THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 401/2023

In the matter between:

THE MEC FOR HEALTH, GAUTENG PROVINCIAL GOVERNMENT **APPELLANT**

and

A A S obo C M M S **RESPONDENT**

Neutral citation: *MEC for Health, Gauteng Provincial Government v AAS obo CMMS* (401/2023) [2025] ZASCA 91 (20 June 2025)

Coram: MAKGOKA, GOOSEN and KGOELE JJA and DAWOOD and BAARTMAN AJJA

Heard: 23 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 20 June 2025.

Summary: Delictual law– general damages – unconscious child claimant – whether entitled to general damages for pain and suffering and amenities of life.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (NN Bam J sitting as court of first instance):

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the high court is amended by deleting the order awarding general damages for R2 200 000 and replacing it with the following:

'There is no award for general damages'.

JUDGMENT

Kgoele JA (Baartman AJA concurring):

[1] The appeal concerns a determination of general damages for a minor child with cerebral palsy. It arises from an order granted by the Gauteng Division of the High Court, Pretoria (the high court) on 12 October 2022, wherein the appellant, the MEC for Health, Gauteng Province (the MEC), was ordered to pay an amount of R15 530 576. The order included an amount of R2 200 000 for general damages(non-pecuniary) for the minor child. With leave of the high court, the appeal is directed against the award of general damages only.

[2] The factual context of this appeal is as follows: CMMS (the respondent), the biological mother of AAS (the minor child), initiated legal action in both her personal and representative capacity against the MEC for damages. These damages

arise from the neurological injuries the minor child sustained during labor and delivery at Tshwane District and Steve Biko Academic hospitals. The child was born on 18 October 2015 and has since been diagnosed with cerebral palsy, which is further complicated by cortical visual and hearing impairments, intellectual disability, intractable uncontrolled epilepsy, and chronic left hip dislocation. Consequently, he is unable to sit, crawl, or walk independently, nor can he speak. His estimated life expectancy is approximately 18 to 20 years.

[3] On 27 January 2020, the MEC conceded liability in full for the respondent's agreed or proven damages. As a result, only the *quantum* of damages for the minor child was determined before the high court.

[4] Two issues were submitted for consideration by the high court. The first concerns the contingency percentages to be applied with respect to the loss of earnings and future medical expenses. The second concerns the amount for general damages. The determination made by the high court regarding the rate of the percentage to be deducted for contingencies is not an issue in this appeal. Nothing further will be said about it.

[5] The high court trial proceeded without oral testimony. The parties requested the high court to determine the general damages issue based on the reports from specific experts, supported by confirmatory affidavits, in line with rule 38(2) of the Uniform Rules of Court, along with their submissions. A key point in this appeal is that the parties requested the high court to accept the experts' reports as admissible hearsay evidence, by consent, in accordance with s 3 of the Law of Evidence

Amendment Act, No. 45 of 1988.[1] Thus, the need to call or cross-examine these experts was dispensed with.

[6] The respondent argued for an amount of R2 400 000, while the MEC proposed R500 000. The high court found that the minor child experiences 'twilight moments' and although he may not fully appreciate his suffering, he is not in a state of unconscious suffering; he endures constant pain and will require various interventions throughout his life; and his loss of amenities is devastating. Consequently, the high court dismissed the MEC's arguments and awarded R2 200 000 for general damages. The MEC, dissatisfied with the outcome, is appealing this decision.

[7] Similarly, two issues arise for consideration in this appeal: a factual one and a legal one. The factual question is whether the minor child, given the facts of this matter, is unaware of his loss of amenities of life, pain and suffering, meaning he is in a 'vegetative state', or if he sometimes experiences a 'twilight moment', as the high court found. The legal question was described by the parties as '*the thought process that should be followed by a court in exercising its discretion in awarding non-pecuniary damages in all those cases where the plaintiff is unaware of his loss of amenities of life and/or his pain and suffering.*' Put differently, whether awareness is a sine qua non for non-pecuniary damages. In my view, the legal question arises only if the factual question is answered in the affirmative.

[1] Section 3(1)*(a)* of the Law of Evidence Amendment Act, No. 45 of 1988 provides: '**Hearsay evidence**
(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings.'

The factual issue

[8] The MEC's main argument regarding the first question is that the minor child is in a 'vegetative state' because he does not show any meaningful responses, such as following an object with his eyes or responding to voices. He also shows no signs of experiencing emotions. He has a realistic chance of not reaching the age of 19 and can only respond, to some extent, to pain and discomfort. The contention is that the high court erred in finding that the minor child, as a fact, has twilight moments and/or is not unconscious.

[9] The MEC relied on the following opinions of experts for its contention that the minor child is in a 'vegetative state':

9.1 Dr J Prins, an Orthopaedic Surgeon amongst others, stated the following:

'It is impossible to know if he is aware of pain resulting from the chronically dislocated hips . . .'

9.2 Dr Karen Levin, a Speech Therapist and Audiologist, opined: the minor child does not have the skills to be able to communicate; he is extremely physically impaired to such an extent that he has exceptionally little means of communication; most of the time, according to his mother, he is silent; he does not understand anything that is said to him and cannot express himself in words except to cry to indicate that he is in pain; and does not make any connection with anybody nor seem to recognise his mother.

9.3 Ms Christel Botes, a Physiotherapist, stated under the heading 'Behaviour and Emotions' that '[h]e has a stoic demeanour and does not smile or cry'. Further, that '[h]e does not respond socially and/or emotionally'.

9.4 Ms Anneke Greef (Ms Greef), an Occupational Therapist, opined amongst others that his mother indicated that his severe presentation of lethargia prevents him from communicating; he doesn't even cry when he is given an injection.

9.5 Dr Marina Van der Ryst (Dr Van der Ryst), an Educational Psychologist in her report stated that his mother indicated that he is unable to speak and to communicate with others; he does not make eye contact, while his head hangs to the one side; he does not interact with her and didn't interact with the personnel on the day of the assessment; his mother indicated that most of his time is spent sleeping which was also the case on the day of assessment. Further, the minor child suffers from cortical blindness and he was unable to track or follow an object with his eyes; he was lethargic and slept for most of the interview; he does not interact, smile, or make eye contact; and does not respond when musical instruments were demonstrated e.g rattle, jingle bells, or a shaker.

[10] The MEC also relied on three cases to support the above argument.[2] Based on the facts presented in these cases, the submission was that a person should be considered to be in a 'vegetative state' when awake but showing no signs of awareness. They may open their eyes, wake up, and fall asleep at regular intervals, exhibiting basic reflexes. Additionally, they can regulate their heartbeat and breathing without assistance. A person in a 'vegetative state' does not display any meaningful responses, such as following an object with their eyes or responding to voices, nor do they show any signs of experiencing emotions. Several authorities in our law refer to this condition as the 'cabbage' or 'persistent vegetative state' with reference to *Clarke* v *Hurst (Clarke)*.[3]

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[2] *Gerke No v Parity Insurance Co Ltd* 1996 (3) SA 484 (WLD*); Reyneke v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 412 (WLD*) and Collins v Administrator, Cape* 1995(4) SA 73 (C). *(Collins)*

[3] *Clarke v Hurst 1992* (4) SA 630 (D) 640D-F.

[11] It is common cause that the MEC primarily relies on expert evidence to support the above proposition. In the law of evidence, "opinion" means any reference from observed facts, and the law on the subject is derived from the general rule that witnesses must speak only to that which was directly observed by them. An expert's opinion represents his reasoned conclusion based on certain facts or data, which are common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is uncontroverted, an expert's bold statement of his opinion is not of real substance.[4]

[12] The cogency of an expert opinion depends on its consistency with proven facts and on the reasoning by which the conclusion is reached.[5] In general, it is important to bear in mind that it is ultimately the task of the court to determine the probative value of the expert evidence placed before it and make its own findings with regard to the issues raised.[6]

[13] The most recent judgment of this Court relevant to this question, although not on all fours with the facts of this matter, is *NK v MEC for Health, Gauteng*[7] *(NK obo ZK),* wherein Willis JA stated the following:

'In *Marine & Trade Insurance Co Ltd v Katz NO*, Trollip JA pointed out 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. ZK's awareness of his suffering, *albeit diminished by his reduced mental faculties*, puts him in this "twilight" situation. During the course of argument this became common cause. This confirms that he is entitled to an award for general damages and

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[4] *Ruto Flour Mills (Pty) Ltd v Adelson* (1) 1958 (4) SA 235 (T) at 235E-G.
[5] *MEC for Health and Social Development, Gauteng v TM obo MM* (380/2019) [2021] ZASCA 110 (10 August 2021).
[6] *Van Wyk v Lewis* 1924 AD 438 at 447. See also *Member of the Executive Council for Health, Eastern Cape v ZM obo LM* (576/2019) [2020] ZASCA 169 (14 December 2020) para 11.
[7] *NK v Member of the Executive Council for Health of the Gauteng Provincial Government* [2018] ZASCA 13; 2018 (4) SA 454 (SCA) para 7.

that all that remains to be determined, under this head, is how much would be suitable in all the circumstances.' (Citations omitted.) [emphasis added]

[14] A 'vegetative state' was described by Thirion J in *Clarke* as '…a neurological condition where the subject retains the capacity to maintain the vegetative part of neurological function but has no cognitive function. In such a state, the body is functioning entirely in terms of its internal controls. It maintains digestive activity, the reflex activity of muscles and nerves for low-level and primitive conditioned responses to stimuli, blood circulation, respiration, and certain other biological functions, but there is no behavioural evidence of either self-awareness or awareness of the surroundings in a *learned manner*…' [emphasis added]

[15] The submissions made by the MEC lack merit on several grounds. Firstly, it should be noted that no report was presented before the high court that categorically expressed an opinion regarding the minor child being in a 'vegetative state'. The high court assessed the expert reports submitted to it by consent, including the arguments presented. Upon finding that the fact that the minor child experiences pain was common cause, it concluded that he was not in a 'vegetative state'. This much is stated by the high court in its judgment.

[16] Secondly, as far as the issue of experiencing pain is concerned, several expert reports support the high court's findings. Ironically, the MEC quoted and relied upon these reports in its head of arguments. Regarding pain and hunger, Dr. Levin's report states that he can cry to indicate he is in pain, a fact also mentioned by Dr. Van der Ryst in his report. He noted that the minor child moans to suggest to his mother that he is in pain or hungry. The physiotherapist, Ms Mkanzi, also referenced a report from the mother indicating that he often cries when he is in pain. She noted further that '[h]ip dislocation is associated with severe pain'. The report of Dr. Prins, relied

upon by the MEC, does not support the MEC's case either, as it remains neutral and inconclusive regarding the issue of experiencing pain from a chronically dislocated hip.

[17] Of cardinal importance is that there is a common thread that runs through the conclusions of all the experts' reports as far as the issue of whether the minor child experiences pain and his mode of communication (i.e, crying, moaning) is concerned, that, they are based on hearsay, as they all gathered this information from the mother. These reports, having been admitted by consent as admissible hearsay, remain evidential material that the court must assess. In my view, a section of Dr Prins' report wherein he asserts that the minor child did not experience pain as such, without providing a foundation for his opinion, cannot gainsay the mother's report to the various specialists. The mother, as the sole caregiver for the past seven years, remains a competent witness, and her reports to the various experts of what she observed in these years cannot be overlooked. Furthermore, whilst on this point, it is significant to point out that, as far as awareness of pain, he indicated in his report that 'it is impossible to know if he is aware of pain due to the chronically dislocated hips.' His report is therefore inconclusive regarding awareness of pain as well. Moreover, no other expert has attempted to express any opinion regarding this aspect of awareness of pain.

[18] Thirdly, the opinions relied upon by the MEC do not fully support the submission that the minor child shows no meaningful responses. Dr. Levin, whose opinion the MEC cites, stated that the child has 'little means of communication,' indicating a limited or restricted ability. Ms Greef noted that the mother reported that the child sometimes turns his head toward her while awake. Dr van der Ryst mentioned that '[the minor] seems to be aware of his mother's voice, but does not

turn toward her when she speaks.' It's crucial to remember that Dr van der Ryst's report mentions the child's moaning, which, along with crying, is a form of communicative behaviour. People with impaired speech and hearing often communicate through non-verbal means.

