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Damages for Injuries Arising from the Infringement of the Rights of Persons in Police or Prison Custody: South Africa in Comparative Perspective (3)

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Abstract

Having laid down the common law, constitutional and statutory backgrounds forming the basis for the prisoner's claim to protection by the Bill of Rights and other statutory protections; and having discussed the preliminary issues and the general principles governing the award of damages in this aspect of the law of arrest and detention; and having discussed the police officers' assault cases involving persons in police custody and an analysis of the awards made in such cases from South Africa, Botswana, Lesotho, Namibia and Swaziland in parts one and two of this series, this third part focusses on assaults committed by prison officers and prison inmates against fellow prisoners and the awards made for violations of fundamental rights in these circumstances. South African and Namibian cases provide the illustrations necessary in these instances.

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8 ASSAULT BY PRISON OFFICIALS

8 1 Failure to intervene in a "prison-gangs' war"

The main claim in *Kennedy and Others v Minister of Prisons and Correctional Services*[1] was for alleged breach of duty which the members of the Prison Services of Namibia owed the plaintiffs as prisoners for the serious injuries sustained by them in a gang war inside the prison. The subsidiary claim was for alleged assault on Kennedy by prison officials on a later occasion and because the prison authorities allegedly failed to provide him with prescribed medication for treatment of his injuries.[2] Maritz J outlined the issues pleaded by the litigants which raised the following issues: (a) a policy based, objective, *ex post facto* enquiry into the legal and moral convictions of the community to determine the nature and scope of the legal duty the Namibian Prison Services had and whether it has wrongfully acted in breach thereof; (b) the second stage of the enquiry is essentially a fact-based one; whether any negligent omission by members of the Namibian Prison Services resulted in the injuries suffered by the plaintiffs.[3]

In order for the court to find that the members of the Namibian Prison Services acted wrongfully when they failed to protect the plaintiffs from the attacks on them by other inmates, it must first establish whether those members had a legal duty to render such protection in the peculiar circumstances of the case. The reason is that without there being a legal duty there cannot be unlawfulness.[4] Coupled with this is the principle that no person is generally held liable for not doing anything.[5] The enquiry becomes more complicated when the alleged wrongfulness is not based on a specific act but rather on an omission to act. The settled exception to law regarding omissions is where given the particular facts and circumstances of a case and the legal nature of the relationship between the persons involved, the one had a legal duty to prevent harm to the other.[6] Maritz J referred to the often cited passage in *Fleming on Torts*[7] which states that:

> In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss shall fall. Hence, the incidents and extent of the duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.

The trial judge had no hesitation in accepting that a special relationship existed between the Namibian Prison Services and persons under their care at correctional institutions all over Namibia. In that regard two crucial provisions of the Namibian Prisons Act of 1998 are relevant. Section 3*(a)* of that Act states in express terms that the Prison Services are obliged to ensure that every prisoner was secure in a prison in safe custody until lawfully discharged or removed. Again, section 25*(a)* states that prison members employed in a prison shall be responsible for ensuring the security and safety of all prisoners detained in custody in that prison. In order to maintain order and discipline, prison officers are authorised by section 30 to use such force against a prisoner as is necessary. In addition, there are important provisions of the Constitution relevant to the issue. Article 8(1) protects the dignity of all persons in Namibia, while sub-article (2) guarantees respect for human dignity "during the enforcement of a penalty" and prohibits "torture or cruel, inhuman or degrading treatment or punishment". In terms of Article 5, these rights and all others enshrined in Chapter 3 of the Constitution "shall be respected and upheld by the executive, legislature and judiciary and all organs of the Government and its agencies."

1 2008 2 NR 631 (HC) (*Kennedy*).
2 The court in *Kennedy* para 61, however allowed the claim of the plaintiff for the injuries he received from kicks from warders because, at least, it was apparent that the level of force used to put him back in his cell smacked of retribution for the damage he caused, and exceeded by far the amount of force necessary to ensure compliance with the order given to him by the warders. Accordingly, the excessive force used constituted an unlawful assault and, given the *sequelae* thereof, justified an award of damages.
3 *Kennedy* para 13.
4 See per Rumpff CJ in *Administrator, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) at 833A-B.
5 See *Saaiman and Others v Minister of Safety and Security and Another* 2003 3 SA 496 (O) at 503H.
6 *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) at 498F-G, *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA).
7 Fleming, *The Law of Torts* 7 ed. 128. See further: *Minister van Polisie v Ewels* 1975 3 SA 590 (A) at 597A-C, *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) at 318E-G.

The factors that must come into play in a case like this include the legal perceptions of the community, the constitutional guarantees, and statutory responsibilities which all give content to the legal relationship between the prison authority and the prisoners being detained in correctional institutions under its control. These factors require the Namibian Prison Services to ensure the security, safety and human dignity of prisoners in their care. After referring to Corbett,[8] and Ackermann and Goldstone JJ in *Carmichele (1)*,[9] Maritz J held that it is not only the interpersonal relationship between guard and prisoner which should be considered in determining the unlawfulness of an omission to prevent an assault by one prisoner on another. Many other considerations bearing on the personal safety of the warders themselves, those of other members and staff and, ultimately, of members of the public at large and of society itself must be considered. In the final analysis, it is, in essence, "one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the court."[10]

The court further found that the situation with which the prison officers were confronted was "most serious". Here, were some 470 prisoners, among whom, "Namibia's most hard core and dangerous criminals, congregated in the restricted space of F-section's courtyard. Some 80 of them were either members or supporters of the 28 gang who actively participated in the attack on the plaintiffs and pursued them as they tried to avoid injury. Many of them were armed with sharpened spoons, irons, wires and toothbrushes as well as with broomsticks and locks wrapped with cloth."[11] On the other hand, the prison officers were only ten in number. Except for one who was armed with a baton, they were unarmed. In effect, they were not battle ready. In those circumstances, it would have been a great personal risk of life and injury for them to have entered the fray individually or in a group. Further:

> Given the level of noise, the sheer number of prisoners running about, the level of violence, the nature of the dangerous weapons being used, the type of criminals involved, it would have been sheer folly for the prison officer in command at the section to order his subordinates into the courtyard to assist the plaintiffs. From a tactical point of view, the prison officers were simply not sufficient in number or sufficiently equipped to suppress the violent and riotous behaviour of such a large number of armed and dangerous criminals bent on violence and retribution.[12]

Maritz J therefore concluded that the society's notion of what justice demanded under the circumstances did not require of the ten unarmed prison officers to put their lives, the safety of other prison staff and the public at risk by entering the courtyard filled with about 270 dangerous criminals and to physically intervene to protect the four plaintiffs from the assaults being perpetrated upon them by about 80 members of the 26 gang, some of whom were armed with dangerous weapons.[13] It was also held that by refusing or omitting to open the grated steel beyond which they were standing to allow the plaintiffs to escape from their assailants was not unlawful. Walls, doors and guards are what separate the public from dangerous, imprisoned criminals, thus, if by opening the gate to allow one or all of the plaintiffs to slip through, the warders would have been at risk of being overwhelmed and taken hostage by those other prisoners as part of a planned escape. It could not have been unlawful for the warders to keep the door between them and the prisoners locked notwithstanding the plaintiffs' entreaties. The reasoning is that:

> In an objective assessment of the setting under consideration, the weight to be accorded to the public's safety and protection against dangerous convicted criminals must necessarily take precedence over the personal safety of the four plaintiffs – some of whom, admittedly, through their unlawful conduct aggravated a rival gang and by refusing to return the money exacerbated the already explosive situation. So too, must the personal safety of the prison officers and that of the prison and administrative staff of the institution in my assessment of the legal convictions of the community be preferred above the risk of injury to the plaintiffs. Had the door been unlocked and, as a consequence, the prison officers been taken hostage, they or their keys and uniforms been used to take other prison officers and administrative staff hostage and people have died in the ensuing riot or because dangerous prisoners

8 Corbett, "Aspects of the Role of Policy in the Evolution of the Common Law" (1987) *SALJ* 52 at 67.
9 *Carmichele (1)* at 957B-C.
10 2008 NAHC para 21. See also per Vivier JA in *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) para 7.
11 *Kennedy* para 33.
12 *Kennedy* para 33.
13 *Kennedy* para 36.

