

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

**CASE NO.: EL 428/08
ECD 928/08**

In the matter between:

VUYISILE DAYIMANE

PLAINTIFF

And

THE MINISTER OF CORRECTIONAL SERVICES

DEFENDANT

JUDGMENT

BESHE, J:

[1] Plaintiff in this matter brought an action for damages suffered by him as a result of an assault on him at the time when he was an awaiting trial prisoner at East London Medium “B” Prison, by prison warders in the employ of the defendant.

[2] The merits of the claim have already been decided in plaintiff’s favour.

[3] *Kemp AJ* found that the defendant was liable for such damages as the plaintiff may prove that he has suffered as a result of the assault that took place on the 16th of June 2005. The matter is now before me for the quantification of those damages.

[4] The plaintiff's claim is for damages for an amount of R3 157 397.40 which amount is made up as follows:

1. Past loss of earnings	R187 919.00
2. Future loss of earnings or earning capacity	R281 635.00
3. Estimated future medical expenses	R597 450.00
4. Estimated future rehabilitation expenses	R3 872.16
5. Future costs of a caregiver	R480 000.00
6. Transport	R132 000.00
7. Accommodation	R205 000.00
8. Specialised equipment	R262 521.35
9. Case manager	R7 000.00
10. General damages in respect of pain and suffering, <i>contumelia</i> , shock, permanent disability, permanent disfigurement, and permanent loss of amenities of life and impairment of health	R1 000 000.00

[5] At the commencement of the proceedings *Mr Wood* who appeared for the plaintiff informed the court that save for the amount to be awarded in respect of general damages, damages in respect of other heads were agreed upon.

[6] It also transpired that the following reports were accepted as correct and therefore admitted without formal proof thereof:

Reports admitted by defendant:

Dr P A Olivier

Dr H J van Daalen

Mr R Charlton Perkins (Cutting Edge Carpentry and Buildings)

Dr R T Toogood

Plaintiff admitted the following reports:

B Sotyato-More (Occupational Therapist)

Ms N Runqu (Industrial Psychologist)

Peter Ennis (Actuarial Report)

[7] In support of plaintiff's claim for damages, in addition to expert reports, two other witnesses gave *viva-voce* evidence, Ms Peliwe Mdlokolo, (Occupational Therapist) and Mrs Priscilla Tshefu, plaintiff's sister-in-law.

[8] From the body of evidence before me the following emerged: Whilst an awaiting trial prisoner on the 16th of June 2005, plaintiff who was then about 50 years old, and an awaiting trial prisoner at Medium "B" Prison, Fort Glamorgan, East London, was assaulted by prison warders in the employ of

the defendant.

[9] Upon being evaluated as Free Hospital on the day of the assault, the following injuries were noted:

A Gustilo Type 1 compound fracture to the right proximal tibia and fibula;

Small anterior wound;

No signs of neurovascular complications;

A closed fracture to the right ulna;

Signs of pre-existing deformity involving the elbow, wrist, hand and fingers.

[10] According to Dr P A Olivier's report, the plaintiff received the following treatment after his admission at Free Hospital:

His wound was cleaned and a well padded above knee cast was applied on the right side. A plaster of paris cast was applied on the right arm to compensate for the ulna fracture. He was admitted for intravenous antibiotics and monitoring. On the 17th of June 2005 it was noted that the Glasgow Coma Scale was 10/5. On the 25th of June 2005 it was noted that the plaintiff had improved. He was talking and fully conscious.

[11] During August 2005 a debridement of his wound was performed, so was a skin grafting procedure in September of 2005. The plaintiff had been in hospital for almost eight (8) months when he was discharged on the 10th of February 2006.

[12] In Dr Olivier's opinion, plaintiff sustained serious orthopaedic injury when he sustained a compound fracture to the right proximal tibia. The injury resulted in chronic osteitis. Dr Olivier also opined that plaintiff's injuries would have resulted in a severe degree of pain and discomfort for a period of six months during which period he underwent multiple surgical procedures and it was difficult to mobilize due to the fact that he had sustained a fracture to his right arm.

[13] It also transpired from the evidence that the plaintiff is now permanently wheelchair bound. According to both Ms Mdlokolo and Ms Tshefu, plaintiff stays in a shack in the same premises where his sister-in-law and her family occupy the main house. The shack he occupies has electricity. He uses a bucket as a toilet since it is difficult for him to access the toilet due to rough terrain and stairs leading to the toilet. He cannot take care of his hygiene needs and depends on his sister-in-law to wash and dress him. He is incontinent. To move from one place to another somebody must push his wheelchair. He is unable to prepare his meals. He cannot be left unattended.

He cannot use public transport.

[14] To while away time plaintiff assists his sister-in-law who sometimes operates a fruit and vegetables stall, weather permitting.

[15] According to Ms Mdlokolo plaintiff cannot wear closed shoes following his injury. He complains of pain on the front of his head, upper back and lumber region and on both feet and right upper limbs.

[16] In a bid to assist the court to arrive at a just and reasonable award for damages, both *Mr Wood* for the plaintiff and *Mr Jozana* for the defendant referred me to a number of useful cases which dealt with awards for damages including general damages. These cases have no doubt provided me with useful guidelines and examples of comparable awards made in cases where similar injuries were sustained and the consideration of an award for damages in general.

[17] In my endeavour to arrive at an award that is fair to both sides I will be mindful of what *Watermeyer JA* said in ***Sandler v Wholesale Coal Supplies Ltd AD 1941 at 199*** namely that “It must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain

and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. 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".

