THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 27428/10

AD **FIRST PLAINTIFF**

IB **SECOND PLAINTIFF**

And

MEC FOR HEALTH AND SOCIAL DEVELOPMENT, WESTERN CAPE PROVINCIAL GOVERNMENT **DEFENDANT**

Coram: ROGERS J

Heard: 16-18, 22, 24, 25 & 29 FEBRUARY 2016; 1-4, 7-10, 14-17, 22 & 23 MARCH 2016; 18-21, 25, 26 & 28 APRIL 2016; 3-5, 9-12, 16-19, 23, 24 & 31 MAY 2016; 8, 9 & 16 JUNE 2016; 8, 10, 11 &12 AUGUST 2016

Delivered: 7 SEPTEMBER 2016

JUDGMENT

ROGERS J:

Introduction

[1] (This paragraph, which tabulates the structure of the judgment, is not reproduced.)

[2] The plaintiffs are the parents of IDT who was born at Mowbray Maternity Hospital on 12 January 2009. After mother and child were discharged following an uneventful birth, IDT began to exhibit signs of jaundice. He was readmitted to the hospital on 16 January 2009. By the time he was discharged on 22 January 2009 he had suffered irreversible brain damage, resulting in athetoid cerebral palsy ('CP').

[3] In December 2010 his parents issued summons against the defendant alleging negligent failure to diagnose and treat the jaundice timeously. They claimed damages for themselves and on behalf of IDT. In July 2012 the defendant conceded the merits. The present judgment is concerned with quantum only.

[4] The trial ran for 45 days from mid-February to mid-June 2016. I heard argument over four days in the second week of August 2016. In regard to issues other than the trust to be mentioned hereunder and related constitutional matters, Mr Irish SC leading Ms Munro appeared for the plaintiffs and Ms Bawa SC leading Ms O'Sullivan for the defendant. In argument on the trust issues the teams were supplemented by Ms Pillay for the plaintiffs and by Mr Budlender SC for the defendant. The Centre for Child Law ('CCL'), which was admitted as an amicus curiae in respect of the trust issues, was represented during argument by Mr Dutton leading Ms Campbell.

[5] The transcript of oral evidence covers 4880 pages; the plaintiffs' expert reports 947 pages; the defendant's expert reports 388 pages; joint minutes of experts 72 pages; the pleadings, further particulars, pre-trial minutes, amendment

application and other court documents 775 pages and the documentary exhibits over 1100 pages. The plaintiffs served expert reports from 22 experts of whom 13 testified. The defendant served expert reports from 15 experts of whom six testified. In most instances the experts filed two and sometimes three reports.

[6] In regard to argument, I directed that counsel file concise heads not exceeding 50 pages in length so that I could obtain a clear view of their final positions on the main issues. I indicated that they were at liberty to file supplementary long heads or appendices. The plaintiffs' long heads ran to 150 pages together with about 100 pages of appendices. The defendants' appendices covered 341 pages. The amicus' heads were 24 pages. I was given four files of legal authorities. An already lengthy judgment would be further extended if I were to identify and respond to all the arguments. I have, however, read all the submissions and endeavoured to ensure that my judgment addresses the main contentions.

[7] By the time the trial started the claims were R2 010 354 for the plaintiffs personally, R32 932 148 for IDT and R3 293 215 for the cost of protecting and administering IDT's award. Certain items of the claims were agreed before and during the trial. Some were agreed in a specified amount, others on the basis of formulas with the determination of the final amounts to await my finding of IDT's life expectancy. Many items remain fully in dispute.

(Paragraphs 8 – 23, summarising IDT's condition and the claims, are not reproduced.)

[24] The parties agree that IDT's award should be paid to a trust to be administered for his benefit. The parties also agree that the amount in respect of future medical expenses should be ring-fenced ('the medical fund') and that in certain circumstances the defendant should be obliged to supplement the medical fund and that in certain circumstances the defendant should be entitled to a refund from the medical fund (I refer to these as the top-up and claw-back provisions). The terms of these provisions and certain other aspects of the trust deed are in dispute.