> have escaped, that single act would undoubtedly have been considered both negligent and unlawful and the Prison Services would have had to bear the responsibility for the delictual and other consequences thereof – not to mention the disciplinary ramifications it would have had for the officers concerned.[14]

It would have been different if there were sufficient opportunity to let one of the plaintiffs out of the courtyard without a real and substantial risk that the prison officers might have been overwhelmed, and it would have clearly been unlawful to turn a blind eye to the plight of the plaintiffs. Society's notion of justice in such a situation would demand that the plaintiffs be allowed refuge behind the door.[15]

Having held that on the facts established, the failure of the Prison Services to protect the plaintiffs from assaults by other inmates was not unlawful in the circumstances, but was it negligent in the sense that a reasonable person in the position of the prison officer would have foreseen and guarded against harm to the plaintiffs? The judge held that much the same can be said about the reasonableness of the refusal to open the grated door to allow the plaintiffs an opportunity to escape from their assailants. To have opened the door with the fighting prisoners only a couple of meters away would have accorded them an opportunity to rush the door and overpower the prison officers. It would have been contrary to the standing instructions dealing with the conduct of officers faced with such situations to have heeded the entreaties of the four plaintiffs in respect of the opening of the grated steel door for them to escape their assailants. It follows therefore that there was no unlawfulness or negligence in the circumstances.

The judgment of the High Court of Namibia in *Kennedy and Others v The Minister of Prisons and Correctional Services*[16] like *Tyatya* affirms that a prisoner retains those fundamental rights not already taken away by virtue of incarceration and that breach of those residual rights can be remedied by an award of damages.[17] *Kennedy* involved a claim for assault by prison officers in their purported attempt to make the plaintiff/prisoner to return to his cell. The prisoner was literally responsible for orchestrating a gang war between two notorious prison gangs from which he sustained injuries. Since the trial judge did not find unlawfulness and therefore no liability on the part of the prison authorities in that particular regard, it was necessary to separate the injuries sustained in the gang attacks from those sustained two days earlier in the hands of the prison officers. In coming to the conclusion that it was fair and reasonable to award the plaintiff the sum of N$15 000 for his pain and suffering, Maritz J took into consideration the following:

- the overlap of many of the *sequealae* in the pleadings in relation to the two separate assaults;
- the absence of a medical report;
- the fact that *contumelia* was not alleged and no damages was claimed for any suffering; and
- the paucity of evidence regarding the physical consequences of the assault by the prison officers.[18]

14 *Kennedy* para 38.
15 *Kennedy* para 39.
16 2008 (2) NR 631 (HC) (*Kennedy*).
17 In this category of cases should be added the Botswana High Court judgment in *Monyadiwa v The Attorney General* 2010 2 BLR 326 (HC) where two prison officers had taken the plaintiff, a prisoner to the prison stores for interrogation after the authorities had received information that certain prisoners including the plaintiff were planning an escape. During the course of the investigation, the plaintiff was assaulted by these two prison officers, for several hours in order to extract confession. The prisoner was suffocated with a blanket, beaten with batons, throttled, kicked, punched and his genitals were pulled and twisted while all along he was handcuffed. He claimed damages for, *inter alia*, pain and suffering and *contumelia*, flowing from the assault as well as for his alleged wrongful arrest and detention during the period when he was being assaulted. While the question of wrongful arrest and detention of a prisoner is not of immediate concern in this discussion, the assault is. Chinhengo J held that the treatment which the plaintiff received in the hands of the two prison officers was a species of torture such that there is need to award exemplary damages where the basic human rights of the person, including a prisoner are needlessly violated.
18 *Kennedy* para 62.

8 2 A Typical Case of Assault by Prison Officers

A typical case of assault by prison officials or custodial officers is that of *Neluheni v SA Custodial Management*[19] where up to nine of those officers descended on the plaintiff apparently searching for dagga with a sniffer dog. Not only did the officers assault him, but they also ordered him to take off his clothes and touched his body. One of the officers wearing hand gloves pushed his two fingers into the plaintiff's anus which made him jump. Having found no dagga, the officers, one after the other, began to take part in the assault with one of them hitting the plaintiff with an open hand in the face while the other jumped on his private parts. He was lifted and again smacked in the face. After he was handcuffed with his hands to his back, his legs shackled, he was dragged by his legs and thrown down the staircase. He had injuries on his whole body including his head; his eyes were swollen, and both his hands and upper arms were scratched and bruised, and his genitals painful.[20]

Khumalo J held that the Constitution of South Africa guarantees every one inherent dignity and the right to have their dignity respected and protected; the right to be free from all forms of violence from either public or private sources, not to be tortured and not to be treated in a cruel, inhuman and degrading way.[21] The plaintiff's right to be treated with dignity and for his dignity to be protected and respected was undoubtedly violated by the impairment of his bodily integrity without a just cause.[22] The defendant failed to prove that the application of force against the plaintiff was justified and without any *animus injuriandi*. The evidence of the officers was full of inconsistencies, contradictions and irregularities and therefore unreliable.[23] There was no doubt that the plaintiff felt humiliated by the several assaults and injuries he sustained as a consequence and being constantly held in segregation. His treatment by a urologist was delayed by nearly six months and therefore he endured the humiliating disposition relating to his affected private parts for some time. He was assaulted in the presence of fellow prisoners and other custodial officers. The defendant failed to show the existence of a just cause for assaulting the plaintiff and the absence of *animus injuriandi* whereas the plaintiff succeeded in his action.[24]

In determining a fair sum to be awarded as general damages for pain, suffering and shock the court had to take into account previous decisions as well as the time, degree and intensity of the discomfort and suffering. So, too, an award in respect of *contumelia*, which relates to the impairment of the *dignitas* or bodily integrity of a person should take into consideration any aggravating or mitigating circumstances in order to arrive at a fair amount.[25] Khumalo J then considered the following cases:

(a) *Peterson v Minister of Safety and Security*[26] where R120 000 (present day value of R139 000) for an assault committed in a thug-like and disgraceful manner by police officers;

(b) *Bennett v Minister of Police*[27] where R6 000 (2016 value being R30 000) was awarded; and

(c) *Ramakulukusha v Commander, Venda National Force*[28] where R15 000 (2016 value being R140 000)[29] was awarded.