[19] In addition to the above, it is common cause that the minor child presents, *inter alia*, with spastic quadriplegic cerebral palsy and cortical blindness. As such, the minor child cannot be expected to see objects or follow instructions with his eyes. His speech and hearing are also impaired due to the brain damage. The fact that '[he] has no word usage' cannot, on its own, justify the conclusion that he is incapable of communicating entirely. In addition, the mere fact that the minor child cannot give expression to his state of consciousness because of his mental retardation, which reduced his intellectual capabilities and as such, are equated to those of a 3-month-old baby, is no evidence that he does not feel or is unaware of his pain. After all, the MEC also made a concession in its heads of argument that there is a level of awareness when they submitted that '*the high court should have awarded an amount of R500 000 as opposed to R2 200 000 mindful of the fact that……he reacted to basic stimuli from time to time, such as discomfort and pain'.*

[20] The upshot of these observations contradicts the MEC's assertion that the child is in a 'vegetative state'. Furthermore, the facts in *Collins* are not on all fours with this matter. In *Collins* amongst others, unlike in our matter, the minor child continued to be ventilated with a tracheostomy tube, and Scott J described her condition as 'in every respect a cabbage case.' In our mater, overall, the minor child experiences and has at least some awareness of pain, hunger and the voice of his mother, which in my view, exhibits awareness consistent with the 'twilight' situation as described in the *NK obo ZK* judgment, where a person does not have full insight

into their dire plight and full appreciation of their grievous loss due to brain injury. In contrast, a ‘vegetative’ state is characterized by a complete lack of awareness and responsiveness. Thus, the difference between a twilight state and a vegetative state lies in the level of consciousness and awareness. The fact that the minor child can’t express his awareness of the pain in a learned manner due to his diminished state of intellect which is likened to that of a child aged 0-3 months old, does not necessarily mean he has ‘no awareness of pain’.

[21] To conclude on this issue, it is crucial to emphasise that the high court had to holistically evaluate the experts’ remarks, views, and conclusions in their reports, including the reports from the mother, which were duly noted in those reports. Though technically the experts' reports were mainly based on hearsay, both parties agreed to their admissibility. Once admitted as such, they form part of the evidential material the high court must evaluate and make a finding from. This is the reason why the parties labeled this as ‘a factual issue’ in their appeal to this Court. It is trite that factual findings reside within the realm of the trial court and can only be overturned by an appellate court under exceptional circumstances.

[22] In my view, the high court’s evaluation of the experts' opinions, views, and/or remarks in their report cannot be faulted. In this appeal, it cannot be said that the high court arrived at a completely wrong conclusion. The MEC could not identify any demonstrable irregularity except to present its ostensible summation or interpretation of the views expressed in the experts’ reports. Without a conclusive or explicit opinion in any of the experts’ reports stating that the child is in a ‘vegetative state’, it casts the interpretative net far too wide to conclude that a child who moans when he is hungry, experiences some form of pain or discomfort, and seems to be aware of his mother’s voice – although he cannot positively respond to it due to his

restricted mental and communication ability – is in a 'vegetative state' or completely unconscious, and thus lacks intellectual appreciation of his suffering, let alone be likened to a dead person.

The legal issue

[23] Regarding the amount of damages to be awarded, the MEC advanced two grounds for the argument that the high court erred in awarding an amount of R2 200 000 for general damages. The first ground was that the high court's approach when assessing general damages was flawed, including the facts taken into account in arriving at its conclusion. The second ground relates to the discretion a court has in awarding damages. Several arguments were advanced to support the first ground relating to the approach and were based on the decision of *Collins v Administrator, Cape*[8] (*Collins*), which held that awareness is a sine qua non for an award of general damages. First, the argument posited was that the minor child was not entitled to receive any award for general damages. The submissions made were that it is accepted in our law that an award is not a punishment to the wrongdoer; that a minor child who is in a 'vegetative state' is akin to a dead person; and that the award will serve no purpose. I will return to this argument later in the judgment.

[24] The other argument put forth by the MEC regarding the high court's approach is that this Court has not definitively determined the legal framework for calculating damages for a child in a 'vegetative state'. The MEC formulated this as a legal question involving the thought process a court must adopt in exercising its discretion in awarding general damages. According to the MEC, this issue needs to be resolved by this Court due to conflicting rulings in the high courts. In addition to the decision in *Collins,* the MEC advanced two conflicting decisions that rejected the Collins

[8] *Collins v Administrator, Cape* 1995 (4) SA 73 (C)

approach to substantiate its submission. These are *Reyneke v Mutual & Federal Insurance Co. Ltd*,[9] and *Gerke NO v Parity Insurance Co Ltd*.[10] The MEC urged this Court to follow *Collins'* decision.

[25] As a result of the conclusion I reached above regarding the state of the minor child's awareness, the need to analyse the approach in the three conflicting decisions fell away. The other reason is that a significant portion of the second judgment examined these decisions, the history of cases before and after them, and the foreign law when it arrived at a different conclusion that because of a finding of unconsciousness, the minor child is unaware of his pain and suffering because of mental retardation, and for the fact that he has the intellectual capacity of a 0 – 3 month infant; his condition is considered a 'persistent vegetative state' in clinical terms.

[26] Similarly, the conclusion that the minor child is not in a 'vegetative state' effectively addressed this argument concerning the conflicting decisions relied upon by the MEC, along with the one related thereto of the proper approach and the facts considered by the high court in assessing general damages. As a result, I cannot take a definitive stance on whether the approach in *Collins* should be adopted or not, since its decision is irrelevant if the child is not in a vegetative state. I am thus constrained to state that whether *Collins* is a sound precedent that has withstood academic scrutiny and remains a guiding reference for this Court in addressing general damages, as the MEC argued, is highly questionable in the constitutional era. It's worth repeating that, in contrast to *Collins* where the experts agreed that the child is completely unconscious or is in a permanent vegetative state, our case, has

[9] *Reyneke v Mutual & Federal Insurance Co. Ltd* 1991 (3) SA 412 (W).
[10] *Gerke NO v Parity Co Ltd* 1966 (3) SA 484 (W.)

no absolute or definitive certainty in the experts' reports that the minor child was in a vegetative state, or that he was completely unaware of pain and suffering. Some recent decisions from various divisions have supported the flexible approach taken in *NK obo ZK* and awarded general damages in situations similar to this matter. Additionally, there is also an academic opinion that criticised the decision in *Collins.*[11]

[27] The MEC added a further argument against awarding any general damages to the minor child. The submission made was that an undertaking from the MEC has secured future medical expenses, and the award of general damages would lead to duplication. This argument too, need not detain us because this Court in *NK obo ZK* dismissed similar arguments, stating:

'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. The court a quo was clearly wrong in regard to the "duplication" issue . . .'[12]

[28] I now return to the first argument presented by the MEC against awarding any general damages to the minor child, which, as mentioned in para 23, was that the award would serve no purpose because the minor child's condition is similar to that of a deceased person, and he would receive no benefit from it. The MEC relied on the reasoning and findings in *Collins* for this proposition and further presented that the award is not punitive, but compensatory. The second judgment accepted this argument in its approach to not awarding any damages, as it similarly held that:

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[11] *Matlakala v MEC for health, Gauteng Provincial Government* (11/11642) [2015] ZAGPJHC 223 (2 October 2015); *T.L obo K.R.L v MEC for health, North West Province* (1273/2017) [2021] ZANWHC 33 (25 June 2021); *Madela v MEC for health, Kwazulu-Natal* (3079/2015) [2021] ZAKZDHC 18 (30 April 2021); S obo S v MEC for health (27452/2009)[2015] ZAGPPHC 605(12 August 2015); AD and Another v MEC for Health (27428/10) [2016] ZAWCHC. B P Wanda 'Problems arising in compensating unconscious plaintiffs for loss of amenities of life: a comparative survey' (2005) 38 CILSA 113- 142.

[12] *NK obo ZK* para 13

'And in truth, insofar as damages for an unconscious person are concerned, there is not much difference between such a person and a dead one. Both are: (a) unaware of their conditions; and (b) not capable of enjoying the money awarded to them as damages.'

Furthermore, the award:

'[W]ould likely accumulate interest in a trust fund, and upon the claimant's death, accrue to the claimant's estate, for the benefit of relatives. In this way, a largesse is poured out to the heirs of an unconscious claimant in circumstances where they were never entitled to the benefit. Ultimately, the award serves a purpose for which it was never intended.'

[29] There are several difficulties in accepting the MEC's argument in this regard. First, in *NK obo v ZK*[13] where the flexible approach for determining general damages was endorsed, this Court ruled that, in assessing the amount for general damages, it did not have to determine what the award will be used for - its purpose or function, but the child's loss of amenities of life and his pain and suffering. In my view, once it is accepted that he experiences pain and that his intellectual capabilities are diminished, his insight into his condition becomes irrelevant. Secondly, our common law is settled that if the claimant dies after litis contestatio, the claim remains transferable to her estate. Its transmissibility only ceases if the claimant passes away before litis contestatio. This means that the heirs or family ultimately benefit from it. The likelihood that the injured party may not live long enough to benefit significantly from the damages awarded cannot, by itself, be a reason to deny such an award. In our case, the claimant is still alive. The claimant has lost the ability to participate in life's activities and the capacity to live the life he could have otherwise lived. His ordinary enjoyment of life has been greatly diminished.

[30] Thirdly, the argument presented by the MEC regarding the purposes and/or circumstances under which a court may award general damages appears to be

[13] Ibid para 7

unclear. Whether the underlying proposition indicates that the unconscious claimant is entitled to compensation solely for amenities of life or for all three categories: pain, suffering, and amenities of life, remains ambiguous. In their amended application for leave to appeal that served before the high court, the criticism is directed at the fact that the high court 'erred in finding that there was an awareness of the loss of amenities of life (pain and discomfort excluded)' and also, 'not finding that the minor child was indeed in a vegetative state in that he was unaware of his loss of amenities of life (pain and discomfort excluded).' This implies that the proposition is not that awareness is a sine qua non to general damages as a whole (all three), but only to general damages for loss of amenities of life. On the same note, a proper reading of their heads of argument and their submissions in Court, including the agreement between the parties in terms of rule 8(9) of the Rules of this Court, reveals that the legal basis upon which the appeal was based has gravitated from its axle. It was described therein as '*the thought process that should be followed by a court in exercising its discretion in awarding non-pecuniary damages in all those cases where the plaintiff is unaware of his loss of amenities of life and/or his pain and suffering.*

[31] In my view, this distinction, if it exists, cannot salvage the MEC's case either. The first difficulty is that MEC uses the two phrases interchangeably, clearly clutching at straws. Damages for pain, suffering, and loss of amenities of life are invariably lumped together under general damages. The fact that the high court lumped the damages for pain, suffering, and loss of amenities of life and awarded a single amount does not detract from the correctness of its approach when assessing general damages, nor does it constitute an irregularity. It is sufficient to say that it is a well-established principle that an appellate court will not seek anxiously to discover reasons adverse to the trial judge's conclusion, as no judgment can ever be

perfect. It is trite law that judgments are never all-embracing, and it does not necessarily follow that because something has not been mentioned, therefore, it has not been considered.[14]

[32] What exacerbates the difficulty is that, as previously indicated and with the risk of repetition, the MEC in their heads argued for an amount of R500 000 as opposed to the one determined by the high court, urging this Court to have regard to the fact that the minor child amongst other factors '*has a chance of not reaching the age of 19 and that he reacted to basic stimuli from time to time, such as discomfort and pain.'* Ostensibly, this stems from the fact that it was common cause between the parties, as the high court found, that the minor child experiences pain. In my view, a lack of awareness, as the MEC contends, even if limited only to amenities of life, cannot, on the facts of this matter, disentitle the minor child to any award of damages, lest we trivialise the very essence of being or existence. Dr Karen Levin stated in her report that, the minor child will continue to experience a profound loss of enjoyment of life and communicative participation for the rest of his life due to his 'extremely restricted communicative participation as well as other impairments associated with cerebral palsy,' The minor child in our matter has shown awareness sufficient to warrant an award of general damages. This leads me to the argument about the issue of the discretion exercised by the high court, whether it was improperly exercised or not.

Discretion in awarding general damages

[33] The second ground relied upon by the MEC as indicated above, is that an amount of R2 200 000 is excessive. The MEC submitted that R500 000 is a reasonable amount that the high court should have awarded. The argument advanced

[14] *R v Dlhumayo and Another* 1948(2) SA 6779(A).

is that the amount is so disproportionate to such an extent that this Court can infer that the discretion accorded to the high court was not exercised properly. Therefore, the argument continued, this Court is entitled to interfere. The MEC added that this Court should be mindful that the minor had a realistic chance of not reaching the age of 19.

[34] The high court exercised a discretion in the true sense when awarding damages. As discussed by Khampepe J in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*:[15]

'A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is 'true' in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.'[16](Citations omitted.)

[35] Where a lower court exercises a discretion in the true sense, an appellate court should be slow to substitute its discretion for that of the lower court.[17] This Court has on numerous occasions held that 'It is trite that a court awarding general damages exercises a wide discretion that will not be lightly interfered with by a court of appeal.'[18] In my view, there is no striking disparity between the award granted by the high court and other awards in similar circumstances, including the one this Court considers fair. The respondent provided a comparable list of cases, which assisted in this regard. This Court would not have awarded a different amount. I find

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[15] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).
[16] Ibid para 85.
[17] *Birkett v James* [1978] AC 297 (HL) at 317D-G, cited with approval in *Bookworks* above n 125 at 807A-G.
[18] *Road Accident Fund v Delport NO* [2005] ZASCA 38; 2006 (3) SA 172 (SCA); [2006] 1 All SA 468 (SCA) para 22.

solace from this Court's decision of *NK obo ZK*, where R1 800 000 was awarded in 2018, almost four years before the high court's order.