[25] The trust issues were formally introduced by way of a conditional counterclaim by the defendant to which the plaintiffs replicated. They annexed to their respective pleadings the trust deeds they proposed.

(Paras 26 – 45, of an introductory nature and dealing with the assessment of expert evidence, are not reproduced.)

The trust and development of the common law

[46] Before addressing the disputed claims for medical costs I need to deal with the case relating to the trust and allied arguments concerning the development of the common law.

[47] The most contentious aspects concern the top-up and clawback provisions. In summary the plaintiffs' proposal is the following:[1]

- The ring-fenced 'medical fund' will be the actuarially calculated present value of my award in respect of future medical expenses after deducting a pro rata proportion of total permissible legal fees and disbursements less any taxed costs recovered from the defendant. (For convenience I shall refer to these as the 'gross medical fund' and 'net medical fund' respectively. The plaintiffs' attorneys are acting on contingency. The total legal costs, for purposes of determining the net medical fund, will be allocated pro rata across the various heads of damages. The deduction will be reduced by taxed costs recovered from the defendant. The deduction will thus be at least a pro rata share of the attorney/client component and the attorneys' contingency allowance. The deduction may be more if there is a without-prejudice offer negatively affecting the usual costs order.)
- The top-up provisions will only apply if IDT survives beyond his expected death age ('EDA') as determined by my finding on his life expectancy ('LE') and if by that stage the net medical fund (including investment returns thereon) has been depleted. Only medical expenses attributable to IDT's CP

[1] For the top-up provisions, see clause 17 of the plaintiffs' trust deed read with the definitions of 'Medical Fund', 'Date of Depletion', 'Certificate of Depletion' and 'Supplementary Payment'. For the claw-back provisions, see clause 18.

will be deducted from the medical fund. (Unrelated medical expenditure would be funded from the award for loss of earnings and general damages.)

- If the corporate trustee considers that a top-up payment is needed, it will issue a certificate of depletion. In anticipation of depletion at IDT's EDA the trustee may make application for a top-up not earlier than 18 months prior to the EDA but no payment need be made until the EDA arrives. Provision is made for mediation or arbitration if the defendant disputes the need for the top-up.
- The clawback provision will become operative when the trust terminates, which is upon IDT's death and settlement of all the trust's liabilities or on such other date as the court may direct. Upon such termination any residue of the medical fund, together with any equipment acquired from the medical fund, will be transferred to the defendant.

[48] The defendant's proposal as pleaded at the time of argument differed from the plaintiffs' in the following respects:[2]

- The ring-fenced 'medical fund' will be the gross medical fund without deduction for legal costs. (This means that depletion will take longer.)
- Conversely, though, the top-up provisions will apply immediately and not only in respect of the period for which IDT may survive beyond his EDA.
- Although there is not much difference in the formulation of the clawback provisions, the preceding two bullet points could substantially affect the amount available for clawback on IDT's death.

[49] In oral argument Mr Budlender explained the defendant's proposal somewhat differently. He said that the defendant had intended to convey the following:

- The ring-fenced medical fund will be the net rather than the gross amount.
- Once the net medical fund is exhausted, the top-up provisions will become operative subject to one further condition, namely that an amount equal to the gross medical fund has actually been expended on medical costs. This actual

[2] See clause 14.

expenditure would be the nominal rand expenditure as and when incurred without adjustment for changes in the time-value of money. (If, for example, in ten years' time there is an item of medical expenditure costing R200 000, the full R200 000 will constitute expenditure towards the threshold even though the present value of that amount (ie at the date of my judgment) is only, say, R60 000.)

[50] Since Mr Budlender's exposition did not accord with the defendant's proposed trust deed, I asked the defendant's team to submit a revised draft, which has been done.

