DAMAGES FOR PERSONAL INJURY – APPEAL AGAINST AWARD OF LARGE AMOUNT OF DAMAGES

Road Accident Fund v Delport NO 2006 3 SA 172 (SCA)

1 Introduction

In this matter the Supreme Court of Appeal was called upon to assess whether the award of damages, of more than R3 million for loss of earning capacity and for pain, suffering and loss of amenities of life, should be reduced. The judgment by Zulman JA (with which Van Heerden and Ponnan JJA concurred) is a classic example of the application of the principles in terms of which a higher tribunal should be guided in such an instance (see generally Visser and Potgieter *Damages* (2003) 492–493; Erasmus and Gauntlett "Damages" 7 *LAWSA* (2 ed by Visser) para 117). The judgment is also noteworthy for a number of other reasons.

2 Facts, reasoning and decision

The litigation was initiated as a result of the "horrendous permanent injuries" sustained by the patient (on whose behalf a *curator ad litem* appeared as plaintiff and respondent respectively). The following provides a sense of the gravity of the bodily injuries of the patient and of their *sequelae* (para 11–12):

> "It is common cause that the patient is unable to speak; that she has no control over either her bladder or her bowel and has been fitted with a catheter which needs to be changed every four weeks; that she is not able to swallow and is fully on a gastronomy feeding tube for all her nutritional and fluid needs; that she has little, if any, movement of the right side of her body and only very limited control of her left hand. She still suffers from headaches; abdominal cramps; discomfort of the bladder; numerous bladder infections; spastic contractions of the right arm; intermittent pain of the left hip; and general body stiffness. She, however, has no significant loss of sensory function. This means that she experiences – but has no independent means of alleviating – pain and discomfort (especially when being handled). [12] The patient has been rendered patently incapable of any form of work. In the opinion of Dr Holmes she has suffered 'an obliteration of her pre-morbid employment prospects, employability and potential to derive an income.' She has been rendered profoundly disabled, is in need of twenty-four hour care and is completely dependent on the assistance of others. She is essentially confined to her bed. As such she has been denied the opportunity of any form of social interaction beyond her immediate environment and does not have any means of mobility."

What has made the patient's condition even more tragic, is the fact that she "is a person with an alert and active mind trapped in a non-responsive body" and that she is unable to engage in the ordinary functions of life (para 15). A medical

expert declared that her trauma almost defies "contemplation and appreciation" (*ibid*).

As far as damages for loss of earning capacity is concerned, the Supreme Court of Appeal found no reason to interfere with the award of the court *a quo* (paras 16–20). It is unnecessary for the purposes of the present discussion to deal with facts in this regard. However, a noteworthy and interesting aspect briefly considered by Zulman JA was the submission that the patient's damages for loss of earning capacity ought to be reduced because she will be confined to an institution for the rest of her life and would thus necessarily save money in this way. This contention was strongly rejected by Hartzenberg J. While the Supreme Court of Appeal declined to comment on the judge's reasoning, it pointed to the absence of any evidence as to the nature and extent, if any, of such savings (para 20). There was accordingly no factual basis on which this could have been considered in any event.

The court *a quo* awarded R1,25 million as general damages for pain, suffering and loss of the amenities of life. This is among the largest amounts of damages in nominal terms ever awarded by a South African court. In assessing the correctness of this amount, Zulman JA summarised the circumstances indicating the nature and extent of the patient's loss (para 21):

> "I refer to what I have stated above in regard to the patient's obvious severe pain and suffering and loss of the normal amenities of life. In addition, the patient has effectively lost her husband as a result of the collision – he no longer visits her and is apparently planning to divorce her. His evidence in this regard was to the effect that, although he still loves her, his feelings for her are akin to that felt for a child and not a spouse. This loss of an exceptionally happy marriage relationship obviously severely exacerbates the patient's psychological and emotional suffering. This is a case where the patient is acutely aware of her pain, discomfort, profound disablement, total dependence upon others and loss of nearly all the amenities of her pre-collision life. She has to cope with that awareness for the rest of her not inconsiderable life span."

The court then cited the well-known general principles which are applicable in appeals against awards of damages that are in the (wide) discretion of a trial court (in para 22; see Erasmus and Gauntlett para 117; see also Visser and Potgieter *Damages* (2003) 491–493). In the court's opinion the finding by the court below in awarding a huge amount of damages was "manifestly free of any misdirection or irregularity". The trial court carefully considered the matter and was led by the principles enunciated in *Marine & Trade Insurance Co Ltd v Katz NO* 1979 4 SA 961 (A) in which there were similar circumstances – although the patient *in casu* suffered more. In *Katz* an award of R90 000 was made. Translated to the values at the time of the current trial, the award made in the *Katz* case amounts to approximately R1,4 million – which is higher than the award *in casu* (para 23). Zulman JA concluded as follows (para 25):

> "In so far as guidance is to be sought from previous awards and although the amount of R1 250 000,00, at first blush, appears high, I certainly do not regard it as excessive ('buitensporig') as contended for by the appellant. Given the circumstances of this case, in particular the extremely serious injuries which the patient suffered and their tragic *sequelae*, I certainly would have awarded, as general damages, an amount which would not have differed substantially, if at all, from the amount awarded by the court below. I accordingly see no warrant for interfering with the exercise by that court of its discretion."

Finally, the court deplored the conduct of the appellant *in casu* in delaying payment to the respondent of undisputed amounts of damages for more than a year (paras 26–29). However, the appellant did apologise and rectified its failure.

3 Comment and evaluation

This judgment is noteworthy for a number of reasons.