The court further took into account that the plaintiff was assaulted by at least six or more custodial officers when it was not necessary. What is more, they fabricated a story of a burning tissue and that the plaintiff assaulted two of them. The plaintiff was falsely accused after the incident and a criminal case was opened against him for common assault. He was named a murderer after the incident even though he was serving a prison term for rape. He endured

19 [2016] ZAGPPHC 622 (13 May 2016).
20 *Neluheni* paras 21–22.
21 Ss 10, 12(1)*(c)*,*(d)* and *(e)*, 1996 Constitution.
22 *Neluheni* para 112.
23 *Ibid* para 111.
24 *Ibid* paras 113–114.
25 *Ibid* para 115.
26 QOD, 2011 6K6 1 ECG.
27 1980 3 SA 24 (CPD)
28 1989 2 SA 813 (VSC).
29 *Neluheni* paras 115–117.

further harsh treatment by being taken to segregation instead of the clinic. When combined with the nature of the injuries sustained; the undisputed facts that the plaintiff waited for more than three months to see a specialist; and that the plaintiff spent four days in hospital, the general damages award made in this case in the form of a global amount was R200 000.[30]

8 3 Prisoner Placed in Leg-iron and Chains

In Namibia, it is in contravention of the prohibition against torture, cruel, inhuman, and degrading treatment or punishment under Article 8(2)*(b)* of the Constitution of Namibia 1990[31] to place prisoners in leg-irons or chains.[32] Following upon this precedent, Manyarara AJ had no problem in brushing aside the defence argument that the plaintiff in *Engelbrecht v Minister of Prisons and Correctional Services*[33] was placed in chains because he exhibited violent tendencies towards prison officials. The judge held that the prison officials were liable for violating the plaintiff's constitutional rights. Furthermore, the violation was aggravated by:

- The fact that the prison authorities kept the plaintiff in solitary confinement for the first week of his detention, in a block reserved for convicted prisoners while he was an awaiting trial prisoner;
- The plaintiff and other prisoners were once marched on foot along Windhoek's Lederitz Street from the holding cells at the magistrate's court to the High Court in full view of the public, instead of taking them through an "underground corridor" linking the two buildings;
- The plaintiff was forced to take a shower in his clothes and thereafter sleep in damp and wet clothes. All these, the trial judge found, were grossly insulting, humiliating and unlawful.

It was held that the plaintiff was entitled to be compensated for this abuse of authority by the prison staff contrary to the contention on behalf of the government that as the *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another*[34] judgment had established that a declaration had the effect of remedying the violation of the plaintiff's constitutional rights in similar circumstances and that the present plaintiff should be awarded a nominal sum of N$1 (one Namibian Dollar). Such an award, the judge considered would "constitute contemptuous damages" which would be unwarranted in the circumstances of this case. On the other hand, the court took into account the fact that the plaintiff literally, by his violent conduct, forced the prison authorities to resort to the measure they took against him in frustration.

The judge was also mindful of the observations of Van der Spuy AJ in *Ramakulukusha v Commander, Venda National Force*[35] on the "comparatively low and sometimes insignificant awards made in Southern African Courts for infringements of personal safety, dignity, honour, self-esteem and reputation." The judge sought to avoid such result through the court's "disapproval of such gross violation of plaintiff's constitutional rights" by upholding the liberty and dignity of the plaintiff in making an award of general damages for N$15 000.00 for pain, suffering and impairment of the plaintiff's dignity and 20 per cent interest on the amounts from the date of judgment to the date of payment.

It is doubtful whether this award could escape the castigation of being "comparatively low" and "insignificant award" even by Namibian standards in spite of the plaintiff's contribution

30 *Ibid* paras 118 and 119.3.
31 See also *Ex parte Attorney General, Namibia: In re Corporal Punishment by Organs of State* 1991 3 SA 76 (NmS).
32 *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 2000 6 BCLR 671 (NmS).
33 2000 NR 230 (HC).
34 2000 6 BCLR 671 (NmS).
35 1989 2 SA 813 (V) at 847B-E. A businessman of good standing was wrongfully arrested for the ritual murder of a young child and thereafter detained for eight days during which time the police viciously assaulted him. In 1989 he was awarded an amount of R 15 000 for the wrongful arrest; R20 000 for unlawful detention, the value of which as at the time of the judgment was delivered in *Engelbrecht* were R56 940 and R75 920 respectively; R20 000 for assault; and R30 000 for malicious prosecution. Meanwhile the observations of Van der Spuy J are rather informative: "It is my respectful opinion that courts are charged with the task, nay the duty, of upholding the liberty, safety and dignity of the individual. … In this case plaintiff, a man of good standing in the whole of Venda and beyond the borders of Venda, was a victim of an unwarranted infringement of his personal liberty, safety, freedom, dignity and enterprise."

to his maltreatment? The Namibian currency is at par with that of South Africa although her economy is less developed, but how much allowance could be made for the disparity in economic developments? Could this award constitute a move away from the approach the trial judge sought to avoid? The answer, certainly, is that it is not. Surely, the award of the High Court of South Africa in *Seymour v Minister of Safety and Security*[36] demonstrates a more conscious effort to depart from the comparative low awards of the pre-democratic constitutional era. Meanwhile attention could also be drawn to the awards of courts elsewhere in the Commonwealth with relatively humbler and small-island economies whose guiding injunction had been that awards in human rights cases "should not be at large as to be a windfall nor should it be so small as to be nugatory."[37] When compared with the approach of the courts in the Commonwealth Caribbean where similar affronts have been committed against the rule of law by public officials who meted out to citizens inhuman and degrading treatment (as already noted in *Peters v Marksman,*[38] by a prison boss, and in *Tynes v Barr*,[39] by the police authority) it becomes clearer that the award in *Engelbrecht* is less favourable and can hardly fit the description of an award designed to "mulct its violators in the payment of monetary compensation."[40] Such award could be shown to be adequate when further compared with that awarded by the Constitutional Court of the Seychelles in a personal liberty deprivation case where the judge did not pretend to be awarding exemplary compensation,[41] or in a case involving violation of the freedom of expression from the High Court of Anguilla.[42]

9 ASSAULT BY PRISON INMATES

Jaftha v Minister of Correctional Services[43] concerned the welfare of a person in prison custody. The plaintiff alleged assault by a prison inmate due to the negligence of the defendant's employees. Having admitted that it owed the plaintiff a duty to ensure his safety, the question turned on whether all reasonable steps were taken to prevent the harm.[44] Goosen J held that the approach to determining foreseeability of harm involves a careful appraisal of the particular facts and circumstances of the matter. In the process the judge adverted to the recognised tests established in *Van Duivenboden* in respect of negligence and omission and *diligens paterfamilias*,[45] in *McIntosh v Premier, KwaZulu-Natal*[46] and *Mukheiber v Raath and Another*[47] – all modifications of *Kruger v Coetzee*[48] – and to determine whether having regard to those circumstances a reasonable person in the position of the defendant would have foreseen the potential for harm.[49] It is thus not necessary that the plaintiff should establish that the manner