[51] There is no doubt in my mind that the defendant's latest proposal is significantly better for IDT than the plaintiffs' proposal. Indeed I think this was also true of the defendant's previous proposal. I find it difficult to understand why the plaintiffs have persisted with their version. During argument I understood Mr Irish to concede that the defendant's latest proposal is very favourable to IDT:

- The date of actual depletion of the net medical fund will be the same on both versions.
- On the defendant's version its obligation to begin top-up payments might be deferred beyond the depletion date if by that date an amount equal to the gross medical fund has not yet been expended. However that would only be worse for IDT than the plaintiff's version if IDT were to reach his EDA without there having yet been expenditure exceeding the amount of the gross medical fund. Since the defendant accepts rand nominalism as the basis for determining the latter question, it is just about certain that a nominal amount equal to the gross medical fund will have been spent before IDT's EDA. For two reasons, the investment growth in the medical fund will fall well short of neutralising increasing medical prices: (i) Investment returns will only be earned on the net medical fund. (ii) The net medical fund itself will reduce as medical expenses are incurred, so there will returns on a diminishing amount.
- IDT will thus benefit from the topping-up sooner on the defendant's version than on the plaintiffs' version. (And, curiously, the worse the plaintiffs fare on

costs, eg if it transpires that the defendant has made a without-prejudice tender exceeding my award, the smaller the starting value of the net medical fund will be, thus potentially triggering a top-up obligation even sooner.)

[52] In its counterclaim the defendant pleaded that the common law should be developed to allow the clawback provisions. The alleged need to develop the common law was pleaded in recognition that the current position at common law is (i) that a person suing for damages must claim, by way of single proceedings, all damages to which he may be entitled, both past and prospective (ii) that the court is obliged to award these damages as a lump sum – the plaintiff is not entitled to claim and is not obliged to accept future damages by way of periodic payments. (I shall refer to these as the one-action rule and the lump-sum rule.)

[53] The pleaded development of the common law was said to apply to (i) delictual claims (ii) for very substantial amounts (iii) arising from medical negligence (iv) where such damages depend in large measure on the injured person's LE (v) with the resultant substantial risk that the awarded damages will not be used for their intended purposes (vi) and where the claim is made against the Western Cape Department of Health, alternatively against an organ of state which has the constitutional duty to provide access to health care services, alternatively against any defendant.

[54] For reasons which I shall presently explain, I do not think it necessary in this case to express a final view on whether and to what extent the common law should be developed in the manner pleaded by the defendant. However, since the defendant views the present matter as a test case and has engaged senior counsel with special expertise in constitutional matters to argue this part of the case, I shall deal briefly with the main points. This may also be of assistance if the case were to go further and another court were to find that the issues relating to the development of the common law should be decided.

[55] Precisely what the state of the common law would be if it were developed as pleaded by the defendant is not altogether clear. The defendant has alleged that the existing rule which needs to be changed is that an award of damages may not be

made 'in such a manner that the amount ultimately to be paid is dependent on when future events take place, or whether they take place'. There are various ways in which the one-action rule and/or the lump-sum rule might be varied. One possibility is to permit multiple actions. Another is to direct a defendant to make periodic payments in fixed annual amounts, or as and when future expenses are incurred, until the victim's death. In the present case the defendant does not in terms plead that any of these solutions should be adopted. Mr Budlender submitted that all I need recognise for present purposes is a flexible jurisdiction to fashion solutions which are fair and reasonable in the particular circumstances of the case. In this particular case, he submitted, the defendant's proposal was a fair and reasonable solution. The development of the law in this field would occur incrementally. Mr Budlender said I need not concern myself with what solutions might be thought fair and reasonable in other cases.

