor's parents who are concerned parents, who are even a tad over-protective. I cannot say that it has been proven that these symptoms, save for the jerking, are the consequences of the injury although they may be. The fact that he did not have these symptoms prior to the incident does not necessarily mean that they are caused by the injury. The fact that medical assistance has not been sought would normally be an indication that they are not serious yet the evidence suggests that they are, at least, troublesome.

[15] The *onus* is on the plaintiff to prove the damages and that they were caused by the injury. I am not satisfied on the evidence that this has been done. The plaintiff could and should have presented sufficient evidence about the causation of these symptoms. I do not take them into account.

[16] I agree with counsel that **Van Oudtshoorn** provides a useful yardstick for assessing the minor child's damages. However, the conversion of the award into current monetary terms is not always susceptible to a mathematical conversion; particularly when a long period of time (about 50 years) has elapsed. Had **Van Oudtshoorn** been decided today I do not think that less than R180 000 would have been award.

[17] The injury and consequences in the case of the minor child are less than that suffered by the child in **Van Oudtshoorn**. I would award the minor child general damages in the amount of R120 000.

Future medical expenses

[18] The future medical expenses, which make no provision for hospitalisation, are estimated at a total of R13 200. No provision is made for an increase in the fees involved. The amount seems to me to reasonable. I would award this amount.

Costs

[19] Mr Charwo conceded that costs should be awarded on the High Court scale.

Order

[20] In the result I make the following order:

1. The defendant shall pay to the plaintiff the sum of R 120 000 being general damages and R13 200 being future medical expenses within 7 days, failing which the sum shall bear interest at the rate of 15.5% as from that date until date of payment.
2. The defendant shall pay the plaintiff's taxed or agreed party and party costs of this action including the reasonable taxable costs of obtaining an expert medico legal report from Dr Jaap Earle which was served on the defendant in terms of Rule 36(9)(a) and (b).
3. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:
 - (a) The plaintiff shall serve the Notice of Taxation on the defendant's attorneys of record;
 - (b) The plaintiff shall allow the defendant 7(SEVEN) court days to make payment of the taxed or agreed costs from date of the settlement or taxation (whichever might be applicable);
 - (c) Should payment not be effected timeously, the plaintiff will be entitled to recover interest at the rate of 15.5% on the taxed or agreed costs from date of allocator or the date of the agreement (whichever might be applicable) to date of final payment.
4. The plaintiff is declared to have been a necessary witness.

A A LANDMAN
JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING : 30 APRIL 2013

DATE OF HEARING : 16 APRIL 2013

COUNSEL FOR PLAINTIFF : ADV SAAIMAN

COUNSEL FOR DEFENDANT : ADV CHWARO

ATTORNEYS FOR PLAINTIFF : W J COETZER ATTORNEYS

ATTORNEYS FOR DEFENDANT : STATE ATTORNEY