36 2005 2 All SA 296 (W).
37 Per Patterson JA, *Fuller v Attorney General of Jamaica* 1998 56 WIR 337 at 402.
38 2001 1 LRC 1 (St Vincent and the Grenadines).
39 1994 45 WIR 7 (The Bahamas).
40 *Rudul Sah v State of Bihar* 1983 3 SCR 508 at 513–4, AIR 1983 SC 1086 at 1089 per Chandrachud CJ.
41 See *Charles v Attorney General* [2001] 2 LRC 169 (Seychelles CC).
42 In *Benjamin and Others v Minister of Information and Broadcasting and Another* 2002 4 LRC 670 d'Auvergne J of the High Court of Anguilla had to determine the reasonable amount of damages to be awarded the applicant upon the decision of the Privy Council (*Benjamin and Others v Minister of Information and Broadcasting* 2001 4 LRC 272 (PC)) that his right to freedom of expression was violated when the State shut down his radio programme without just cause. The judge considered the principles laid down by Patterson JA in *Fuller v Attorney General* 1998 56 WIR 337 at 402 and the admonition of Harrison JA (*ibid* at 420) that an award of exemplary damages in constitutional rights claims should not be allowed to "serve in principle to cloud the distinction between a claim for compensation under the Constitution and a claim in private law." The judge did not consider that aggravated or exemplary damages should be awarded since the trial judge had found no *mala fides* and, so, "this is not a case for the consideration for damages at large." The judgment of the Court of Appeal of Trinidad and Tobago in *Rees v Crane* 2001 3 LRC 510 (*supra*) persuaded the judge to hold that there was nothing to preclude a court from taking the question of reputation into account in determining the distress and inconvenience suffered by an applicant hence d'Auvergne J came to the conclusion ([2002] 5 LRC 670 at 676g-h) that the effect of the breach on the appellant's reputation was bound to result in severe distress and anxiety to him. An award of EC$70 000 was considered appropriate and just in the circumstances.
43 2012 2 All SA 286 (ECP) (*Jaftha*).
44 *Cf* in *Pitzer v Eskom* 2012 ZASCA 44 (29 March 2012) (*Pitzer*) para 17; *Kruger v Carlton Paper of SA (Pty) Ltd* 2002 2 SA 335 (SCA) para 9.
45 *Jaftha* paras 12 and 23.
46 2008 6 SA 1 (SCA) para 12; *Pitzer v Eskom* 2012 ZASCA 44 (29 March 2012) para 18; *Kruger v Coetzee* 1966 2 SA 428 (A) at 430E-F (*Coetzee*).
47 1999 3 SA 1065 (SCA) para 31.
48 *Kruger v Coetzee* 1966 2 SA 428 (A) at 430E-F.
49 *Jaftha* paras 18–22. See also *Joffe & Co Ltd v Hoskins & Others* 1941 AD 431 at 451.

in which harm occurred ought to have been foreseen, not even that the degree or extent of the harm caused be foreseen,[50] but only the general manner of its occurrence.[51]

Goosen J found that as a result of a violent altercation which had previously occurred between the plaintiff and the inmate who had attacked him, there was risk of further violence for as long as those prisoners remained in one another's presence.[52] This was clear to the warders on duty as they had earlier separated the plaintiff from his assailant. It was obvious that they must have foreseen that there was a risk of further violence and accordingly, a risk of harm in the event that they were not segregated. That failure to properly segregate the prisoners and to ensure that they were sufficiently monitored and guarded until such time as they could be securely segregated constituted a breach of the duty that the defendant owed to the plaintiff.[53] It also resulted in the plaintiff suffering physical harm in consequence of the violent attack upon him by the inmate.[54] The plaintiff, therefore, succeeded in establishing liability in damages for the breach of the duty owed to him by the defendant.[55]

Section 4(2) of the Correctional Services Act 111 of 1998 (CSA) enjoins the department to take such steps as are necessary to ensure the "safe custody of every inmate and to maintain security and good order in every correctional centre." Section 26(1) not only assures every inmate the right to personal integrity and privacy, but also subjects those rights to "the limitations reasonably necessary to ensure the security of the community, the safety of the correctional officials and the safe custody of all inmates." In order to achieve these safety objectives of every member of the prison community, subsection (2) of section 26 empowers the correctional services officials to "search the person of an inmate, his or her property and the place where he or she is in custody and seize any object or substance which may pose a threat to the security of the correctional centre or of any person, or which could be used as evidence in a criminal trial or disciplinary proceedings." The frequency of the searches and other related information are stated in the Standing Orders made pursuant to the Act.[56]

These provisions of the CSA came up for interpretation in *Tyatya v Minister of Correctional Services*[57] where the plaintiff claimed general damages in respect of pain and suffering, shock, trauma, loss of amenities and disfigurement arising from three incidents of assault upon him whilst he was an awaiting trial prisoner in a correctional centre. The plaintiff contended that the employees of the defendant failed to take steps as were necessary to ensure his safe custody and the maintenance of security and good order of the prison as required by the Act. Along the lines of a negligence claim, the plaintiff argued that the defendant's employees failed to comply with the duty imposed on it by, *inter alia*, section 12(2)*(b)* of the Constitution which required the defendant to protect the rights of the plaintiff to bodily and psychological integrity of his person. Further, that the employees of the defendant acted unlawfully and negligently in breach of their statutory duties, in that they failed to exercise due and proper care in the performance of their duty to safeguard the plaintiff while he was incarcerated. The plaintiff argued in the alternative that the employees of the defendant acted unlawfully and negligently in that they failed to prevent and or stop the plaintiff from being assaulted on all three occasions when they were under the legal duty to do so and were reasonably able to do

50 *Jaftha* para 23. See also *Kruger v Van der Merwe & Another* 1966 2 SA 266 (A) at 277F.

51 Per Boruchowitz AJA, *Pitzer v Eskom* 2012 ZASCA 44 (29 March 2012) para 25; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) para 21 per Scott JA.

52 *Jaftha* para 29.

53 *Ibid* para 33.

54 *Ibid* para 37.

55 *Ibid* para 38. See also in *Spence v Minister of Correctional Services* 2017 ZAECPEHC 46 (22 September 2017) paras 19, 22, 39–40 where the plaintiff was assaulted by a fellow inmate by slashing across his face with a surgical blade. It was argued that the *Jaftha* case was on all fours with the present case. There was evidence that the prison officials had taken steps to keep the plaintiff and his cell inmates segregated from the general body of maximum security inmates. The steps included holding the plaintiff in a separate cell, the so-called security cell; ensuring that prisoners were escorted to and from the dining hall separate from other inmates; and that the prison officials had employed the mechanism of controlling entry into the passage area from the dining hall to ensure that those prisoners did not mingle with other inmates. Even in spite of all these measures, the prison authority was found wanting in respect of the prisoner attacker possessing a dangerous weapon, to that extent, the defendant acted negligently, hence the plaintiff was successful in establishing that the defendant was liable to him in damages for the harm suffered by him in consequence of the defendant's breach of its "duty of care" owed to him.