[56] That our common law of delictual damages incorporates the one-action and lump-sum rules is clear (*Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) at 147B-D; *Marine & Trade Insurance Co Ltd v Katz NO* 1979 (4) SA 961 (A) at 970C-H; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835B-836A; *Coetzee v Guardian National Insurance Co Ltd* 1993 (3) SA 384 (W) at 392E-J; Boberg *The Law of Delict* at 486; Van der Walt & Midgley *Principle of Delict* 3rd Ed para152). In relation to road accident injuries, the legislature has intervened to allow future medical expenses to be covered by an undertaking (now s 17(4)(b) of the Road Accident Fund Act 56 of 1996, the first version of which was s 21(1C) inserted in 1978 into the Compulsory Motor Vehicle Insurance Act 56 of 1972).[3]

[57] When applying a provision of the Bill of Rights the court must, in order to give effect to that right, apply or if necessary develop the common law and may also develop rules of the common law to limit the right in question (s 8(2) of the Constitution). When developing the common law the court must promote the spirit,

[3] In *Wade v Santam Insurance Co Ltd & Another* 1985 1 PH J3 (C) Baker J ordered a defendant to pay the claimant's lost earnings by way of indexed instalments until date of death or remarriage. The report is terse. The judge apparently said that he 'got the idea' of ordering instalments from s 21(1C) of Act 56 of 1972, while acknowledging that the section was not directly applicable. The authors of Neethling-Potgieter-Visser *Law of Delict* 7th Ed observe, correctly in my view, that there appears to be no authority for the view that the court has the inherent jurisdiction to make such an order (p 245 fn 223). *Wade* has not subsequently been cited in any reported decisions.

purport and objects of the Bill of Rights (s 39(2)). Because the Constitution is our supreme law, any law (including the common law) which is inconsistent with it is invalid (s 2).

[58] The provisions of the Bill of Rights which are said by the defendant to give rise to the need to develop the common law are (i) everyone's right to have access to health care services, with the corresponding obligation on the state to take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of this right (s 27 read with s 7(2)); (ii) the right which every child has to basic health care services (s 28(1)(c)) and to have his or her best interests treated as of paramount importance (s 28(2)).

[59] The pleaded development of the common law is not confined to damages suffered by children. In response to a question from the court, Mr Budlender confirmed that it was not the defendant's case that the common law needed to be developed in order to safeguard the interests of children harmed by medical negligence. The proposed development would apply to adult victims as well, because their claims might also relate to a lengthy future period. In *Singh & Another v Ebrahim* [2010] ZASCA 145 the court rejected an argument that s 28 justified differential treatment of children in the assessment of damages (paras 123-130).

[60] The defendant's case is thus concerned with the financial burden which lump-sum awards place on public hospitals, a burden which (so the argument goes) can hamper organs of state in progressively realising everyone's right to have access to health care services and in fulfilling their obligation to provide basic health care services to all children. In short, awards in favour of the few are said to harm the rights of the many.

[61] In the present case the lump-sum rule is engaged in somewhat attenuated fashion. The defendant does not say that it should only have to pay for IDT's future medical expenses as and when they are incurred or that future actions should be instituted as future expenses are incurred. Both sides have proceeded on the basis that I must quantify and make a lump-sum award in the usual manner. In a general sense the top-up and clawback provisions are only intended to be operative if future

events reveal that the damages as conventionally assessed are more or less than IDT requires.

[62] Whatever the pros and cons might be of more radical departures from the one-action rule or lump-sum rule, the proposed departure in the present case is not justified by its constitutional premise. The defendant accepts that it would not be fair or reasonable to have a clawback provision without a top-up provision. Furthermore the defendant does not say that its proposed solution relieves the court of the duty to assess damages conventionally. The defendant accepts that damages as conventionally assessed must be paid as a lump sum to the trust. No evidence was led to show that this type of solution would promote the constitutional rights and duties on which the defendant relies nor is such a conclusion self-evident, indeed it is counter-intuitive:

- Private and public resources would still have to be expended on a full quantum trial, despite the fact that the top-up and clawback provisions might render the exercise largely academic
- The defendant and similarly placed organs of state would still have to pay damages, as conventionally assessed, in a lump sum. The money in question would thus not be available to meet state organs' obligations to the population at large.
- Although there would be some prospect of eventual clawback, in most cases that would lie many years in the future.
- In any given case there would be an even likelihood of the top-up and clawback provisions becoming operative. On average one would expect the financial benefit from clawback rights to be neutralised by the financial burden from top-up provisions.