[36] In my view, the high court's judgment is free from misdirection or irregularities. The high court carefully considered other previous awards and motivated its conclusion. It is significant to note that the high court prefaced the paragraph analysing the comparable cases with the following: 'Almost all the cases discussed in the reasons appeared to be broadly similar to C's case.' In my view, the high court did not slavishly follow previous awards.

[37] Consequently, I would have dismissed the appeal with costs, such costs to include the costs of two counsel.

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A M KGOELE

JUDGE OF APPEAL

Makgoka JA (Goosen JA and Dawood AJA concurring):

[38] I have read the judgment prepared by my colleague, Kgoele JA (the first judgment). It concludes that the child is not in an unconscious state and therefore deserves compensation for non-pecuniary damages. I take a different view. As I see it, because of his brain injury and mental retardation, the child is unconscious of his loss, and will be, for the rest of his life. This conclusion leads me to an issue of principle: whether the child's lack of awareness of his loss is relevant in considering non-pecuniary damages for him. This Court has yet to pronounce itself authoritatively on the issue. This appeal presents us with an opportunity to do so, and to clarify some of the doctrinal and practical aspects concerning the award of general damages.

In the high court

[39] The child suffered a severe brain injury at birth due to the negligence of the health workers under the employment of the appellant, the MEC. Because of the injury and its effect on her child, the respondent, as mother and natural guardian of the child, sued the MEC for both pecuniary and non-pecuniary damages for pain and suffering and loss of amenities of life.

[40] The MEC conceded liability, and the high court was requested to decide compensation for pecuniary and non-pecuniary damages for the child. The respondent's claims in her personal capacity were separated from those in her representative capacity. There was no oral evidence before the high court. The court had to determine the quantum based on medico-legal reports prepared by various experts in respect of the child, as well as oral submissions by the parties' counsel. The high court (per NN Bam J) heard counsel's submissions on 3-7 October 2022 and on 10 and 11 October 2022.

The high court's order and subsequent reasons

[41] On 12 October 2022, the high court granted an order in terms of which the MEC was to pay the respondent R15 530 575.28 (fifteen million five hundred and thirty thousand, five hundred and seventy-five rand and twenty-eight cents), together with ancillary orders relating to interest and costs. Included in the amount ordered by the high court was R2 200 000 (two million and two hundred thousand rand) for non-pecuniary damages. The high court did not furnish any reasons for this order. Subsequently, the MEC requested the reasons for the order, in particular for the amount of R2 200 000 awarded for non-pecuniary damages. The high court furnished its reasons on 21 November 2022. Subsequently, it granted leave to the MEC to appeal to this Court.

[42] In her reasons for the order, the learned Judge found that:

'[The child] does have his twilight moments albeit he may not have the full appreciation of his suffering. [The child] is not in state of unconscious suffering. [He] is said to be in constant pain and is going to need various interventions throughout his life . . .'

[43] These findings are not clear and seem contradictory. 'Twilight moments' can only be experienced by a person who is in an unconscious and vegetative state. Therefore, the statement that the child has his twilight moments seems to suggest that the Judge had accepted that the child was in an unconscious and vegetative state. But immediately thereafter, the Judge said that the child 'is not in a state of unconscious suffering.'

[44] The confusion was compounded in the judgment granting leave to appeal. The learned Judge considered it unlikely that another court would come to a different conclusion on her findings. This suggests that the learned Judge did not consider the child to be in an unconscious and vegetative state. However, she granted leave on

the basis that there were conflicting judgments and 'there is a need for a superior court to pronounce on the matter'. There is a glaring internal contradiction in this reasoning. If the child is not unconscious, general damages should, without more, follow, and the issue about conflicting judgments does not arise. It only arises in the event of a finding that the child is unconscious, for it is only upon that finding that the question whether compensation for pain and suffering and loss of amenities of life arises. Nothing, however, turns on this misdirection as the MEC has been granted leave generally, without any limitations.

In this Court

[45] In this Court, the MEC contended, in the main, that the high court should have made no award at all in respect of general damages as the child is in an unconscious, vegetative state, and thus: (a) does not experience pain; and (b) is unaware of his loss of amenities of life. Alternatively, the MEC submitted that only a nominal amount of R500 000 should have been awarded. The respondent denied that the child is in an unconscious, vegetative state. But even if he was, the respondent contended, that was irrelevant for determining general damages. The respondent accordingly supported the high court's award and sought the dismissal of the appeal.

Issues for determination

[46] Despite a lack of clarity in the high court's findings as to whether the child is in an unconscious state or not, I shall assume that the learned Judge meant to convey that the child is not in an unconscious state. That is the primary question which must be decided first. If it is answered in the negative, the further issue is whether the high court exercised its discretion judicially in considering general damages. If the primary question is answered in the affirmative, it must be decided whether, as an

unconscious claimant, the child is entitled to general damages. If so, the juridical basis therefor.

Whether the high court properly exercised its discretion

[47] Assuming that the child is not in an unconscious state, did the high court exercise its discretion judicially? I make observations about the high court's judgment on the following issues: (a) previous comparable cases; (b) the distinction between pain and suffering, on the one hand, and loss of amenities, on the other; (c) the interrelationship between special (pecuniary) damages and general (non-pecuniary) damages. I consider each in turn.

Previous comparable cases

[48] The high court's judgment contains a long quotation from an unreported judgment of the high court, which in turn quotes at length from this Court's judgment in *Protea Assurance v Lamb*[19] on the utility of awards in previous cases. The high court then referred to four cases, which it considered comparable, and the awards for general damages made in those cases. Thereafter, the high court concluded as follows:

'Almost all the cases discussed in these reasons appeared to be broadly similar with C's case. From the assessment of all the evidence, including [the mother's] comments as incorporated in the various reports, C does have his twilight moments albeit he may not have the full appreciation of his suffering. C is not in a state of unconscious suffering. He is said to be in constant pain and is going to need various interventions throughout his life. His devastating loss of amenities of life cannot be gainsaid. Having reflected on the cases mentioned in these reasons, it was my considered view that an award of R2.2 million was justified for C's general damages.'

[19] *Protea Assurance Co. Ltd v Lamb* 1971 (1) SA 530 (A) (*Protea Assurance*).

[49] Apart from previous cases, it is unclear from the high court's judgment what else weighed with it to arrive at R2 200 000 for general damages. Few cases are directly comparable. For that reason, a trial court should not slavishly follow previous awards. The particular facts of each case must be considered, and a trial court should, at the very least, state the factors and circumstances it considers important in damages assessment. It should provide a reasoned basis for arriving at its conclusions.[20] This, the high court failed to do.

[50] As repeatedly stated by this Court, past awards in comparable cases serve as a useful guide in determination of general damages. However, the comparison should never interfere with a court's discretion.[21] What is more, to ascertain whether particular cases are similar in material respects, the facts, regarding the degree of pain suffered by a claimant in each particular case and the amenities of life of which he or she was deprived, must be known before a comparison is justified.[22] The high court did not embark on any meaningful or critical appraisal of the particular condition of the child in the present case to determine the degree of pain, if any. As a result, its reliance on awards in previous cases amounted to no more than a mechanical exercise.

The distinction between pain and suffering and loss of amenities of life

[51] The high court awarded a globular amount of R2 200 000 without indicating what was allocated to the respective components. Although pain and suffering and loss of amenities of life are often lumped together under general damages, these are

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[20] *Road Accident Fund v Marunga* [2003] ZASCA 19; [2003] 2 All SA 148 (SCA); 2003 (5) SA 164 (SCA) para 33. For fully reasoned awards of general damages see Saldulker J's judgment in *Megalane NO v RAF* [2006] ZAGPHC 116; [2007] 3 All SA 531 (W); 2007 JDR 0171 (W), and Rogers J's judgment in *AD & Another v MEC for Health and Social Development, Western Cape Provincial Government* [2016] ZAWCHC 116 paras 606-619.
[21] See, for example, *Protea Assurance* at 535H-536A.
[22] *Marine Trade Insurance Co. Ltd v Goliath* 1968 (4) SA 329 (A) at 333H.

two distinct components.[23] Their lumping together is not appropriate in all the circumstances, especially where, as is the case here, it is disputed that one of the two variants, ie, pain, is experienced.

[52] 'Pain and suffering' refer to: (a) the physical discomfort due to the injury itself or its consequences, including the discomfort caused by any medical treatment which one might have to undergo,[24] and (b) the mental or emotional distress which a person may experience because of the injury. Loss of amenities of life, on the other hand, refers to, among others, the deprivation of the ability to do the things which before the accident a claimant was able to enjoy, and to prevent full participation in the normal activities of life. This may include the loss of special amenities which are peculiar to the particular plaintiff, such as no longer being able to engage in pre-morbid hobbies or interests.[25] As explained in *Gerke v Parity Insurance Co. Ltd* (*Gerke*):[26]

'Although it has been the practice in our Courts to make an award of general damages for pain and suffering and loss of amenities, . . . I can see no reason why separate awards should not be made for pain, suffering, etc., in the appropriate case. One can conceive of cases in which there has been no pain but there is suffering because of the loss of an amenity or others in which there has been pain but no loss of any amenity and so forth, and naturally appropriate awards will have to be made in each case.'[27]

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[23] Rule 18(10) of the Uniform Rules of Court provides that:
'A plaintiff suing for damages shall . . . as far as practicable state separately what amount, if any, is claimed for—
(a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;
(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;
(c) disability in respect of—
(i) the earning of income;
(ii) the enjoyment of amenities of life . . .'

[24] See, for example, *Povey v Governors of Rydal School* [1970] 1 All ER 841 at 846c-d.

[25] *Administrator-General, South West Africa, and Others v Kriel* [1988] ZASCA 21; [1988] 2 All SA 323 (A); 1988 (3) SA 275 (A) (*Kriel*) at 288F.

[26] *Gerke v Parity Insurance Co. Ltd* 1966 (3) SA 484 (W) (*Gerke*).

[27] Ibid at at 494H-495.

[53] A survey of our cases reveals that the distinction between the two is rarely made, with a few exceptions far and in between.[28] In *Sigournay v Gillbanks* (*Gillbanks*),[29] this Court expressed misgivings that the trial court had not awarded separate amounts for pain and suffering, on the one hand, and for loss of amenities on the other, as '[t]he declaration lumped them together and the learned Judge did the same'.[30] Schreiner JA then gave a detailed analysis of each of 'pain and suffering' and 'loss of amenities of life', respectively.

[54] The method of assessing general damages in separate amounts for pain and suffering and loss of amenities of life is not only sound. It also serves, among others, three purposes: (a) it affords a higher court on appeal to have a meaningful review of the award; (b) it affords reasonable guidance in future cases; (c) it assures the litigants and their legal representatives that each of the various heads of damage in the overall award, has been given thoughtful consideration.[31]

The interrelationship between general and special damages

[55] The high court failed to consider the interrelationship between general and special damages. It treated medical and related expenses (special damages) and general damages as completely discrete and individually distinct components. In this it erred. The correct approach was stated by Kriegler J in *Dhlamini v Government of RSA* (*Dhlamini*)[32] as follows:

'If I were to have assessed the damages for the non-patrimonial elements in isolation, I would have arrived at an award considerably in excess of the figure at which I have arrived. I have grappled with the question what, in law, logic or equity, underlies my conviction that there must be some

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[28] For example, Classen J made this distinction in *Reyneke v Mutual and Federal Insurance Co Ltd* 1991 (3) SA 412 (W), as did Rogers J in *AD v MEC.*

[29] *Sigournay v Gillbanks* 1960 (2) SA 552 (A) (*Gillbanks*).

[30] Ibid at 569C.

[31] *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229 CanLII 1 (SCC) at 235-6.

[32] *Dhlamini* was delivered on 14 June 1986 in the Witwatersrand Local Division and reported in Corbett and Buchanan *The Quantum of Damages in Bodily and Fatal Injury Cases* 2 ed Volume III (1989) at 554.

interaction between the awards for patrimonial loss on the one hand and the award for non-patrimonial loss, on the other. Whatever may be the rationale in principle or in other cases, it appears to me, in this case, and on its particular facts, that I cannot ignore the very substantial awards made [for special damages] when I come to assess general damages for pain and suffering, loss of amenities of life, disability and disfigurement. Those awards were considered reasonable for the very reason that they served to ease the plaintiff's painful shuffle across this mortal coil. They were intended to reduce the suffering, the loss of amenities of life and general disablement that the plaintiff will have to live with. I cannot ignore them when assessing those very elements under what is a different head of damage, but forms part of one and the same award.'[33]

[56] The reasoning in *Dhlamini* was endorsed by this Court in *Administrator-General, South West Africa v Kriel* (*Kriel*)[34] where it was held that the trial court had materially misdirected itself in its total award of damages by: (a) disregarding the interrelationship between the patrimonial and non-patrimonial elements in its assessment; (b) treating medical and related expenses and general damages as completely discrete and individually distinct components.

[57] Rogers J also grappled with this issue in *AD v MEC for Health and Social Development, Western Cape* (*AD v MEC*).[35] When assessing the significance of the items which weighed with him, in arriving at general damages, he considered 'the beneficial and palliative effects of the medical interventions factored into my award for future medical expenses'.