56 See Regulations 15 and 16 of the Regulations Gazette No. 8023 of 30 July 2004.

57 2014 ZAECPEHC 8 (21 February 2014) (*Tyatya*).

so.[58]

As Beshe J found, attacks on inmates occurred frequently whereas searches of inmates and cells took place once every two or three weeks or even once every month. This amounted to negligence and or a breach of the statutory obligations on the part of the employees of the defendant, and when measured by the test enunciated by Nugent JA in *Minister of Safety and Security v Van Duivenboden,*[59] as to whether a particular act or omission will necessarily attract liability, it clearly emerges that the defendant's employees failed to conduct regular searches of inmates and their cells as required and in circumstances where attacks were commonplace. Consequently, the correctional centre could not detect that the assailants of the plaintiff were armed with different objects on all three occasions when he was assaulted. Had the search been regularly conducted as required by law, the assaults on the plaintiff would have been prevented.[60] The prison officials were therefore negligent in each of the three occasions in the performance of their obligation to provide a safe environment for the plaintiff.[61]

In assessing what should be a fair and reasonable award to both parties in the circumstances, the judge referred to what Watermeyer JA said about there being "no scales by which pain and suffering can be measured" given the absence of any relationship between them and that it all boils down to the judge's view of what is fair in all the circumstances of the case.[62] The judge, however, had regard to the award in *Klass Britz v The Correctional Services*[63] where Dambuza J awarded the sum of R50 000 to the plaintiff who was stabbed by a fellow inmate and sustained three lacerations of about 4cm each on the face.[64] The plaintiff in *Klass Britz* was given pain tablets whereas the plaintiff in *Tyatya* was attacked at three separate occasions. On the second occasion, the two attackers used a rock and water tap fitting. Twice, the plaintiff was stabbed with a knife. He was not given any pain medication. The attacks on him were more serious than the attack on the plaintiff in *Klass Britz.* In view of all these, the amount of R120 000 was awarded in *Tyatya* as a fair and reasonable award for damages suffered by the plaintiff in the hands of the employees of the defendant.[65]

10 1 The Recent Case of *B v Minister of Justice and Correctional Services*[66]

It is not usual to come across a judgment with an opening statement such as: "One cannot help but feel profound empathy for the plaintiff in this matter."[67] But, that is exactly how Smith J welcomed the reader to the judgment in *B v Minister of Justice* which clearly indicates to the reader the sort of treatment that must have been meted out on the prisoner/plaintiff in this case. He was not only brutally assaulted, but was also raped by a fellow inmate while being held at the St Albans Medium B Correctional Facility. Worse still, his attempts to complain and report to the prison authorities were treated with indifference by prison officials hence the perpetrator continued to terrorise him with impunity. Since the liability issue was previously resolved whereby the defendant was held to be 100 per cent liable to such damages he may prove, the present case involves his claim for general damages for the amount of R700 000 and R200 000 for medical expenses.[68]

As much as the prison authorities purport to place certain groups of prisoners in single cells for their own safety including offenders with a potential for self-harm and those with a different sexual orientation such as the plaintiff, they did not in actual fact put that policy into practice as they lumped in the same block these same vulnerable prisoners with those placed in single cells as punishment, thus exposing those whose safety was sought to be protected with those who were potentially a danger to them.[69] So, on 11 January 2015, the plaintiff was accosted by one Sikhonyane, a prisoner placed in the same block as a form of punishment. Sikhonyane,

58 *Tyatya* para 2.
59 2002 6 SA 475 (SCA) para 12.
60 *Tyatya* paras 18–20.
61 *Ibid* para 21.
62 *Sandler v Wholesale Coal Supplies Ltd* 1941 AD 194 at 199.
63 Case No. 2838/09.
64 See also in *Mokuke v Minister of Safety & Security* 2007 ZANWHC 38 (10 August 2007) where the sum of R45 000 was awarded for assault for failure of the police to prevent harm. *Seymour* was cited for guidance.
65 *Tyatya* paras 24–26.
66 [2019] ZAECGHC 113 (5 November 2019) (*B v Minister of Justice*).
67 *B v Minister of Justice* para 1.
68 *B v Minister of Justice* paras 2–3.
69 *B v Minister of Justice* para 6.

who held a shard of glass, had grabbed the plaintiff to his neck and instructed him to remove his pants. When he resisted, Sikhonyane cut him with the glass and threatened to kill him if he screamed. Sikhonyane tore his pants and proceeded to rape him anally; he had used a condom but no lubrication. The ordeal lasted between 15 and 20 minutes. The plaintiff averred that the unlubricated penetration was painful, but he could not cry or shout as he was warned that his throat would be cut if he ever cried or made any noise that would attract attention.[70] It was not clear whether Mrs Riti, one of the wardens on night duty to whom the plaintiff reported the incident, but who felt unconcerned, and was reluctant to attend to the complaint "was motivated by insipient homophobia, callous indifference, or simply shocking incompetence."[71] With this unconcerned attitude of the warden, the plaintiff had become so despondent that he developed suicidal tendencies. His attempt to hang himself in his cell was fortunately thwarted by a night-duty warden who called for assistance. Although he was taken to and treated in a hospital, the criminal charges he laid at the police station were never proceeded with.[72] His suicidal tendencies were exacerbated by the continued indifference of the prison authorities who took no steps to prevent Sikhonyane, who continued with his threats, from having contact with him hence his second attempt at suicide by overdose. Again, although he was taken to hospital, the prison authorities cared less about the recommendations of a psychologist for follow-up treatment in prison.[73] Since the plaintiff's return from the hospital and his transfer to the Grahamstown prison, he continued to experience frequent bouts of severe anxiety and flashbacks to the events. He also committed several acts of self-harm by cutting himself. His pre-existing history of alcohol abuse was likely aggravated by the rape. As Smith J put it:

> These and other psychological *sequelae* of the plaintiff's traumatic experiences were manifest and extensive. He still experiences low mood swings, loss of enjoyment of activities that he previously enjoyed, auditory hallucinations, and distressing dreams, amongst others. His feelings of shame and anger, coupled with sleeplessness, has rendered him a high risk of suicide. Professor Young also said that the plaintiff's trauma was compounded by the inadequate and indifferent reaction of the prison authorities.[74]

Among the cases referred to as comparators are the familiar rape cases: first, *Bridgman v Witzenberg Municipality*,[75] where there was a clear evidence of the plaintiff's genitalia having been torn and bloodied and contained traces of the perpetrator's DNA, yet the Municipality persisted in denying that the plaintiff was raped thus, enabling the trial judge to say that: "The approach of the municipality added insult to her injury and it further violated her dignity. A remedy for injury should be given when words or conduct involve degradation or an element of insult. This translates into damages."[76] The plaintiff was awarded R750 000 in general damages.[77] Second, *Mrasi v Minister of Safety and Security*[78] where a 25-year-old woman was raped while in police detention was awarded R425 000 for *contumelia* and general damages for the assault. Third, *DW v Minister of Police*[79] where a 25-year-old female student was attacked and raped by an accused out on bail was awarded R750 000 for pain and suffering, disfigurement, psychological and mental suffering, as well as a further R350 000 in respect of *contumelia*. Fourth, *EF v Minister of Safety and Security*[80] where a person held in police custody was sodomised in the early hours of the morning by fellow detainees was awarded damages in the sum of R200 000; the aggravating factors being that the plaintiff had developed an intense and irrational fear of contracting HIV, his sexual relations with his wife had been negatively