[63] The first and second of these observations would not apply if one adopted a more radical departure from the lump-sum rule, namely substituting for a lump-sum award an obligation to meet future medical expenses as they arise. Such a regime might allow public funds to be better matched to current public needs and in a general sense this might enhance the constitutional rights and duties which the

defendant invokes. The parties and the court would also be saved the time and expense of determining future medical costs.

[64] In my view, however, a radical departure of that kind should be left to the legislature. The decision is one of policy. There are arguments for and against the lump-sum rule. While the lump-sum rule may sometimes result in over-compensation or under-compensation, it has the advantage of finality. An order for periodic payments inevitably involves risk of ongoing disputes as to whether particular medical expenditure is reasonable and whether it arises from the injury for which the defendant is liable. An order against an organ of state to make indeterminate payments over an indeterminate period may present significant budgetary and fiscal challenges. In order properly to assess its annual requirements under such an order, an organ of state would have to obtain annual updates on the claimant's condition and likely medical requirements. Even if this information were readily obtainable, its assessment could be time-consuming and expensive. If the lump-sum rule were varied, there would be many aspects of definition and detail which would more appropriately be regulated by a statutory scheme.

[65] In our constitutional democracy it is the legislature and not the courts which has the major responsibility for law reform. The judiciary must exercise caution, confining itself 'to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society' (*Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC) para 36; *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd & Another* 2016 (1) SA 621 (CC) paras 37-40). It has also been observed that a constitutional principle that tends to be overlooked when generalised resort is made to constitutional values is the principle of legality: 'Making rules of law discretionary or subject to value judgments may be destructive of the rule of law' (*Bredenkamp & Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 39).

[66] I am not attracted by the argument that the court should have a wide flexible jurisdiction to fashioning orders to address the perceived shortcomings of the lump-sum rule. The rule of law is a foundational principle of our democracy and equality

before the law is a guaranteed right. Law needs to have a measure of predictability (see *Mighty Solutions* para 38) and to operate similarly in relation to similarly placed litigants. If the court had the power, without the present defendant's consent, to compel it to make provision for indeterminate payments over an indeterminate period (and this is what Mr Budlender argued), I do not see how such an order could be granted in this case but not in a host of broadly similar cases which may arise against organs of state.

[67] The common law in England and Scotland adopted the lump-sum rule (see *Simon v Helmot* [2012] UKPC 5 paras 25-26). By way of s 2(1) of the Damages Act 1996 the English courts were given the power to make orders for periodic payment if both parties agreed. In *Wells v Wells* [1998] 3 All ER 481 (HL) Lord Steyn identified various shortcomings in the common law lump-sum rule which applied in cases where one or both parties objected to periodic payments (as apparently they routinely did) but he said that judges could not make the change; only Parliament could 'solve the problem' (at 502e-h). The English lawmaker intervened by way of ss 100-101 of the Courts Act 2003, which substituted the relevant provisions of the Damages Act.

[68] The English regime reflects the sophistication of a legislative scheme (see a discussion in *Thompstone v Tameside and Glossup Acute Services NHS Trust* [2006] EWHC 2904; [2007] LS Law Med 71).[4] The English regime does not leave anything over for later decision and potential dispute. After a full enquiry into damages the trial court makes an order for periodic payments which are annually adjusted in accordance with the retail prices index unless the court orders some other index to apply. The court is required to be satisfied that the periodic payments are reasonably secure. There are provisions relating to the tax treatment of payments, the beneficiary's bankruptcy and the like. The regime is of potential application to all future pecuniary loss, including loss of earnings.

[69] The common law lump-sum rule obtains in Australia (*Todorovic v Walter* [1981] HCA 72 para 6; *Gray v Richards* [2014] HCA 40 para 1) and in Canada

[4] See also on appeal at [2008] EWCA Civ 5; [2008] 2 All ER 553 (CA).