[58] In the present case, when it awarded general damages, the high court seemed to have disregarded that it had awarded a substantial amount (R13 330 578.28) for special damages. It erred. Most of the cost items claimed in the respondent's

[33] Ibid at 587.
[34] *Administrator-General, South West Africa v Kriel* 1998 (3) SA 274 (A) at 289D-E.
[35] *AD & Another v MEC for Health and Social Development, Western Cape Provincial Government* [2016] ZAWCHC 116 (*AD v MEC*) paras 606-610.

particulars of claim were geared at the amelioration of the child's suffering, eg: paediatric tilt-in space commode shower chair; adjustable mattress and its maintenance; pressure care mattress and its maintenance; seating system wheelchair; base wheel chair; a seating system and its maintenance; occupational therapy and assistive devices; care givers; relief caregivers, facilitators, holiday care, aftercare, weekend care, night care and domestic assistant; speech and language therapy; physiotherapy; behavioural and psychotropic medication; epilepsy medication; dental care; special transport; and architect relating to adaption of respondent's home.

[59] Although the high court did not specify for which items it had made provision for in its award, it must be assumed that the R13 330 578.28 it had awarded for special damages was considered sufficient to ameliorate the child's suffering and make his life less unbearable to the extent money can achieve this. The high court awarded general damages as though the child's condition would not be ameliorated by the amount awarded for special damages. It failed to consider whether, in light of the substantial amount it had awarded for special damages, a further substantial amount in respect of general damages was warranted. As held in *Kriel*, the more comprehensive the range of devices and services for which explicit allowance has been made, the smaller the award for general damages should be.[36] The high court failed to heed this principle.

[60] The effect of all the above is that, even assuming that the child was not an unconscious claimant, the high court's exercise of its discretion in awarding general damages was vitiated by several misapplications of the law, and influenced by wrong principles.[37] This Court would therefore be at large to consider the issue afresh.

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[36] *Kriel* fn 34 at 289G.

[37] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88.

Whether the child is in an unconscious state

[61] In claims arising from brain damage injuries, a distinction is often made between 'twilight' cases and 'cabbage' cases.[38] In the former state, some communication with a claimant is sometimes possible. In the 'cabbage' state, the claimant has no such cognitive senses.[39] The latter state, also referred to as 'persistent vegetative state', was explained by Thirion J as follows in *Clarke v Hurst* (*Clarke*):[40]

'The term "persistent vegetative state" seems to have been created by Dr Fred Plum, professor and chairman of the Department of Neurology at Cornell University and a world-renowned neurologist. It describes a neurological condition where the subject retains the capacity to maintain the vegetative part of neurological function but has no cognitive function. In such a state the body is functioning entirely in terms of its internal controls. It maintains digestive activity, the reflex activity of muscles and nerves for low level and primitive conditioned responses to stimuli, blood circulation, respiration and certain other biological functions but there is no behavioural evidence of either self-awareness or awareness of the surroundings in a learned manner (see *Quinlan* and *Conroy (supra*)). *Steadman's Medical Dictionary* defines "vegetative" as functioning involuntarily or unconsciously after the assumed manner of vegetable life.'[41]

[62] To answer this question, it is important to refer briefly to the opinions of some expert witnesses whose reports were placed before the high court. According to the joint minutes of Paediatric Neurologists, Dr Keshave and Dr Mogashoa, the child has the following diagnosis and clinical features: micro cephalic spastic quadriplegic cerebral palsy. It is complicated by: cortical visual and hearing impairment; global developmental delay; intellectual disability; symptomatic epilepsy; gastro-oesophageal reflux disease; a pseudo-bulbar palsy; multiple contractures; intractable

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[38] Neethling and Potgieter *Law of Delict* 8 ed (2021) at 294.
[39] See, for example, *Marine and Trade Co Ltd v Katz* 1979 (4) SA 961 (A) at 983; *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A) at 120; *NK v MEC for Health, Gauteng* [2018] ZASCA 13; 2018 (4) SA 454 (SCA) para 7.
[40] *Clarke v Hurst NO and Others* 1992 (4) SA 630 (D).
[41] Ibid at 640E-F.

uncontrolled epilepsy; and chronic left hip dislocation. Another Paediatric Neurologist, Dr Reid, opined that the child's brain injury had resulted in 'mental enfeeblement'.

[63] The child cannot feed himself. He is fed through a gastrostomy tube. He does not communicate, for he has no word usage. His head appears swollen and has a protruding tongue, and he drools a lot. He has a pectus carinatum deformity of the chest, a bilateral spasticity and continuous spastic myoclonus. There is also evidence of scoliosis. He is fully dependent on others for all activities of daily living. The only time that he does not need someone to actively care for him and nurture him is when he sleeps. He cannot be left alone and always requires supervision. He cannot sit, stand or walk by himself, and will never be able to do so. He uses a buggy carriage for mobility.

[64] His ability to develop as a normal child has been hugely restricted. He will not experience any enjoyment of life and will require full-time caregiving for the rest of his life. The child is completely dependent on his mother for all his needs. He cannot suck or eat by himself, is incontinent of bladder and bowel functioning and has to be kept in a nappy at all times. As to his life expectancy, the two neurologists who examined him agree that he would not survive beyond the age of 20 years.

[65] Dr Levin, a speech therapist, noted the following about the minor child: he is so extremely physically impaired that he has little means of communication; he has pseudo bulbar palsy, which is a significant neurological involvement of the control of the musculature required for speaking, as well as a profound intellectual disability; he is only capable of producing some vowel-like vocalisations, generally open vowels, and he vocalises very rarely; he has not developed the understanding

of symbolic language; he does not understand anything that is said to him and cannot express himself in words; he is not able to communicate at all except to cry to indicate that he is in pain; he does not make any connection with anybody and does not seem to recognise his mother.

[66] Dr van der Ryst, an educational psychologist, reported that he 'never crawled, he cannot stand or walk, and he cannot sit independently. He is unable to speak, and he is incontinent and still using nappies'. She further stated that the child 'does not understand instructions, but he cries and moans if he has pain'. Furthermore, he does not make eye contact, while his head hangs to one side. Dr van der Ryst further stated that the child was in constant pain. She also observed that the minor child was unable to track or follow an object with his eyes. He seems to be 'aware of his mother's voice, but he does not turn towards her when she speaks to him.' He was lethargic and 'frequently moaned', which alerted his mother that he required feeding, a nappy change, or attention. He does not interact or smile. He does not respond when musical instruments, eg rattle, jingle bells, or a shaker, are demonstrated to him.

[67] The child needs 24-hour constant care. His situation will never improve because this is how he was born. He knows no life other than the one the medical experts predict he will endure until his death. He will never appreciate the fact that he is different from other children. In all circumstances, he is not aware of his suffering and will never be. He depends on others for all his needs. The experts agree that he has diminished social and emotional skills.

[68] From the above overview of the injuries suffered by the child and their sequelae, it is evident that the child has suffered severe, permanent and irreversible cerebral palsy, which has profoundly affected his intellectual disability with almost non-existent intellectual function. The high court's finding that the child is not in an

unconscious state is not supported by the expert evidence. The learned Judge made no effort to substantiate it with reference to the expert reports. The finding is also out of kilter with those made by our courts in respect of similar claimants, as will become clear when I discuss various cases.

[69] For all of the above reasons, I disagree with the high court's presumed conclusion that the child is not in an unconscious state. I also disagree with its conclusion that even though the child might be unconscious, he has 'twilight moments'. It seems, with respect, that the learned Judge misconceived what is meant by a 'twilight moment' in the context of damages claims. What is envisaged here is a *lucidum intervallum* – a reference to a momentary improvement in a patient's condition after a brain injury.

[70] A good example of a claimant who experienced twilight moments is found in *Qunta NO v Bay Passenger Transport Ltd* (*Qunta*).[42] The claimant there had intervals of lucidity when she appreciated to a degree that she was being treated differently from how she conducted her life, before the collision. She infrequently realised that something was drastically wrong with her and that she was not enjoying life.

[71] The same cannot be said of the child in the present case. I have, in some fairly comprehensive detail, set out his injuries and their sequelae. Based on the expert reports, his mental retardation would never improve, and he would never have insight into his condition. The 'awareness of pain' in this context does not mean the child does not feel the pain or hunger. Thus, whether the child cries when he is hungry or feeling uncomfortable is irrelevant.

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[42] *Qunta NO v Bay Passenger Transport Ltd* 1973 (2A4) QOD 368 (E).

[72] The key consideration is the lack of intellectual appreciation of his suffering. Babies in their infancy do not have that type of appreciation. The child in the present case, despite being over 7 years old, has an intellectual capacity of a 3-month-old infant, which, according to expert reports, was unlikely to improve. He, therefore, does not have the type of appreciation referred to above, and never will, until his death. In my view, the child's condition fits neatly into Professor Plum's definition of a 'persistent vegetative state' as referred to in *Clarke*, above. I therefore conclude that the child is in an unconscious state.

Whether the child is entitled to general damages

[73] General damages comprise, among others, pain and suffering and loss of amenities of life. It is settled that where there is unconsciousness, there is no awareness of pain, and a claimant is not entitled to compensation for pain and suffering.[43] Based on my finding that the child is in an unconscious state, it follows that there is no awareness of pain. He is thus not entitled to compensation for pain and suffering as a component of general damages.[44] The high court did not indicate which portion of the award for general damages was allocated for pain and suffering. However, it must be assumed that this was taken into consideration in the overall award.

Compensating an unconscious claimant

[74] What remains to be determined is whether the child, as an unconscious claimant, is entitled to be compensated at all for loss of amenities of life. This question has divided judicial and academic opinion, both in our jurisprudence and

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[43] *Gillbanks* fn 29 at 571B; *Reyneke v Mutual and Federal Insurance Co Ltd* 1991 (3) SA 412 (W) (*Reyneke*) at 426; *Collins v Administrator, Cape* 1995 (4) SA 73 (C) (*Collins*) at 92.
[44] Ibid.

in other jurisdictions. It is indeed a difficult question, involving, as it does, a range of considerations, including moral and economic ones.

[75] There are two schools of thought in this regard. On the one hand, there is the 'objective' approach, in terms of which an unconscious claimant is compensated for the mere fact that he or she has been injured. On the other, there is a 'functional approach',[45] in terms of which damages for non-pecuniary loss may be justified only to the extent that they serve a functional purpose for the claimant.

Academic opinion

[76] As mentioned, academic opinion on the compensation of an unconscious claimant is also divided between supporters of the objective approach, on the one hand, and those who prefer the functional approach, on the other. For present purposes, I confine myself to the works of two scholars — Professor Wanda (Wanda)[46] and Professor Stolker (Stolker),[47] a Dutch academic.

[77] Wanda approaches the question from a human dignity perspective. According to him, an unconscious claimant has lost total capacity to live the life that he or she could otherwise have lived because of the wrongful conduct of another. Thus, through the medium of the law, society should recognise a duty to compensate for loss of amenities of life, because such a claimant has lost the 'ability to engage in life's activities'.[48]

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[45] The term is attributed to English scholar, Professor Anthony J Ogus in his article 'Damages for Lost Amenities: For a Foot, a Feeling or a Function?' (1972) 35 *Modern Law Review* 1; P J Visser *Kompensasie en genoegdoening volgens die aksie weens pyn en leed* (Unpublished LLD thesis. Pretoria: University of South Africa, 1980) 425 at 270-289.

[46] B P Wanda 'Problems arising in compensating unconscious plaintiffs for loss of amenities of life: a comparative survey' (2005) 38 *The Comparative and International Law Journal of Southern Africa* (CILSA) 113(Wanda).

[47] C J J M Stolker 'The Unconscious Plaintiff: Consciousness as a Prerequisite for Compensation for Non-Pecuniary Loss' (1990) 39(1) *International and Comparative Law Quarterly* 82 (Stolker).

[48] Wanda at 139.

[78] Wanda further posits that 'the issue cannot be confined to providing for substitute pleasures and the ability to enjoy such pleasures, which of course, an unconscious person cannot feel'.[49] In his view, such an approach trivialises the whole essence of being. The learned author supports the view adopted by the English majority that the use to which the damages are put is none of the court's business, and that this factor should not influence the quantum of damages. He also views compensation for the unconscious claimant as a symbolic reflection of society's outrage for the damage done to the claimant.[50] Furthermore, the author invokes s 9 (the right to equality) and s 10 (the right to dignity) of the Constitution, and argues that denial of compensation breaches these rights.[51]

[79] Wanda also refers to the works of other academic writers such as Boberg[52] and Neethling *et al*,[53] who are both proponents of the objective approach. Boberg strongly supports the view that, by compensating an unconscious claimant for loss of amenities of life, the law reflects 'society's sympathy with the victim and its sense of outrage at his grievous loss'. For their part, Neethling *et al* posit that the loss of amenities of life is not only measured by the consciousness of a claimant. It can be ascertained objectively to what extent the claimant's capacity to enjoy a normal life has been negatively affected by the injury. The learned authors further assert that, since an unconscious person does not have a normal life and does not take part in normal activities as he used to, it cannot be correct to say that he has not suffered any loss.