70 *B v Minister of Justice* paras 8–9.
71 *B v Minister of Justice* paras 10–11.
72 *B v Minister of Justice* paras 11–12.
73 *B v Minister of Justice* paras 13–14.
74 *B v Minister of Justice* para 17.
75 2017 (3) SA 435 (WCC).
76 *Bridgman* para 221.
77 This amount was reduced to R630 780 by the SCA in its judgment in *Witzenberg Municipality v Bridgman* [2019] ZASCA 186 (3 December 2019).
78 2015 (2) SACR 28 (ECG) (*Mrasi*). Since the quantification for wrongful arrest and detention aspects of this case has been dealt with in the article on "Quantification of Damages for Unlawful Arrest and Detention: South Africa, Namibia and Swaziland (1)" para 3.9, the discussion in her present context is limited to the award of damages made for sexual assault.
79 2017 (1) SACR 441 (GP).
80 2018 (2) SACR 123 (SCA) posted in SAFLII website as *Flanagan v Minister of Safety and Security* [2018] ZASCA 96 (1 June 2018).

affected, he struggled to cope at work and was mocked by his colleagues.[81] Acknowledging that the comparators could do no more than provide guidance since the circumstances of each case differ from the other, Smith J considered that it would be fair and reasonable to award the plaintiff in *B v Minister of Justice* the sum of R450 000 in respect of general damages and *contumelia*; and the sum of R113 880 in respect of future medical expenses including costs of medication and the need for further psychological therapy of 36 hours as has been established.[82]

11 INJURY TO A PRISONER DUE TO NEGLIGENCE OF PRISON AUTHORITIES

The plaintiff in *Lee v Minister of Correctional Services*[83] alleged that the prison authorities had failed to take adequate precautions to protect him against contracting TB; that he contracted the illness in consequence of their omission; and that the omission violated his right to protection of his physical integrity under the common law, the Correctional Services Act 8 of 1959 and the 1996 Constitution. He had contracted TB while he was detained in prison for four years pending trial for certain offences. He claimed damages against the authorities for failing to take adequate steps to protect him from the risk of that infection. Once he was diagnosed as actively infected with TB, they failed to provide him with adequate medical treatment and medication to cure or prevent further spread. They failed to adhere to his numerous requests for adequate treatment for the infection.

The rights allegedly violated included: (a) under the common law, his right to respect for and protection of his physical integrity; (b) in terms of the Bill of Rights, specifically, the invasion of the rights to: (i) human dignity under section 10; (ii) life under section 11; (iii) freedom and security of the person under section 12(1); and (iv) the right to be detained in conditions that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, medical treatment under section 35(2)*(c)*; and section 2*(a)* and *(b)* and section 12 of the Correctional Services Act 8 of 1959 and its Regulations.[84] De Swardt AJ held that a reasonable person in the position of the defendant would have foreseen that the prevailing conditions in the prison would reasonably possibly spread TB among the inmates and causes those who had previously been ill with TB to succumb to the disease.[85] Again, a reasonable person in the position of the defendant would have taken steps to guard against the spread of TB in the prison, because it was such a formidable disease which would easily spread. In particular, a reasonable person would have ensured that sufficient numbers of nursing staff were employed to perform the various tasks involved in the control and prevention of TB in the said prison.[86] There was no evidence that the defendant, or members of the Department of Correctional Services, had taken any steps whatsoever to guard against the spread of TB in the prison. It was held that the defendant's omission constituted negligence,[87] thus the failure on the part of the defendant to take reasonably adequate precautions against contagion in the prison was unlawful. Consequently, the defendant was held liable in delict pursuant to the plaintiff becoming ill with TB whilst he was incarcerated in the maximum security prison at Pollsmoor.[88]

11 1 Prisoner Sustained Burns while Carrying Out Assignment by Prison Management

In *Gumede v Minister of Safety and Security*[89] the plaintiff sustained 28 per cent burns to his right axila, chest, thorax, both forearms and hands while doing the job of "petrol boy" which he was assigned as prisoner by the management of the prison as a result of the alleged negligence of the defendant's employees. The employers were found to have been liable for his injuries in a previous decision of the court while the present case was concerned with quantum in respect of future medical and ancillary expenses; future loss of earnings; general damages for past and future pain, shock, suffering and discomfort; as well as general damages

81 *B v Minister of Justice* paras 20–29.
82 *B v Minister of Justice* paras 31 and 33.
83 2013 2 SA 144 (CC) (*Lee* CC).
84 *Lee v Minister of Correctional Services* 2011 6 SA 564 (WCC) (*Lee* WCC).
85 *Lee* WCC para 242.
86 *Ibid* para 252.
87 *Ibid* para 258.
88 *Ibid* paras 269–270.
89 [2015] ZAKZDHC 21 (13 March 2016) (*Gumede*).

for permanent disability; permanent loss of amenities of life and disfigurement.[90]

In estimating the loss of income, the court took into account the pre-injury physical well-being of the plaintiff to generate income and the post-injury tests which suggested: "permanent physical, behavioural and functional compromise that cause the plaintiff to function in a diminished capacity at the workplace." The physical, emotional, behavioural, cognitive and functional *sequalae* for his injury prevented him from working at pre-morbid levels. Whereas the plaintiff would have continued to compete for unskilled employment, but he could no longer do that for lack of heavy strength demands. The negative social stigma attached to visible disfigurement, the high level of competition for unskilled work, the scarcity of work of unskilled employment of light strength demands and the plaintiff's past criminal records are factors which minimised his prospects of employment and which his well-placement in his present enterprise of selling fruit, vegetables and other commodities from home, which, according to the plaintiff yields an income of approximately R80 to R100 per day.[91] Apart from the physical scars, there was considerable body-image disturbance as a result of the scarring making the plaintiff to withdraw from society. On the emotional and psychological *sequalae,* the plaintiff presented a depressed mood, anhedonia, diminished libido, impoverished sleep, fluctuating concentration, low energy, suicidal ideation, heart palpitations and flashbacks.[92] Although the trial judge, Ntshangase J, mentioned in the judgment of being referred to "various cases with past awards for comparative purposes" and having taken into account "past awards in comparative cases", no such cases, or any case at all, were cited or referred to in the judgment.[93] Having been satisfied that the plaintiff had proved his claims for damages under the various heads, the court made awards to reflect each head as follows: (a) future medical and ancillary expenses – R245 298; (b) future loss of earnings – R77 379; and (c) general damages – R300 000.

11 2 Detainee Sodomised while in Police Custody

The appellant's damages claim in *EF v Minister of Safety and Security*[94] was based on the alleged breach of the police of its duty to ensure his safety in custody following his arrest and detention for driving under the influence of alcohol, reckless and negligent driving and failure to stop after an accident. The appellant was entitled to be released on bail but owing to police bungling, instead of being released, the appellant was transferred to another police station where he spent the weekend in custody. He was sodomised in the early hours of the Monday morning by fellow detainees.[95] The appellant's claim for negligent police conduct and breach of their legal duty to prevent harm to the appellant therefore arose from three sources: (a) the police failure in their common-law duty to prevent harm to the appellant; (b) the police violation of a number of the appellant's constitutional rights including, the right to dignity, freedom and security of the person and to bodily integrity; and (c) the police failure to separate the appellant from other categories of detainees in violation of the relevant Standing Order. Although the Minister admitted that the police officers owed a legal duty to the appellant, and were obliged to ensure his safety while in police custody, but denied that the police had breached that duty and that all reasonable and necessary measures were taken to meet the legal obligations of the police.[96] The conduct of the police and its wrongfulness was not in dispute since the respondent conceded that the police had a duty to protect the appellant from harm. That left the issues of negligence and causation for the court to decide before turning to quantum.[97]

90 *Gumede* paras 3–4.
91 *Ibid* para 12.
92 *Ibid* para 22.
93 *Ibid* para 26.
94 2018 (2) SACR 123 (SCA).
95 *EF* paras 1–5.
96 *Ibid* para 6.
97 *Ibid* para 7.