First it probably demonstrates the importance of not putting an artificial limit on the maximum amount of damages to be claimed and awarded in personal injury cases. Although damages must sometimes take account of the financial and economic realities in a country (see eg Visser and Potgieter 439), and it is probably justifiable in certain instances to have statutory limitations on the *quantum* (*idem* 290), it is hardly reasonable in a relatively developed country like South Africa to have rigid principles and absolute exclusions in cases of quantification relating to personal injury claims. Such arbitrary limits, as some have proposed, will deny justice to the injured.

Secondly, the question of the significance possible savings caused by the devastating injuries suffered by the patient raises the complexities of the collateral source rule, or, as it is more aptly described in Afrikaans, *voordeeltoerekening* (see generally Visser and Potgieter 220). While Zulman JA correctly dismissed this submission for lack of evidence of the possible extent of the alleged savings (para 20), Harzenberg J in the court *a quo* was much more explicit (*ibid*):

> "Ek wil net op hierdie stadium meld dat ek definitief verskil van Mnr Delport [counsel for the appellant in the trial court] wat aanvoer dat daar op 'n manier 'n vermindering van die pasiënt se skade moet wees omdat sy nou bedgekluister is en gevolglik nie meer mooi kan aantrek nie, nie kan reis nie en nie geld kan uitgee op vermaaklikheid nie. Dit lê nie in die mond van die persoon wat verantwoordelik is vir die pasiënt se toestand om 'n voordeel te wil beding vir hierdie gevolg wat myns insiens niks met die delik pleger te doen het nie."

The judge's rejection of the submission was probably inspired too much by emotional considerations – which is understandable given the tragic circumstances of the case. However, the defendant (appellant) as statutory "insurer" was in any event *not* the perpetrator that caused the grievous injuries to the patient. There is also no reason why it should not be able to raise an issue that could be relevant in principle regarding the calculation of *quantum.* Damages in these circumstances are in any event not awarded to punish anyone, but merely to compensate for the culpable conduct by the driver of the vehicle causing the injuries, and remains an irrelevant consideration. Moreover, there is indeed some authority supporting the idea that savings, even in these tragic circumstances, could be taken into account in reducing patrimonial damages (see eg *Roberts v Northern Assurance* 1964 4 SA 531 (D) 537 (the seriously injured plaintiff was institutionalised and the court refused to consider damages for loss of earning capacity in isolation – the absence of expenses in maintaining himself had to be reckoned with); *Reid v SAR & H* 1965 2 SA 181 (D) 190 (serious injuries would prevent the plaintiff from marrying and having children and thus caused savings in providing maintenance); see Visser and Potgieter 220 for further cases illustrating this principle).

Thirdly, the fact that the patient, who used to be an active and dynamic person, is conscious of the seriousness of her injuries, is relevant in determining the extent of the award for non-patrimonial loss. The Supreme Court of Appeal

stressed this subjective factor (see eg para 21). Consciousness or unconsciousness is also a matter of considerable complexity (see generally Visser and Potgieter 104–107; Neethling, Potgieter and Visser *Law of delict* (2006) 226–230). It is not exactly clear precisely how this factor was considered *in casu.* A related aspect that may be raised is the extent to which the sum of money awarded could be usefully employed to alleviate the position of the plaintiff – something which it was not necessary for Zulman JA to pay too much attention to. As is known, in *Collins v Administrator, Cape* 1995 4 SA 73 (C) the court accepted a *functional approach* when considering damages for non-patrimonial loss in the case of a permanently unconscious young child, and refused an award for non-patrimonial loss because it could serve no valid objective in alleviating the position of the tragically injured child (92–93). While it may be accepted that *in casu* the award could probably serve some kind of useful purpose, R1.25 million would obviously not be able to "create enough happiness" to act as a realistic counterweight to the severity and extent of the loss (Visser and Potgieter 196–197). The theory concerning the "overcoming" of the loss (based on the German law *Überwindungsgedanke* – see Visser "Kompensasie van nie-vermoënskade" 1983 *THRHR* 56–60), would probably also be an insufficient basis to explain the full amount of the award. The only possible conclusion is that a strong element of personal as well as objective satisfaction ("genoegdoening") must inevitably be involved as an object of damages in this instance (see Visser "Genoegdoening met betrekking tot nie-vermoënskade" 1983 *TSAR* 54; "Genoegdoening in die deliktereg" 1989 *THRHR* 468). This means that although the patient's loss can never be made good again by the R1.25 million, this amount is, *inter alia,* an indication that the law has responded in the best practical way possible to address the injuries caused to her. Any part of the amount which cannot be used by her personally, could obviously be used by her to improve the circumstances of her children – from which she might derive some satisfaction and pleasure. An objective element of satisfaction is also present in that the community may feel more comfortable knowing that the law has done what it can in these circumstances.

Fourthly, the court's confirmation of the principle of seeking guidance from previous awards in broadly similar cases in assessing damages for non-patrimonial loss, is useful – as is its approval of the earlier decision on the possible effect of an alleged tendency towards higher awards (as considered in *De Jongh v Du Pisanie NO* 2004 2 All SA 565 (SCA) paras 64–65). The same can be said of the court's approach in deciding whether or not to interfere on appeal with the award of damages by the court *a quo.* Even this reaffirmation of existing principles is to be welcomed, since it promotes legal certainty.

Finally, the court's consideration of the deplorable aspects of the conduct of the appellant (the defendant) evidently did not play a role in dismissing the appeal. This is not an instance where the *actio iniuriarum* was instituted and where certain acts or omissions by a defendant may be relevant in regard to the *quantum* of satisfaction (Visser and Potgieter 461–462). Although the statutory defendant *in casu* has an obligation to act reasonably and justly, the *quantum* of damages in cases such as the present should not be influenced by the identity, financial means or conduct of the defendant.

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