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[49] Ibid at 139-140.
[50] Ibid at 140, footnote 71.
[51] Ibid at 142.
[52] PQR Boberg *Law of delict: Vol 1 Aquilian Liability* 3 ed (1984) at 567.
[53] Neethling et al *Law of Delict* 4 ed (2001) at 251.

[80] Stolker's central proposition is that the determining factor ought to be whether the victim is aware of the compensation, in the sense that he or she is capable of deriving happiness from that which is bought for him with the money.[54] He argues that the purpose of damages for non-pecuniary loss is to provide happiness for the claimant. In other words, not compensation per se, but compensation with a purpose. If this purpose cannot be achieved, no damages for non-pecuniary loss should be awarded. For this reason, he concludes that no award should be made for damages for the unconscious in respect of loss of amenities of life. Stolker devotes a section in his article to the position of very young children.[55] He concludes that they are not entitled to damages for non-pecuniary loss because they are not receptive to the happiness provided to them through the use of the money.

Foreign law

[81] In terms of s 39(1)(*c)* of the Constitution, we may consider comparative foreign law in resolving the issue. In doing so, I bear in mind the caution sounded by the Constitutional Court in *H v Fetal Assessment Centre*[56] to, among other things, view any doctrines, precedents and arguments in the foreign jurisprudence through the prism of the Bill of Rights and our constitutional values. As will be evident later, English law featured predominantly in our jurisprudence. It is therefore necessary to set out the key findings and reasoning in those authorities. I will also consider the position in two common law jurisdictions, Canada and Australia, as well as the United States of America, before I turn to the jurisprudence in our country.

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[54] Stolker at 98.
[55] Ibid at 99-100.
[56] *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC) para 31.

English law

[82] The two leading decisions in English law are *Wise v Kaye* (*Wise*)[57] and *H West & Son v Shephard* (*West*).[58] *Wise* is a decision of the Court of Appeal, while *West* is that of the House of Lords. In both cases, the courts were not unanimous.

[83] *Wise* concerned a 20-year-old young woman who had suffered serious brain injuries. She was still unconscious three and a half years after the accident, and was not expected ever to recover consciousness. There was no prospect of recovery, and she would never have any knowledge of her condition. For this reason, no claim was made for pain and suffering. On appeal against the amount awarded by the trial court in respect of general damages, the Appeal Court was not unanimous. The majority rejected the submission that, because of the claimant's unconsciousness, only a nominal amount should have been awarded. It held that general damages must be assessed on an objective basis and the fact that the victim was ignorant of the loss suffered was irrelevant. In the main majority judgment, Sellers LJ likened limiting the compensation of an unconscious claimant to treating them as if they were dead. In a concurring judgment, Upjohn LJ reiterated the same point. He reasoned that in respect of a claim for a living person, the fact that they were ignorant of their loss was irrelevant because '[t]he injury to her has been done; the damage has been suffered'.[59]

[84] In a dissenting judgment in *Wise*, Lord Diplock held that the compensation for a claimant who is unaware of their loss should only be nominal. He reasoned that the only rational basis on which these damages can be assessed is by assessing the difference between the happiness which the victim would have enjoyed if he had not

[57] *Wise v Kaye and Another* [1962] 1 All ER 257 (*Wise*).
[58] *H West & Son Ltd and Another v Shephard* [1963] 2 All ER 625 (*West*).
[59] *West* fn 58 at 268.

been injured and the happiness or unhappiness which he has experienced as an injured person. Lord Diplock observed:

'When physical pain is over leaving a permanent physical disability behind, the consequent "loss of amenities of life" can also be compensated only by an arbitrary or conventional sum.'[60]

[85] In *West*, a 41-year-old woman had sustained severe head injuries resulting in cerebral atrophy and paralysis of all four limbs. Her life expectancy was reduced to five years. She was not totally unconscious, as she, to some extent, could appreciate her condition. For that reason, the trial court had awarded slightly more. On appeal to it, the House of Lords was not unanimous on the question of how an unconscious claimant should be compensated for non-pecuniary damages.

[86] The majority endorsed the Appeal Court's majority decision in *Wise*, and emphasised that: (a) the fact of unconsciousness does not eliminate the actuality of the deprivation of the ordinary experiences and amenities of life; (b) if damages are awarded on a correct basis, it is of no concern to the court to consider any question as to the use that will thereafter be made of the money awarded. Consequently, there should not be a paring down of the award because of some thought that a particular plaintiff will not be able to use the money.

[87] Writing for the majority on how unconsciousness affects compensation, Lord Morris of Borth-y-Gest said:

'An unconscious person will be spared pain and suffering and will not experience the mental anguish which may result from knowledge of what has in life been lost or from knowledge that life has been shortened. The fact of unconsciousness is therefore relevant in respect of and will eliminate those heads or elements of damage which can only exist by being felt or thought or experienced. The fact of unconsciousness does not, however, eliminate the actuality of the

[60] Ibid at 271.

deprivations of the ordinary experiences and amenities of life which may be the inevitable result of some physical injury.'[61]

[88] Dissenting, Lord Devlin reasoned that if, because of their injuries, claimants are rendered wholly unconscious so that they do not suffer any of the frustrations associated with the injuries, they should be compensated less than those conscious of their loss. For him, there are two elements for consideration: (a) the fact of the loss, and (b) what a claimant feels about it. He considered the latter factor more important to an injured person. He explained:

'To my mind there is something unreal in saying that a man who knows and feels nothing should get the same as a man who has to live with and put up with his disabilities, merely because they have sustained comparable physical injuries. It is no more possible to compensate an unconscious man than it is to compensate a dead man'.[62]

[89] The English Court of Appeal had another occasion to consider the issue of general damages for an unconscious claimant in *Lim Poh Choo v Camden and Islington Area Health Authority* (*Lim Poh Choo*).[63] The claimant was a senior psychiatrist who suffered brain damage through negligence at a minor gynaecological operation, as a result of which she became a complete invalid with severe mental impairment. Because of her condition, she was essentially non-appreciative of her loss.

[90] As was the case in previous cases, the court was not unanimous. The majority followed the reasoning of the majority in *West* and dismissed the appeal against the award for general damages. In his minority judgment, Lord Denning MR held that, because of the claimant's unconsciousness of her condition, only a modest amount

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[61] *West* fn 58 at 349.
[62] Ibid at 265.
[63] *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 1 All ER 332.

should have been awarded, for a large sum would avail her nothing; it would merely accumulate during her lifetime, and ultimately devolve on her relatives upon her death.

[91] On appeal, the unanimous House of Lords declined the invitation to revisit *West*, but instead affirmed its correctness.[64] Although it acknowledged the force of the dissenting opinion in that judgment, and that of Lord Denning in the Court of Appeal in *Lim Poh Choo*, the House considered that the policy issues underpinning divergent judicial opinion were best served through legislative reform, rather than judicial intervention. Writing for the House, Lord Scarman pointed out that since *West* was decided in 1963, settlements and contested claims had proceeded on the basis that *Wise* was correct and that its reversal 'would cause widespread injustice, unless it were to be part and parcel of a comprehensive reform of the law'. He accordingly concluded that if the law is to be changed, it had to be done through legislative intervention rather than judicial pronouncement.

[92] It is worth mentioning that in England, a commission tasked to investigate this issue has recommended that damages for non-pecuniary loss no longer be awarded to unconscious victims. In its report, the Commission said:

'We think the approach should be to award non-pecuniary damages only where they can serve some useful purpose, for example, by providing the plaintiff with an alternative source of satisfaction to replace one that he has lost. Non-pecuniary damages cannot do this for a permanently unconscious plaintiff. As Justice argued in their evidence to us, "When we compensate someone for non-economic loss, we are essentially seeking to relieve his suffering, and suffering is by its nature an experience subjective to the victim."

[64] *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910.

We recommend that non-pecuniary damages should no longer be recoverable for permanent unconsciousness'.[65]

Canada

[93] The Canadian Supreme Court pronounced itself on the issue in three contemporaneous judgments: *Arnold v Teno* (*Teno*);[66] *Andrews v Grand & Toy Alberta Ltd* (*Grand & Toy*);[67] and *Thornton v Board of School Trustees* (*Thornton*).[68] In both *Grand & Toy* and *Thornton*, young men became quadriplegic as a result of their injuries, although their mental capacities were unaffected. In *Teno*, the infant claimant's mobility was seriously lessened. Although technically she was not paralysed, she suffered a considerable degree of mental impairment.[69]

[94] The Canadian position is summed up in Dickson J's judgment in *Grand & Toy*:[70]

'If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.'

These remarks should, however, be understood in the context that none of the three cases concerned an unconscious claimant.

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[65] Report of the United Kingdom Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd 7054 Vol I, paras 397-8, established in 1973 and chaired by Lord Pearson. The commission reported in 1978.
[66] *Arnold v Teno* 1978 CanLII 2 (SCC); [1978] 2 SCR 287 (*Teno*).
[67] *Andrews v Grand & Toy Alberta Ltd* 1978 CanLII 1 (SCC); [1978] 2 SCR 229; 83 D.L.R. (3d) 452 (*Grand & Toy*).
[68] *Thornton v Board of School Trustees of School District No 57* 1978 CanLII 12 (SCC); [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480, 19 N.R. 552, [1978] 1 W.W.R. 607, 3 C.C.L.T. 257.
[69] *Teno* fn 66 at 296.
[70] *Grand & Toy* fn 67 at 262.

Australia

[95] The leading authority in that jurisdiction is *Skelton v Collins* (*Skelton*),[71] where a 17-year-old claimant had been rendered unconscious as a result of a motor vehicle collision. He had remained unconscious since the accident and would remain unconscious for the rest of his life, which was projected to last about six months from the date of the trial. The trial court had determined general damages on the basis that compensation must be 'for what the plaintiff consciously suffers'. In doing so, the trial court departed from the position adopted in England by a majority of the Court of Appeal in *Wise* and by a majority of the House of Lords in *West*.

[96] On appeal to the high court, it was argued that general damages for the loss of amenities of life should have been assessed on an objective basis, ie without regard to the fact that the claimant had remained unconscious since the accident, as enunciated by the English majority in *West.* The high court was divided in a four-to-one split.[72] The majority declined to follow the principle enunciated by the majority in *Wise* and *West.* It held that where the claimant is not aware of their injuries, damages should be low. In reaching that decision, the majority took into consideration that a body of authority inconsistent with the majority opinion in *West* had developed in Australia.[73] It also pointed to the diversity of opinion in *West* itself.

United States of America

[97] Various states approach the issue differently. For example, in *Flannery v United States*,[74] the Supreme Court of Appeals of the State of West Virginia held

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[71] *Skelton v Collins* [1966] HCA 14; (1966) 115 CLR 94 (*Skelton*).
[72] Kitto, Taylor, Windeyer and Owen JJ held the majority, with Menzies J dissenting.
[73] The court considered two notable cases which had declined to follow the English majority, namely *Scutt v Bailey (No. 2)* (1964) WAR 81 and *Fowler v Fowler* (1964) WAR 193, which in turn, had influenced the trial court.
[74] *Flannery v. United States* 297 S.E.2d 433 (1982). See also *Rufino v United States* 829 F.2d 354, 360-61 (2d Cir. 1987).

that a claimant who has been rendered permanently 'semi-comatose' is entitled to recover for the impairment of his capacity to enjoy life. The New York Court of Appeals reached a contrary conclusion in *McDougald v Garber*.[75] The majority, led by Chief Judge Wachtler, held that compensation beyond the purpose of delictual recovery, further compensation results in damages that are punitive, and therefore should not be awarded. Dissenting, Judge Titone held that loss of enjoyment of life is an objective damage item, conceptually distinct from conscious pain and suffering, and should be allowed.

South Africa

[98] This brings me to our country, where there are three main judgments on the issue: *Gerke*,[76] *Reyneke v Mutual & Federal Insurance Co. Ltd* (*Reyneke*),[77] and *Collins v Administrator, Cape* (*Collins*).[78] All three are judgments of two divisions of the high court.[79] There are dicta in other cases, to which reference will be made in the course of the judgment.