Along the lines of the test for establishing negligence enunciated in *Kruger v Coetzee*,[98] of the reasonable police officer having taken reasonable steps to guard against harm and, indeed, failed to take those steps, Makgoka AJA for the unanimous SCA, considered two relevant aspects of the negligence inquiry to revolve around: (a) the effect of the police failure to release the appellant on bail as prescribed in section 59 of the CPA where the offence in question falls under Part II or Part III of Schedule 2; and (b) the police failure to comply with the Standing Order. It was held that instead of conducting a simple inquiry as to the nature of the offence for which the appellant was held, they adopted a supine and uncaring attitude towards the appellant's wife who came to pay the bail fee. In this regard, they failed to release the appellant who was entitled to bail. The police failure to release the appellant on bail was closely connected to his subsequent sexual assault. It also follows that the failure of the police to release the appellant on bail in circumstances where he was entitled to be released, and had in fact been recommended by the investigating officer, the police failed to ensure that he was separated from violent criminal detainees which, in turn, violated clause 13(1)*(g)* of the Standing Order, thus rendering it reasonably foreseeable that the appellant could be harmed.[99] The police failure to take reasonable steps to prevent reasonably foreseeable harm rendered their conduct negligent in the circumstances of this case.[100] The court found "a direct and probable chain of causation"[101] between the police failure to release the appellant on bail, and their failure to detain him separately, and the sexual attack on the appellant. Accordingly, the omissions by the police officers to release the appellant on bail, and to detain him separately materially contributed to the appellant being sodomised. Therefore, the harm suffered by the appellant was sufficiently closely linked to the omission of the police to attract liability.[102]

The quantum concerned general damages. The court took into account the personal circumstances of the appellant including the unchallenged evidence of the clinical psychologist who reported that: (a) the appellant was intensely traumatised; (b) six years after the event, he was still being treated with antidepressant medication; (c) he had a chronic disorder which was likely to continue; (d) he received tranquilising medication to help him sleep and for general containment of anxieties; (e) the medication was not particularly successful and the appellant was treated in a clinic; (f) psychologically, the appellant felt deeply humiliated and fearful; (g) he had an intense fear of contracting HIV; (h) his sexual relationship with his wife was negatively affected by the experience; and (i) the appellant experienced a profound breakdown in his marriage which was at a stage on the brink of divorce.[103] The court also found that the appellant could no longer cope at work or working in a team as within the team he experienced triggers which precipitated him re-experiencing the traumatic experience. Worse still, he was mocked by colleagues. He deliberately absented himself from work from time to time and his employment was eventually terminated. At some stage, he attempted suicide by drug overdose after losing his job. His personality had changed since the incident for he became withdrawn, irritable, impatient, easily provoked and aggressive. He even struggled to relate to his 5-year-old daughter. He became self-rejecting and derogatory about his masculinity.[104] Considering that the incidence of sodomy has had a serious psychological impact on the appellant, Makgoka AJA with the concurrence of the other four Justices of Appeal, awarded the appellant R200 000 as general damages albeit without engaging in any comparative analysis with previously decided cases.[105]

12 DETENTION UNDER THE MENTAL HEALTH ACT – NAMIBIA

The appellant's claim in *Gawanas v Government of the Republic of Namibia*[106] was based on *Lex Aquilla* for damages for wrongfully and unlawfully detaining her in a mental health centre for the period 13 January 2003 until 15 December 2003 as well as certain provisions of the Constitution: the right to liberty, human dignity, and fair administrative justice. There was no doubt that the relevant government agency was entitled to detain a mentally ill person in terms of the Mental Health Act 18 of 1973. The contention was in respect of the time it took the relevant government bureaucracy to exercise their statutory duty of deciding to release the appellant after she was declared fit by the medical authorities. Before the Supreme Court of Namibia, Strydom AJA (Langa and O'Regan AJJA concurring), had no doubt whatsoever that the compulsory detention of a person in a mental institution inevitably impairs the

98 *Kruger v Coetzee* 1966 2 SA 428 (A) at 430E-F.
106 2012 2 NR 401 (SC) (*Gawanas*).

personal rights of the detainee and, in particular, his/her right to liberty and dignity under the Constitution of Namibia. Such a person is physically restrained and his/her right of freedom of movement has been taken away and the detainee is subject to certain discipline enforced by the detaining institution.[107] Therefore, such compulsory incarceration in a mental institution where a person is mentally fit does impair the liberty and dignity of the person.

The crisp question in *Gawanas* was, in the words of Strydom AJA, "what obligations are imposed upon respondent once the court order to detain a person has been made in terms of section 9(3), to secure the release of the patient once the patient is medically fit for release."[108] In other words, what obligations are placed upon the minister, the hospital board, the superintendent and the official *curator ad litem* by the provisions of section 29(4)–(7) as to who are the functionaries upon who the duty to decide the issue are reposed? In approaching that question, the Supreme Court was guided by the Appellate Division decision in *Simon's Town Municipality v Dews*[109] to the effect that:

> … even where the statute does authorise interference with rights of others, the person or authority vested with the power is under a duty, when exercising the power, to use due care and to take reasonable precautions to avoid or minimise injury to others. Failure to carry out this duty has been described as 'negligence' but, as pointed out by Prof JC van der Walt in Joubert (ed) *Law of South Africa* vol. 8 para 30, in this context the word is used in a special sense; and 'the presence of negligence' in this special sense in the exercise of a statutory power is, however, a conclusive indication that the defendant has exceeded the bounds of his authority and has therefore acted wrongfully.[110]

Strydom AJA was of the opinion that the foregoing correctly states that jurisprudentially the consequences of the repository of the statutory power having exercised it without due care and without having taken reasonable precautions to avoid or minimise injury to others, are that the repository must be taken to have exceeded the limits of his authority and accordingly to have acted unlawfully.[111] The defence of the respondent was that it was acting in terms of a valid court order which was still operative and that therefore it had authority to continue to detain the appellant meant that there could be no question that the detention of the appellant was unlawful at any stage. Further, that the court order issued under the Mental Health Act authorised the detention even where doctors considered she was fit for release amounts to a plea of immunity as long as there was a court order. If it means that a statutory authority mandates the institutions of the government to interfere with the rights of a person so certified by a court order, this argument "cannot be correct". On the contrary, the Act provides in detail the steps to be taken to obtain the release of a person detained in terms of an order by a magistrate, and once a person so detained is fit for release, a decision left to the health authorities and the court, the steps prescribed by the Act must be complied with reasonably. In effect, those authorities that are mandated to obtain the release of a patient are under a duty to act cautiously and reasonably in order to minimise or avoid further injury to such patient. Where this is not done they will have overstepped their authority and a valid court order will not assist them.[112]