[18] *Mr Jozana* also referred the court to the case of ***The Minister of Safety and Security v Seymour, Dennis Thomas 2007 (1) All SA 558 (SCA)*** where at paragraph 20 *Nugent JA* had this to say "Money cannot be more than a crude solarium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss. The awards I have been referred to reflect no discernable pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind that when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection".

[19] As indicated earlier on in this judgment, plaintiff's claim for general damages is for the amount of R1 000 000.00. However in argument *Mr Wood* contended that due to the fact that there was no sequelae for head injury, an amount of R900 000.00 would be appropriate. *Mr Jozana* on the other hand submitted that if the court was to follow the trend of amounts awarded for similar injuries, the amount of R900 000.00 claimed by the plaintiff for general damages will not be appropriate. He urged the court to adopt a conservative approach and award between R300 000.00 and R400 000.00 and contended

that that amount will be fair to both parties.

[20] I will take cognisance of awards made in cases referred to by *Messrs Wood and Jozana* as well as in other cases to the extent that the injuries sustained by claimants in those cases are comparable to the injuries sustained by the plaintiff *in casu*.

[21] Examples of awards made in cases where claimants had sustained injuries to the lower limbs include the following cases:

Mgudlwa v Road Accident Fund 2011 (6E3) QOD 1 (ECM) a 34 year old teacher who had fractured his femur and tibia and was in traction for three and a half months was awarded R300 000.00 in respect of general damages.

[22] In ***Sinkampule v Road Accident Fund 2010 (6E4) QOD 1 (ECM)*** a 37 year old loader/bus conductor who had sustained a fracture of the right tibia and fibula, and was immobilised in a full length plaster cast for 2 months. He has since relied on crutches for mobility. His right leg was shortened. He was awarded R56 000.00 in general damages, this being 80% of the total claim as a result of 80/20 apportionment.

[23] ***Aeschliman v Road Accident Fund 2010 (6E7) QOD 1 (ECP)***. The plaintiff in this matter was involved in a collision when she was 20 years old and sustained the following injuries:

1 centimetre laceration of the upper lip

blunt trauma to the right shoulder

a compound injury to the right knee consisting of

i Fracture of the medial plateau

ii rapture of the posterior crutiate ligament

iii rapture of the post lateral corner ligament

She underwent a number of surgical procedures. She was awarded R300 000.00 in respect of general damages.

[24] The injuries sustained by the plaintiff *in casu* appear to be of a more serious nature than those sustained by the claimants in the aforementioned cases. Plaintiff in this case also sustained injuries to his upper body and as indicated is confined to a wheelchair and is unable to take care of himself. There can be no doubt that this subjects him to the indignity of being dependant on others, especially his sister-in-law who has assumed the responsibility of feeding him, attending to his ablusion, moves him around etc. Plaintiff's injuries resulted in pain and suffering, contumelia, permanent disfigurement, disability, loss of amenities as well as impairment of health.

[25] In the premises I am of the view that general damages of R400 000.00 will be appropriate.

[26] Regarding the claim for loss of earnings, *Mr Jozana* urged me to allow contingency of 20% in view of the fact that according to the occupational therapist's report plaintiff used to sell cigarettes and he can continue doing so seeing that he even assists his sister-in-law in running the fruit and vegetable store. He further contended that the same should apply to the damages under the head: estimated future medical expenses.

[27] It is indeed so that when considering contingency factors that are to be applied, one looks at factors such as the possibility of errors in the estimation of plaintiff's life expectancy, likelihood of illness or unemployment which would have occurred in any event, inflation / deflation in the value of money, the fact that treatment may or may not be taken or become necessary etc. In the circumstances of this case I am of the view that a contingency of 15% will be appropriate in respect of future medical expenses. I do not propose to apply any contingency in respect of future loss of earnings and earning capacity because, according to defendant's expert witness's report: Bubusi Sotyato-More an Occupational Therapist, the plaintiff will never be able to continue with his hawking business without incurring costs of paying someone to order, pack and unpack stock in view also of the fact that his medical status has

been gradually deteriorating.

[28] In the circumstances, my calculation of damages is as follows:

(i) Past loss of earnings	R187 919.00
(ii) Future loss of earnings/earning capacity	R281 635.00
(iii) Estimated future medical expenses	R597 450.00
	- 15%
	= R507 833.00
(iv) Estimated future rehabilitation expenses	R3 872.00
(v) Future costs of caregiver	R480 000.00
(vi) Transport	R132 000.00
(vii) Accommodation	R205 000.00
(viii) Specialized equipment	R262 521.35
(ix) Case manager	R7 000.00
(x) General damages	R400 000.00
Total	R2 467 780.35

[29] Accordingly judgment is given in favour of the plaintiff as follows:

The defendant is to pay the plaintiff:

- 1. The sum of R2 467 780.35 as and for damages arising from the assault on the plaintiff that took place on the 16th of June 2005.**
- 2. Interest on the aforesaid sum calculated at the rate of 15.5% per annum from a date 14 days after this order.**
- 3. Costs of suit including the qualifying expenses if any of:**

R J Koch

Dr P A Olivier

DR H J van Daalen

Mr R Charton Perkins

Dr R T Toogood

Ms Peliwe Mdlokolo

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For Plaintiff	ADV: C B Wood
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For Defendant	ADV: M Jozana
Instructed by	THE STATE ATTORNEY 42 – 46 Corner Oxford and Terminus Street 1 st Floor, Permanent Building EAST LONDON TEL.: 043 - 706 5100 REF.: 911/06-P4 – Ms Myoli
Date Heard	9 March 2011
Date Reserved	9 March 2011
Date Delivered	13 December 2011