[99] *Gerke* was the first South African case in which the issue of general damages for an unconscious claimant was treated in any detail. Before then, there were several dicta on the issue. In *Steenkamp v Minister of Justice* (*Steenkamp*),[80] Roberts AJ had held that it was not proper to award an unconscious claimant such an amount as would provide more than could be usefully employed in alleviating his unhappy position, but leave a large sum for his heirs — a view to be adopted later in the

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[75] *McDougald v Garber* 73 N.Y.2d 246; 536 N.E.2d 372, 538 N.Y.S.2d 937, 1989.
[76] *Gerke* fn 26.
[77] *Reyneke* fn 43.
[78] *Collins* fn 43.
[79] *Gerke* and *Reyneke* are judgments of the former Witwatersrand Local Division (now Gauteng Division of the High Court, Johannesburg), while *Collins* was decided in the former Cape of Good Hope Division (now Western Cape Division of the High Court, Cape Town).
[80] *Steenkamp v Minister of Justice* 1961 (1) PH J9 (T) (*Steenkamp*).

minority judgments in English law. The ratio in *Steenkamp* was followed in *Geldenhuys v South African Railways and Harbours* (*Geldenhuys*).[81]

[100] Shortly after *West* was decided, Burne J briefly considered the issue in *Roberts NO v Northern Assurance Co Ltd* (*Roberts*).[82] He noted that in English law, the consideration that a large portion (if not the whole) of the damages awarded would almost certainly not be used by the claimant, but would accrue for the benefit of his or her estate and heirs, was irrelevant. He considered the English cases to 'reflect a sound, common sense view . . . in accordance with the principles of our law'.[83] For these reasons, he declined to follow *Steenkamp.*

[101] *Gerke*, which was decided shortly after *Roberts*, concerned a 21-year-old young man who had remained unconscious two and a half years after being injured in a motor vehicle accident. He would never be able to comprehend or talk again, or to recover control of his bodily functions or limbs. He would remain bedridden and helpless for the rest of his life, with a life expectancy of six months.

[102] The court considered how the plaintiff's unawareness of his loss affected the *quantum* of general damages. Ludorf J made extensive reference to English law and attributed its heavy influence in concluding as he did. He reasoned that, as unawareness was not a disqualification for a claim for loss of earnings, it should not be a disqualification for a claim for loss of amenities of life.[84] According to Ludorf J, general damages are awarded on objective and subjective bases for an unconscious claimant. Objectively, compensation is made for the mere fact of the injury and the

[81] *Geldenhuys v South African Railways and Harbours* [1964] 1 All SA 13 (C); 1964 (2) SA 230 (C) at 235B-D.
[82] *Roberts NO v Northern Assurance Co Ltd* 1964 (4) SA 531 (D). The judgment was handed on 24 September 1964.
[83] Ibid at 540F.
[84] *Gerke* fn 26 at 495A-B.

loss, irrespective of the fact that the claimant is not aware of his or her loss. '[S]omething falls to be awarded for what has been called loss of happiness.'[85] The learned Judge alluded to some overlap between the objective and subjective elements of damages as made in English law. He referred to a passage in *Benham v Gambling* (*Benham*) in which it was said:[86]

'. . . it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habit of the individual were calculated to lead to a future of unhappiness or despondency, that would be a circumstance justifying a smaller award.'[87]

[103] Ludorf J concluded that a similar approach be adopted in considering compensation for an unconscious claimant. He said that the subjective element has two components in assessing damages for loss of amenities of life. In the first one, the court 'will have regard to any relevant data about the individual characteristics and circumstances of the plaintiff which tend to show the extent and degree of the deprivation'.[88] In the second component, the court will consider the claimant's awareness of his or her loss. The less awareness, the smaller the award, he said.

[104] I must point out that the passage in *Benham* was made in the context of damages for loss of expectation of life. There, a child of two and a half years old was injured in a motor accident. He was unconscious from the moment of the accident and died later the same day. Because of the holding in *Rose v Ford*,[89] the child had acquired, at the time of injury, a cause of action for loss of expectation of life. Viscount Simon LC held that under those circumstances, no more than a

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[85] Ibid at 494F.
[86] *Benham v Gambling* [1941] 1 All E.R. 7; [1941] AC 157.
[87] Ibid at 12-13.
[88] *Gerke* fn 26 at 494G.
[89] *Rose v Ford* [1937] AC 826; [1937] UKHL J0625-1.

moderate sum should be awarded for the diminution of his expectancy of life. Thus, the limitation was confined to claims for shortened life expectancy. In *West*, the majority expressly declined to extend such a limitation to other heads of damages, such as loss of amenities of life. Lord Pearce put it thus:

'*Benham v Gambling* artificially and drastically limited the liability of defendants in respect of loss of expectation of life. But I would not extend that artificial limitation to any claims for loss of some or even all of the amenities of living during a plaintiff's life, however low that life may have been brought.'[90]

[105] In *Gerke*, Ludorf J rested his test on the following premise:

'[T]he test *(a)* is objective in that something falls to be awarded for what has been called loss of happiness even in a case where the victim has been reduced to a state in which he has never realised and will never realise that he has suffered this loss; *(b)* is, however, subjective, in the sense that the Court, in fixing *quantum*, will have regard to any relevant data about the individual characteristics and circumstances of the plaintiff which tend to show the extent and degree of the deprivation; *(c)* is subjective, also, in the sense that any realisation which the plaintiff has, or did have or will have, of what he has lost, is most material and important. This is the true compensable suffering (as distinct from pain) which will carry far heavier damages than the somewhat artificial and notional award referred to in *(a)* above. This suffering will continue only for the expected duration of his life.'[91]

The reasoning in *Gerke* was followed, albeit without discussion, in *Qunta.*

[106] In *Reyneke*, a 16-year-old child had sustained severe, irreversible brain injuries resulting in her being in a permanent vegetative state. She was unaware of her bodily functions, and was blind, mute and deaf. The court accepted, however, that she experienced pain momentarily, for example, when she was injected. Classen AJ referred to the English authorities considered in *Gerke*, and supported the

[90] *West* fn 58 at 368.
[91] *Gerke* fn 26 at 494F-H.

conclusions reached by Ludorf J in the latter case. The learned Judge expressed his objection to the functional approach as follows:

'The principal criticism levelled at awarding damages to a "cabbage" for pain and suffering and loss of amenities of life is that money is paid for enjoyment of life to a person who does not know that he had suffered such loss of enjoyment. It is said one is consoling someone with money who does not know that he needs consolation and it is said that consolation presupposes consciousness and some capacity of intellectual appreciation. In my view the fallacy in this argument is that it equates a dead man with an unconscious man. It also implies that it is "cheaper to kill a man than to maim him".' [92]

[107] The learned Judge also had regard to the approach adopted in *Southern Insurance Association Ltd v Bailey* (*Bailey*)[93] , and concluded that 'the South African approach' to the issue at hand was the following:[94] courts had developed a twofold approach to this problem, the effect of which is to divide the head of claim, 'loss of amenities' into two categories of loss. The first category is for 'pain and suffering, shock, mental anguish, anxiety, distress or fear, etc.' When making an award in this category, said Classen J, the court adopts a subjective approach. Such an amount, if any, will depend on the extent to which the claimant can subjectively feel or experience pain, fear, anxiety, etc. If, due to their condition, the claimant is insensible to those, no compensation should be made.

[108] The second category is for 'loss of amenities of life, reduced expectation of life, disfigurement, etc'.[95] Here, the court adopts an objective approach, in that it awards damages for loss, whether the victim is aware of such loss or not. In awarding damages for loss in this category, a court may take into account the functional approach as one of the factors influencing the award, whereby the amount of

[92] *Reyneke* fn 43 at 425G-H.
[93] *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) (*Bailey*).
[94] *Reyneke* fn 43 at 425I-426C.
[95] Ibid at 426A.

damages may be increased or decreased depending on: (a) the extent to which the money so awarded can be utilised to benefit the victim in alleviating his/her lot in life; and/or (b) the extent to which such money will exclusively benefit the victim's heirs.[96]

[109] Although Classen J in *Reyneke* followed *Gerke*, which in turn was influenced by English law, he held that the use to which any award for an unconscious claimant might be put, could be considered in the award of general damages. This is a deviation from the English position set out by the majority in *West* where it was held that the use to which any award could be put was irrelevant. Classen J found that the child was unaware of her loss of amenities of life. Consequently, he accepted that any award in respect of loss of amenities of life may not be applied for her benefit. Applying the above principles, the learned Judge considered himself to retain a discretion to make an award for loss of amenities of life. He said that the money could be used, for example, the transport costs of family and friends intending to visit the child, even though she may not be aware of their presence.

[110] Just under four years after *Reyneke*, the issue arose again in *Collins*. There, an infant had suffered severe cerebral hypoxia in a hospital following the displacement of a tracheostomy tube on which she was dependent for ventilation, with the following sequelae: cortical blindness, inability to swallow, and fed using a naso-gastric tube; unconscious of environmental stimuli; unaware of herself; no awareness of pain; in a permanent vegetative state, and with no intellectual function.

[111] Scott J embarked upon an excursus of the English authorities referred to earlier, including the respective dissenting judgments. He pointed out that the

[96] Ibid at 426A-E.

distinction drawn in English law between the subjective and objective elements in the loss of amenities of life owed its existence to a statutory provision in English law, which allowed a claim for loss of expectation of life to be transmitted to a deceased's estate.[97] As such, the distinction is uniquely English and there is no basis for accepting it in South African law. Thus, such a claim is not transmissible in South Africa, and there is no need for such a distinction, and without it, no logical basis exists for drawing such a distinction.[98]

[112] As to his objections to the English approach, Scott J remarked:[99]

'First, the award of non-pecuniary damages in respect of the actuality of the loss serves no purpose as the money awarded cannot be used for the benefit of the unconscious plaintiff. Second, it can provide no consolation to an unconscious plaintiff, as consolation presupposes consciousness and some capacity of intellectual appreciation. A conscious person who, by reason of his injuries, is incapable of deriving any advantage from a monetary award can notionally obtain some consolation from the receipt of money and from being able, if he pleases, to give it away. An unconscious person cannot even have this consolation. The so-called "functional" approach involves the award of non-pecuniary damages only to the extent that such damages can fulfil a useful function in making up for what has been lost in the sense of providing for physical arrangements which can make the victim's life more endurable.'

[113] For all these reasons, Scott J declined to follow *Gerke* and *Reyneke*, and their English provenance. He further concluded that this Court's decision in *Bailey* (not to embrace the functional approach) did not oblige him to make an award of non-pecuniary damages. The functional approach, he reasoned, involves limiting an award to an amount which can serve a useful purpose.[100] Because of the unconscious state of the claimant in that case, any award would serve no purpose at all, whether

[97] *Collins* fn 43 at 74G.
[98] Ibid at 94D-E and 94E-F.
[99] Ibid at 92F-I.
[100] Ibid at 95B-C.

useful or otherwise. He also distinguished *Bailey* on the basis that it did not concern an unconscious claimant. Scott J accordingly concluded that the claimant was not entitled to an award of non-pecuniary damages.[101]

The dicta of this Court

[114] As mentioned, this Court has not had an occasion to squarely grapple with the divergent opinions expressed in the cases considered above. However, in two cases, *Marine & Trade Insurance Co Ltd v Katz* (*Katz*)[102] and *Bailey*,[103] this Court was urged to apply the functional approach to the awarding of general damages. The appellant insurance companies argued that the large amounts awarded for general damages would be of no use to the claimants. Therefore, in line with the functional approach, so contended the appellants, the amounts ought to be reduced.

[115] *Katz* concerned a quadriplegic woman whose mentality and intelligence were not adversely affected by the injuries sustained in a motor vehicle accident. She therefore had considerable insight into her dire condition, which caused her mental distress. The trial court had awarded her what was agreed to be a higher-than-normal amount for general damages. On appeal against that amount, the appellant insurance company relied on Lord Denning MR's minority judgment in the Court of Appeal in *Lim Poh Choo*, and submitted that the award could bring no greater mental or physical consolation to the claimant than a more modest and pragmatic award. Thus, it was contended, there was no real usefulness or comfort to her as *solatium*.

[116] This Court pointed out that the trial Judge had considered that argument, and had suggested that the award could be used, for example, to finance visits to her by

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[101] Ibid at 95D.
[102] *Marine & Trade Insurance Co Ltd v Katz* 1979 (4) SA 961 (A) (*Katz*).
[103] *Bailey* fn 93.

her children who had emigrated to Australia. Although an amendment specifically claiming the expenses of such trips was abandoned in the trial court, this Court held that this did not preclude the point from being validly used to counter the argument about the alleged futility of awarding a large amount.

[117] Trollip JA recognised the force of the argument against awarding large sums which would be of no use to the claimant, and would merely accumulate during her lifetime and ultimately devolve on her relatives. However, since the claimant 'fully retains her intelligence and normal mentation . . . ways and means can and doubtless will be found to use the award to her best advantage.'[104] The learned Judge considered that the award could be used to alleviate her lot in life or bring her pleasure or consolation, eg convenient electronic devices, a reading machine, a gadget to turn the pages of books or magazines, a person could be engaged to pay her social visits to entertain her or relieve her boredom, etc.

[118] In *Bailey*, a two-year-old girl had suffered severe widespread brain damage, but was not a 'cabbage', as the court put it. She would have sufficient insight into her condition as she developed in future. She would be aware of her physical and mental disabilities by comparison with normal people, 'so that this will be a permanent source of painful frustration and suffering to her'. The appellant insurance company contended that the trial court should have adopted the 'functional approach', which would have had the effect of reducing the amount awarded for general damages.

[104] *Katz* fn 102 at 983F.