A determination of what is reasonable in these circumstances must take into account the protection of personal liberty under Article 7 and the respect for human dignity in Article 8 of the Constitution. Further, bearing in mind that a detention order carried out according to the Constitution is not necessarily in conflict with the provisions of these articles, but in the present case where the doctors attending to the appellant declared her fit for release, the problem is whether the role players acted reasonably in order to obtain her release.[113] After considering all the facts, the Supreme Court held that the hospital board did not act reasonably in delaying from January 2003 until 24 June 2003 before they sent their recommendation to the Minister of Justice. In turn, the Ministry of Justice offered no explanation as to why it took them almost

107 *Ibid* para 19. See also *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A).
108 *Gawanas* para 20.
109 1993 (1) SA 191 (A).
110 Per Corbett CJ *ibid* at 196. See also Boberg, *The Law of Delict* vol. 1 at 771-773; Neethling, Potgieter and Visser *Law of Delict* 6ed 2010 para 7.6.
111 *Gawanas* para 21.
112 *Ibid* para 24.
113 *Ibid* para 27.

six months to obtain the discharge of the appellant as a President's patient.[114]

It was held that a *diligens paterfamilias* would have, in these circumstances, foreseen the possibility of his conduct causing loss to another person and would have taken reasonable steps to avoid such possibility.[115] Accordingly, the respondents owed a legal duty to take reasonable steps to secure her release once her medical condition had improved to the point that her doctors considered her continued detention in an institution unnecessary. "Detention", according to Strydom AJA:[116]

> … seems to be in a niche of its own as far as foreseeability is concerned. Where a person is unlawfully detained the person causing that can hardly be heard to say that harm was not foreseeable. The liberty of an individual and protection against arbitrary arrest and detention form the cornerstones of any Constitution based on human rights and respect for the individual. In regard to Namibia this Court has found that the right to liberty, set out in Article 7, gives rise to a substantive right which guarantees personal liberty.[117]

The respondents were held liable in terms of *Aquilian* liability for its omission to take reasonable steps to secure the release of the appellant once her doctors considered her continued detention in the institution unnecessary.[118] On the question of how long it would have taken the authorities acting reasonably and expeditiously to release a President's patient, it was held that a period of three months would afford those involved in the process ample time to consider, and if necessary, to call for further information to assist them. And, in the circumstances of this case, where in each instance the parties involved in the process have supported the discharge of the appellant a period of three months was reasonable, thus leaving a period of seven and a half months during which the appellant was detained unlawfully and for which the respondent is liable to compensate her for the loss she might have suffered.[119]

13 CONCLUSION

This study has demonstrated beyond any shadow of a doubt that a person in police or prison custody has not, by the mere fact of his or her incarceration, been totally deprived of the protection of the law. As case law discussed in this study clearly establishes, the constitutional protections embedded in the Bill of Rights; relevant statutory provisions; international instruments and the common-law *residuum* principle all combine to provide a formidable safeguard for the rights of persons in police or prison custody from the deliberate acts or omissions of police and prison officers. Insofar as the rights of these persons are already lawfully impinged upon, those rights that are not thereby affected by their incarceration are protected against encroachment. This is the essence of the common-law *residuum* principle as it has been affirmed to exist on firmer grounds in contemporary constitutional jurisprudence by the Constitutional Court in *Zealand*[120] as amplified by Plasket J in *Ehrlich v Minister of Correctional Services*.[121] The judgment of the High Court of Namibia in *Kennedy and Others v The Minister of Prisons and Correctional Services*[122] also affirms that a prisoner retains those fundamental rights of his not already taken away by virtue of incarceration and that breach of those residual

114 *Ibid* paras 34 and 36.
115 *Ibid* para 42.
116 *Ibid* para 43.
117 Referring to *Alexander v Minister of Justice and Others* 2010 1 NR 328 (SC) para 116 where the question was whether the constitutional right to liberty of a person arrested and detained under s 21 of the Extradition Act 11 of 1996 was threatened by the lack of a right to apply for bail which was an issue which Parker J held was not ripe for adjudication at trial. The Supreme Court therefore had to decide whether art 7 of the Constitution of Namibia provides substantive protection to the right of liberty of an individual and whether the provisions of s 21 of the Extradition Act infringed or abridged that right. Strydom AJA (Maritz JA and Damaseb AJA concurring) entertained no doubt that the "right to liberty is one of the cornerstones on which a democratic society is built. Without such right there is no protection for the individual against arbitrary arrest and detention. The importance of the right to liberty was acknowledged in decisions in Namibia and also in decisions prior to independence." See e.g. *Katofa v Administrator-General for SWA and Others* 1985 4 SA 211 (SWA) at 220I-221D; *S v Acheson* 1991 NR 1 (HC) at 10A-C; *Djama v Government of the Republic of Namibia* 1992 NR 37 (HC) at 44F-J; *Julius v Commanding Officer, Windhoek Prison and Others; Nel v Commanding Officer, Windhoek Prison and Others* 1996 NR 390 (HC).
118 *Gawanas* para 44.
119 *Ibid* paras 46–47.
120 2008 4 SA 458 (CC).
121 2009 2 SA 373 (ECD).
122 2008 2 NR 631 (HC).

rights can be remedied by an award of damages. The extent to which the modern law protects a prisoner in the present day and to allow him or her to live a normal life as much as it is possible is that of *Pretorius v Minister of Justice and Correctional Services*[123] relating to the use of computers to enable the prisoners to pursue their educational careers.

What is even more remarkable is that in quantifying the damages to award the plaintiffs in police or prison custody, the fact that the victims find themselves in those circumstances does not count against them except that there are certain heads of damage of which such persons cannot obtain judgment. One of such heads is loss of earning capacity, this being one of the rights of which they are already deprived by dint of lawful imprisonment. Otherwise, the courts treat them for this very purpose like every other victim of a fundamental rights' breach, whether it is rape or sexual assault, assault by police officers or prison officials, or assault by prison inmates or any other breach of right. The quantification of damages for these wrongs is conducted in the same manner as in the normal arrest, detention and malicious prosecution cases of which a close scrutiny reveals that it is the same previous awards that provide comparable materials as in the present instances of this study. It is clear that the awards in the circumstances of persons in custody might be limited to general damages for *contumelia* relating to the impairment of the *dignitas* or bodily integrity of the individual, humiliation, and breach of human dignity rights which might arise from assault or rape, these being injuries that can afflict anyone who finds his or herself in similar circumstances. It does follow, however, that the damages recoverable by persons in prison custody – as against someone unlawfully detained by the police – would not include loss of earnings, profits or business or professional opportunities, these being injuries most likely unforeseeable in the circumstances of a person who has been convicted and lawfully sentenced to a term of imprisonment. One thing every police officer or any law enforcement officer in active service must know is that the freedom, liberty and dignity of everyone is guaranteed in all modern Constitutions especially that of the Republic of South Africa and all the other jurisdictions covered by this study and that it is the primary responsibility of the police to protect these guaranteed rights from infringement.

123 2018 2 SACR 501 (GJ) paras 40–44.