[119] This Court noted that the functional approach had been rejected by the House of Lords in the United Kingdom.[105] Regarding the approach adopted by Trollip JA in *Katz*, it was indicated that the case was decided on its own facts. This merely meant that the approach adopted by the trial court did not warrant interference with its award of damages.[106] Nicholas JA said that the case, 'did not lay down that the "functional" approach was the one to be followed'. He went on to refer to the general 'flexible approach' alluded to in *Sandler v Wholesale Coal Suppliers Ltd* (*Sandler*)[107] in determining the award of general damages, which is to be done 'by the broadest considerations'. However, Nicholas JA recognised that the function to be served by an award is a factor which may be considered, together with all the considerations.

[120] In *NK obo ZK v MEC for Health (Gauteng)* (*NK obo ZK*),[108] it was stated that it was not for a court to determine the purpose or function that an award will be used for. The first judgment places much store on this remark. I will revert fully to *NK obo ZK*.

Analysis

[121] It is against the above academic and jurisprudential discourse that I consider whether an unconscious claimant is entitled to an award for loss of amenities of life. As stated, the English approach is that general damages are awarded to an unconscious claimant, on an objective basis, irrespective of whether they are aware of their loss of amenities of life. That entails that the use to which non-pecuniary damages may be put is entirely irrelevant in the awarding of general damages. In

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[105] *Bailey* fn 93 at 119B.
[106] Ibid at 119E-F.
[107] *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199.
[108] *NK obo ZK v Member of the Executive Council for Health of the Gauteng Provincial Government* [2018] ZASCA 13; 2018 (4) SA 454 (SCA) para 9.

other words, an unconscious claimant is immutably entitled to an award for loss of amenities of life, irrespective of whether that amount would serve any purpose, albeit such an amount is awarded on a nominal basis. As was put by the majority of the House of Lords in *West*, if damages are awarded to a plaintiff on a correct basis, the use to be made of the money awarded is of 'no concern to the Court'.[109]

[122] The English approach has not found acceptance in South Africa. Even *Gerke*, which, as mentioned, was heavily influenced by English law, seems to have accepted that the use to be made of the money awarded is a relevant factor. Ludorf J accepted that unawareness should play a role in considering general damages for an unconscious claimant. First, he alluded to awareness as 'the true compensable suffering (as distinct from pain) which will carry far heavier damages than the award' based on the objective basis, which the learned judge characterised as 'somewhat artificial and notional award'.[110] Second, when considering the amount of damages, Ludorf J deviated from the majority's holding in *West* that, between the objective and subjective elements of the loss, the former is greater than the latter. He accepted that 'awareness of such loss is the most important factor in such an assessment, in the proper case'.[111]

[123] As demonstrated earlier, the functional approach was employed in several South African decisions. In *Katz* it was used to justify the large award for general damages, and had been adopted in two earlier cases, namely, *Steenkamp* and *Geldenhuys.* In *Steenkamp* Roberts AJ said:

'[I]t does not seem to me to be proper to award such an amount as would provide more than could be usefully employed in alleviating his unhappy position, but leave a large sum for his heirs, as

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[109] *West* at 629, 633, 641, and 642 and affirmed in *Lim Poh Choo* at 332.
[110] *Gerke* fn 26 at 494H.
[111] Ibid at 496A.

might well be the position if the amount claimed were awarded. It is not for the court to determine what kind of expenditure by the plaintiff would be justified, but in considering possible needs and compensatory activities, I have given thought to reasonable capital expenditure such as a home, a car adapted to his condition to allow him to be driven round in a position to see around him, home cinema equipment, equipment to reproduce music, apparatus to allow him to read, and above all paid help.'[112]

[124] In *Geldenhuys* Rosenow J referred with approval to *Steenkamp* as follows:

'[T]he Court should aim at awarding an amount that can be usefully employed in alleviating the plaintiff's unhappy condition, rather than to proceed to an astronomic level which would in the result probably benefit the ultimate heirs instead of the plaintiff.'[113]

[125] In *Bobape v President Insurance Company Limited*,[114] the court considered general damages for a 10-year-old boy who had suffered a brain injury resulting in severe neurological deficits that left him with severely impaired intellectual capacity and marked impairment of communication. The court had regard to the child's 'apparent lack of appreciation of his condition' when considering general damages.[115]

[126] Classen J in *Reyneke*, held that some allowance had to be made for the fact that the claimant would not be able to make use of any awarded amount because of their unconsciousness. To that extent, the learned Judge posited, this should be a factor for consideration in the awarding of general damages. He was more expressive in rejecting the English position that the use to be made of the money awarded is of no concern to the Court. He said:

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[112] *Steenkamp* fn 80 at 26.
[113] *Geldenhuys* fn 81 at 235C.
[114] *Bobape v President Insurance Company Limited* 1990 (4A4) QOD 43 (W).
[115] Ibid at 55.

'In South Africa it may be the concern of the Court if the victim will never be able to utilise or enjoy the money. It will be in the discretion of the Court when making an award to decide whether or not it should take into account the extent to which the victim will be able to employ the money to alleviate his lot in life. The Court may, if it is desirable in its discretion to do so, have cognisance of the "paring down" argument.'[116]

[127] The sum of these dicta is that, unlike in English law, our courts do not consider the purpose to be served by an award of damages to an unconscious claimant to be irrelevant. This is a factor to be taken into consideration, together with all the other circumstances.

[128] *Roberts* and *NK obo ZK* are the only cases in which the English approach was accepted without any qualification. As far as *Roberts* is concerned, it is understandable why the court adopted that position. The case was decided in 1964, shortly after the English House of Lords' decision in *West*, and there were no South African decisions on the issue at that stage.

[129] *NK obo ZK*, upon which the first judgment places much reliance, stands on a different footing. There, reference was made to a passage in *Bailey* in which this Court declined to adopt the functional approach as the standard in claims for loss of amenities of life for unconscious claimants. Relying on that passage, it was said that '[w]e do not have to determine what the award will be used for – its purpose or function'.[117] This being a holding of this Court, it is ordinarily binding on us, and from which we would not easily depart. That is the essence of the principle of precedence. But there are two difficulties with these remarks. First, they go against

[116] *Reyneke* fn 93 at 423I.
[117] *NK obo ZK* fn 108 para 9.

what this Court held in *Bailey*. It is necessary to quote in full, the relevant passage, in which Nicholas JA said:

'This Court has never attempted to lay down rules as to the way in which the problem of an award of general damages should be approached. The accepted approach is the flexible one described in the often quoted statement of Watermeyer JA in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199:

"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the Judge's view of what is fair in all the circumstances of the case."

I do not think that we should now adopt a different approach. To do so might result in injustice of the kind referred to in Lord Scarman's speech in the *Lim Poh Choo* case.

This does not mean, of course, that the function to be served by an award of damages should be excluded from consideration. That is something which may be taken into account together with all the other circumstances.'[118] (Emphasis added.)

[130] In the emphasised portion, this Court expressly recognised that the function for which the award could be used is a factor which can be considered in awarding general damages, together with other factors. Viewed in this light, the remarks in *NK obo ZK* that the purpose for which an award would be used is of no relevance, contradict the key holding in *Bailey*. The remarks in *Bailey*, especially those in the first part, are often relied upon as a total rejection of the functional approach to general damages for unconscious claimants. This is evident in the high court's judgment, and in both *NK obo ZK* and the first judgment. As I have demonstrated above, this, with respect, is an erroneous view of what Nicholas JA said.

[131] Second, the remarks in *NK obo ZK* were made in passing and do not constitute binding authority. The test in this regard is settled. What is binding in a judgment is

[118] *Bailey* fn 93 at 119H.

the *ratio decidendi*, which amounts to the principle to be extracted from the case.[119] As to how to determine the *ratio decidendi*, Schreiner JA laid down the following test in *Pretoria City Council v Levinson*:[120]

'[W]here a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the ratio decidendi, originating or following a legal rule, provided *(a)* that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, *(b)* that they were not merely a course of reasoning of the facts . . . and *(c)* (which may cover *(a)*) that they were necessary for the decision, not in the sense that it could not be reached along other lines, but in the sense that along the lines actually followed in the judgment he result would have been different but for the reasons.'

[132] This test was affirmed and applied in *True Motives 84 (Pty) Ltd v Mahdi*,[121] where Cameron JA observed that what binds courts is only the ratio of the decision of a court and not what might have been said in passing. He explained:[122]

'According to Schreiner JA's approach, the reasons given creating or following a legal rule are binding on this court provided they were not merely subsidiary to the main principle, that they were not merely linked to the incidental facts . . . and that they were necessary for the decision in the sense that along the lines that the court actually followed the results would have been different, but for the reasons.'

[133] When Schreiner JA's distinction is applied to the remarks in *NK obo ZK* (that a court does not concern itself with the purpose for which an award would be used for) it must first be determined what the issue in that case was. There, the appellant was an unconscious claimant. The issue was whether he experienced 'twilight moments'. During argument, this became common cause. Accordingly, all that

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[119] *Collect v Priest* 1931 AD 290.
[120] *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 317; see also *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA); [2009] 8 BLLR 721 (SCA); [2009] 4 All SA 146 (SCA); (2009) 30 ILJ 1539 (SCA) para 81.
[121] *True Motives 84 (Pty) Ltd v Mahdi* and Another [2009] ZASCA 4; 2009 (4) SA 153 (SCA); 2009 (7) BCLR 712 (SCA); [2009] 2 All SA 548 (SCA).
[122] Ibid para 105.

remained was for this Court to determine the amount of damages. Thus, the remarks in *NK obo ZK* were not necessary to determine the issue before the Court. They were therefore made *en passant*, and thus constitute neither the *ratio decidendi* of the judgment, nor a considered judgment on the issue in dispute in the present case: whether the purpose for which an award might be used is relevant in considering damages in respect of an unconscious claimant.

[134] Thus, the remarks in *NK obo ZK* go against the authority of this Court's judgment in *Bailey*, and they were made in passing. To that extent, they do not bind us.

[135] Lastly, on the remarks in *Bailey*. As a general proposition about the approach to general damages, there is nothing controversial about the remarks. The remarks are, however, unhelpful in answering the question of legal principle raised in the present appeal: whether an unconscious claimant is entitled to general damages for loss of amenities of life. It must be borne in mind that neither in *Bailey* nor *Sandler* was this Court confronted with that question. In *Sandler*, the claim was about a knee injury, and there were no neuropsychological sequelae.

[136] As evident from a survey of our jurisprudence and of other jurisdictions, the question of whether an unconscious claimant is entitled to general damages for loss of amenities of life is of formidable legal complexity. Given this context, it is doubtful that Nicholas JA meant his remarks to be anything more than a restatement of the broad principle about general damages. This is the context in which 'the flexible approach' alluded to by Watermeyer J in *Sandler* and referred to by Nicholas JA in *Bailey*, should be understood. It is, therefore, simplistic to hold up Nicholas

JA's remarks as an answer to a complex doctrinal question we are required to answer in this appeal.

[137] I have demonstrated that our courts have adopted the approach that the purpose for which an award is to be used is a relevant factor in considering loss of amenities of life for an unconscious claimant. However, this approach is not without difficulties. There seems to lack a coherent articulation as to how, in the final analysis, the purpose to be served by the award should be factored in, ie whether: (a) the award should be made in the first place; and (b) how the fact of unawareness influences the quantum of the award, ie whether the amount should be nominal or standard. In both *Bailey* and *Reyneke*, the fact of unawareness was identified as but one factor that *may* be considered whether an award for loss of amenities of life should be made for an unconscious claimant.

[138] In *Reyneke*, Classen J held that he had 'a discretion whether or not to take that fact [of unconsciousness] into account in assessing her loss'.[123] He said that, in exercising that discretion, he took into account that the child claimant was 'unaware of her loss of amenities as well as the fact that a portion of any award made under this head of damage may not be applied to [her] benefit'.[124] These factors, said the learned Judge, did not prevent him from making an award for her loss of amenities of life.

[139] Unfortunately, Classen J did not articulate the factors he considered important when exercising the discretion. It is therefore unclear what factors may be relevant, or when they might be so. The result is to leave it open for a judge to decide

[123] *Reyneke* fn 43 at 427H.
[124] Ibid at 427H-I.

whether a claimant's lack of awareness is relevant. This is undesirable. Claimants and their legal representatives are entitled to expect a principled and consistent approach from our courts.

[140] I do not accept that a court has a discretion whether to consider the fact of unawareness. In my view, a court is enjoined to take that fact into account in all circumstances where a claim for loss of amenities of life is asserted on behalf of an unconscious claimant. Inevitably, when a court engages in that exercise, the purpose for which the award is to serve, would arise. Once that comes into consideration, Classen J's test in *Reyneke* runs into difficulties. This is evident in the learned Judge's difficulty in justifying the entitlement of the unconscious claimant to an award for amenities of life. He said:

'In cases of this kind, it is never a clear-cut case whether or not awards for loss of amenities will or will not redound to the victim's personal benefit. Benefit may result directly or indirectly. An example of indirect benefit may be established in cases where the money is used to pay the transport costs of family and friends intending to visit Suzette. In such instances the money is in fact employed to console her and to alleviate her lot in life, however small. This is so because, although she may not be aware of her family's presence, she has a right to be visited by her family while still alive. . .'.[125]

[141] With respect, this is unconvincing. First, the learned Judge had earlier accepted that a portion of any award made under this head of damage may not be applied to the child claimant's benefit. Thus, the statement that it was unclear whether the award would be to the claimant's benefit seems contradictory. Second, because of the child's unawareness, the presence of her family at her bedside would not benefit her at all, either directly or indirectly. It would certainly benefit her family members with their transport costs. Indeed, every benefit conceived by the

[125] Ibid at 427I-428C

Judge was not to the claimant, but to her family members. In *Collins*, Scott J correctly cautioned against making an award as a means of indirectly awarding compensation to the child's parents for their bereavement and suffering if the claimant is a young child.[126]

[142] Third, because of her unawareness, the child would not appreciate the presence of her family members. Their presence would never console her. Fourth, despite the learned Judge stating that he would consider the claimant's unawareness, the large amount awarded (R50 000) for loss of amenities of life suggests that this fact did not have much effect on the award.

[143] Lastly, Classen J remarked:

'The defendant cannot be heard to say, "Suzette is not aware of the presence of her family and friends and therefore I should not be forced to pay any contribution towards the costs of having them at her bedside.'

[144] The above remarks are emblematic of one of the often-advanced reasons for awarding an unconscious claimant damages for loss of amenities of life. It is said that this reflects society's demand that some retribution be made for the injustice done to the claimant. The difficulty with this proposition is that it impermissibly introduces a punitive element into our law of delict. It is now settled that in the *Aquilian* action, in the action for pain and suffering and loss of amenities of life, an award of punitive damages has no place.[127] Windeyer J put it well in *Skelton*:

'The one principle that is absolutely firm, and which must control all else, is that damages for the consequences of mere negligence are compensatory. They are not punitive. They are given to

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[126] *Collins* fn 43 at 94I.

[127] *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917A, affirmed by the Constitutional Court in *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (CC) para 62 and *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) para 76.

compensate the injured person for what he has suffered and will suffer in mind, body or estate. Only so far as they can do so is he entitled to have them.'[128]

[145] In a different but relevant context of constitutional damages, this Court held, in *R K v Minister of Basic Education*,[129] that where adequate compensation has been made for damages suffered, additional constitutional damages would amount to punishment. There, the parents of a child who drowned in a pit latrine at his school were awarded compensation for the emotional shock, trauma and grief they had suffered as a result of the incident. Additionally, the parents sought constitutional damages. This Court surveyed cases in which constitutional damages were awarded.[130] Declining their claim for constitutional damages, Leach JA said:

'It seems to me, in principle, that where, as here, persons have been compensated for their damages suffered by reason of an injury, physical or psychiatric, any further damages would effectively amount to a punishment for breach of a right for which compensation has already been granted.'[131]

[146] The other reason advanced why non-pecuniary damages should be awarded to an unconscious claimant is that refusing to do so, equates a living person with a dead one. This may be true. But that is a consequence of our legal system. And in truth, insofar as damages for an unconscious person are concerned, there is not much difference between such a person and a dead one. Both are: (a) unaware of their conditions; and (b) not capable of enjoying the money awarded to them as damages. There are indeed outcomes in our law of damages that are not morally or socially palatable. For example, a person who causes life-changing injuries to an elderly

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[128] *Skelton* fn 71, para 5 of Windeyer J's judgment.
[129] *R K and Others v Minister of Basic Education and Others* [2019] ZASCA 192; [2020] 1 All SA 651 (SCA); 2020 (2) SA 347 (SCA) (*R K*).
[130] For example, *MEC, Department of Welfare, Eastern Cape v Kate* [2006] ZASCA 49; 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA) and *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC).
[131] *K R* fn 129 para 59.

person who does not have any dependents, would likely pay less in damages than would one who causes the same injuries to a young professional with dependents.[132] That is how our law works.

[147] In addition to the above general contentions, counsel for the respondent asserted that denying the child damages for loss of amenities of life would result in a breach of his constitutional right to dignity. There is no merit in this submission. That the child has been awarded a substantial sum in special damages is a complete answer to it. That amount is such that the child would not want for anything, and that, to the extent possible under the circumstances, his dignity would be preserved by the facilities and medical equipment to be covered by the money awarded as special damages.

[148] It should always be borne in mind that a compensation award, whether for pecuniary or non-pecuniary damages, must have a purpose. Special damages are meant to 'redress, to the extent that money can, the actual or probable reduction of a person's patrimony as a result of the delict or breach of contract'.[133] The purpose of general damages, on the other hand, is 'to redress the deterioration of a highly personal legal interests that attach to the body and personality of the claimant'.[134]

[149] If the purpose of an award cannot be achieved, it must follow that there is no basis for such an award. In a case of loss of amenities of life, the purpose of an award is to offer some *solatium* or consolation to a claimant. If, because of the claimant's unconsciousness, this cannot be achieved, there should be serious doubt whether the

[132] This is an example given by Stolker fn 47.
[133] *Van der Merwe v Road Accident Fund and Another* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) (*Van der Merwe*) para 38.
[134] Ibid para 39.

award should be made at all. Indeed, where it is clear that a damages award would not be of any use to a claimant, it is difficult to think of any legal basis for such award, other than it being punitive in nature so as to express society's outrage for the damage caused. That is not the purpose of compensation in delictual claims.

[150] Taylor J asserts in *Skelton* that a proper assessment whether damages should be awarded 'can be made only upon a comparison of the condition which has been substituted for the victim's previously existing capacity to enjoy life . . .'.[135] In the present case, no such comparison is feasible. The child has never experienced the enjoyment of the amenities of life, because he suffered brain injury at birth. A conscious claimant would, for example, suffer the distress about his or her condition, the possibility of early death, frustrations about not being able to navigate things they previously could.

[151] An unconscious claimant would never have to contend with these. He or she would therefore not be receptive to the consolation with which the damages are intended to provide him or her. An award for loss of amenities of life would thus serve no purpose in those circumstances. No amount of money, whether nominal or conventional, can ameliorate an unconscious claimant's situation. As Windeyer J put in *Skelton*:

'Consolation presupposes consciousness and some capacity of intellectual appreciation. If money were given to the plaintiff, he could never know that he had it. He could not use it or dispose of it. It would simply go to his legal personal representatives on his death. It would be of no more benefit to him personally than sending the defendant to gaol would be. He is not, like Samson Agonistes, aware and able to bemoan his fate "to live a life half dead, a living death". His existence is in very truth a living death.'[136]

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[135] *Skelton* fn 71 (per Taylor J) para 12.
[136] *Skelton* fn 71 (per Windeyer J) para 13.

[152] In the present case, the situation is complicated by the fact that the claimant is an infant who was born with severe mental retardation resulting in his unconsciousness. As such, his cognitive development was stunted at birth. He has never experienced any life other than the unconscious one. Put differently, the child has never experienced anything but his disability and dysfunction.

[153] In *Oliver v Ashman*,[137] Pearce LJ described the situation of an unconscious infant as 'a complete and painless destruction of all the higher attributes of man [with] . . . no consciousness of what is [lost], no anguish of remembered happiness'.[138] In the same case, Willmer LJ observed that such a child 'has never known what the joys and sorrows of ordinary adult human life [are], and he cannot ever know what he has been deprived of'. Alluding to the difficulty in determining compensation for such an infant, he said:

'. . . I think it must be obvious that where a man has known these pleasures of ordinary life, the award of damages must be greater than in the case of one who has never known them and who never will. This plaintiff, in so far as that matter is concerned, is (most unhappily) in the same position substantially as if he had actually been killed in the accident.'[139]

[154] It must be emphasised that general damages serve to protect 'highly personal legal interests that attach to the body and personality of the claimant'.[140] As such, the award must be capable of being used for the exclusive benefit of the claimant. Even the proponents of the objective approach seem to acknowledge that in most instances, the bulk, if not all, of the award for the unconscious claimant is unlikely to be used for their benefit. It would likely accumulate interest in a trust fund, and upon the claimant's death, accrue to the claimant's estate, for the benefit

[137] *Oliver and Others v Ashman and Another* [1962] 2 QB 210.
[138] Ibid at 231-2.
[139] Ibid at 236.
[140] *Van der Merwe* fn 133 para 39.

of relatives. In this way, a largesse is poured out to the heirs of an unconscious claimant in circumstances where they were never entitled to the benefit. Ultimately, the award serves a purpose for which it was never intended.

[155] Scott J in *Collins* made a trenchant observation that an award for non-pecuniary damages can only be considered to the extent that such damages can fulfil a useful function in making up for what has been lost in the sense of providing for physical arrangements which can make the claimant's life more endurable.[141] Thus, where an unconscious claimant's physical needs have been taken care of (by way of pecuniary damages), awarding such a claimant non-pecuniary damages, as the headnote reads, 'would be like paying a dead person money in order to compensate him for the loss of his life'.[142] Accordingly, he held, where an award of non-pecuniary damages to the unconscious claimant will not serve any purpose for the claimant at all, whether useful or otherwise, there is no basis for making any award.[143]

[156] For all of the above reasons, I cannot endorse either *Gerke* or *Reyneke. Gerke* was based on English law, although it made a slight deviation therefrom. I have demonstrated that our courts have not followed the English position that the purpose for which an award would be used is irrelevant. Regarding *Reyneke*, although it marked a welcome departure from English law, I have demonstrated that its approach suffers insurmountable theoretical and practical limitations. The remarks in *NK obo ZK* to the effect that the purpose for which an award would be used is irrelevant, do not reflect our law as correctly set out in *Bailey.* In all the

[141] *Collins* fn 43 at 95B-C, 92H-I and 93E-F.
[142] Ibid at 95D, 91G-H, 93H and 93I-J and 94B.
[143] Ibid at 95B-C.

circumstances, I find the reasoning of Scott J in *Collins* far more juridically sound and cohesive.

Conclusion

[157] The position in our law on the compensation of an unconscious claimant can thus be summarised as follows. Such a claimant is not entitled to any award for pain and suffering under any circumstances. This is uncontroversial. In respect of an award for loss of amenities of life, such can only be made to the extent it can serve some function for the personal and exclusive benefit of the claimant. This is particularly so where an award for special damages adequately provides the means and facilities to make the unconscious claimant's life less miserable.

[158] Therefore, where loss of amenities of life is claimed for an unconscious claimant, the particulars of such loss should be pleaded. This is, in any event, what is required by rule 18(10)*(c)*(ii) of the Uniform Rules of Court, which enjoins such a party to give particulars of his or her loss. Thus, a court adjudicating such a claim is enjoined to always enquire as to the purpose to be served by such an award. Accordingly, unless there is some indication that additional sums in the form of general damages can be employed for the exclusive use of the claimant, there is no juridical basis for awarding such amounts in the form of general damages for loss of amenities of life.

[159] In the present case, adequate provision has been made for the child's physical needs by an award of special damages. There was no evidence as to what the additional amounts, over and above those provided for by special damages, would be used for. In the absence of any indication as to how that amount was likely to be used for the exclusive benefit of the child, it should not have been awarded.

Awarding additional amounts for loss of amenities of life to the unconscious child would serve no purpose other than benefiting the child's mother. The result is that there was no basis for awarding the amount of R2 200 000 for general damages. I would thus uphold the appeal.

Order without reasons

[160] It is necessary to comment on a matter of judicial conduct. As mentioned in the introductory paragraphs, the high court granted an order on 12 October 2022, without reasons. Although the high court subsequently furnished reasons upon request, its failure to do so when it made the order remains unexplained. It often happens that a court, due to reasons of urgency or expediency, makes an order without reasons. But, in those circumstances, the salutary practice is to inform the parties that the reasons for the order would follow in due course. There is no indication in its subsequently furnished reasons that any of the above circumstances necessitated the high court to grant an order without reasons, or that it had intended to give them later.

[161] The practice of granting orders without reasons has been discouraged by both this Court and the Constitutional Court. In *Botes v Nedbank* (*Botes*),[144] this Court noted that, in opposed matters where the issues have been argued, it is an unacceptable procedure to make an order without giving any reasons for it. Litigants are entitled to be informed of the reasons for the court's decision. *Botes* was endorsed by the Constitutional Court in *Strategic Liquor Services v Mvumbi*,[145] where that Court pointed out that failure to supply reasons 'will usually be a grave lapse of duty . . .'.

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[144] *Botes and Another v Nedbank Ltd* 1983 (3) SA 27(A) at 27D.
[145] *Strategic Liquor Services v Mvumbi NO and Others* [2009] ZACC 17; (2009) 30 ILJ 1526 (CC); 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 (CC); [2009] 9 BLLR 847 (CC) para 14.

Order

[162] The following order is made:

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the high court is amended by deleting the order awarding general damages for R2 200 000 and replacing it with the following:
'There is no award for general damages'.

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T MAKGOKA

JUDGE OF APPEAL

Appearances:

For appellant:	A B Rossouw SC (with L A Pretorius)
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein
For respondent:	S J Myburgh SC (with C Jacobs)
Instructed by:	Werner Boshoff Inc., Pretoria
	Phatshoane Henney Inc., Bloemfontein.