(*Watkins v Olafson* 1989 CanLII 36 (SCC), [1989 2 SCR 750; *Krangle v Brisco* 2002 CanLII 9 (SCC), [2002] 1 SCR 205 para 21). In *Watkins* the Supreme Court of Canada rejected an invitation to alter the lump-sum rule on the basis that such a significant change should be left to the lawmaker. The case contains an instructive discussion of the relevant considerations and of legislative interventions in the United States and elsewhere.

[70] Mr Irish argued, with reference to s 66 of the Public Finance Management Act 1 of 1999 ('PFMA'), that an organ of state is precluded from borrowing money or issuing a guarantee, indemnity or security or entering into any other transaction that binds the institution to a future financial commitment unless it is authorised by the PFMA (s 66(1)) and has been approved, in the case of a Provincial Revenue Fund, by the provincial MEC for Finance (s 66(2)). Mr Budlender objected to this argument on the basis that it was not pleaded. Mr Irish's riposte was that the plaintiffs had pleaded that it was not 'competent' for the court to develop the common law in the manner envisaged by the defendant's trust deed, that 'competent' meant competent in law, that the PFMA was a law, and that the plaintiffs were not obliged to plead the law. I confess to finding this submission contrived. If the plaintiffs' legal representatives had had s 66 of the PFMA in mind when pleading, I think they would have made express reference to it.

[71] Nonetheless, in considering a development of the common law I cannot ignore statutory provisions which may be inconsistent with such development. Section 66(1) would not apply to a court order save perhaps for a settlement which is made an order of court. However if the common law were developed as the defendant proposes one would expect claimants and organs of state to avoid litigation by seeking and offering undertakings in respect of future expenses, if necessary accompanied by a reasonable provisional sum. The ability to resolve claims in this way would be one of the significant policy considerations in favour of a relaxation of the lump-sum rule.

[72] It is here that s 66(1) may present difficulty. The undertaking would bind the institution to a future financial commitment. My attention was not directed to any provision of the PFMA which in terms authorises such a transaction. It may be that

entering into future financial commitments is part of the general executive authority of national and provincial departments. This would be subject inter alia to s 63(1) of the PFMA which stipulates that executive authorities of departments must perform their statutory functions within the limits of the funds authorised 'for the relevant vote' (presumably a reference to money allocated to the department in terms of an Appropriation Act). There would also need to be compliance with the Treasury Regulations promulgated under the PFMA. In terms of para 8.2.1 of the Treasury Regulations an official of an institution may not spend or commit public money without the approval of the accounting officer or a properly delegated or authorised officer. In the present case that would be a reference to the accounting officer of the WC Department for Health and Social Development. If a transaction binds or may bind the Provincial Revenue Fund the transaction must also be authorised by the MEC for Finance (s 66(2)) though it is not clear to me that a departmental undertaking would purport to bind the Provincial Revenue Fund.

[73] These provisions may not be an absolute bar to voluntary undertakings by a national or provincial department but they provide further reason for judicial caution when intruding into the field of public finance.

[74] In summary, the departure from the common law which the defendant contends for in this particular case (ie a solution following the form of its proposed trust deed) has not been shown to be a development which will promote or enhance any rights or duties in the Bill Of Rights. A more radical departure, in which the obligation to pay a lump sum is replaced by an obligation to make periodic payments, might promote or enhance certain rights and duties in the Bill Of Rights but is a development which should be left to the legislature.

[75] However it is unnecessary in this particular case to express a final view on these questions. This is because the defendant has volunteered terms (insofar as top-up and clawback provisions are concerned) which are more beneficial for IDT than those the plaintiffs were willing to accept. I thus need not decide whether a court could in law impose such terms on an unwilling defendant.

[76] A court awarding damages in respect of injuries suffered by a child has the power to order that such damages be paid to a trustee to be administered for the child's benefit (*Van Rij NO v Employers' Liability Assurance Corporation Limited* 1964 (4) SA 737 (W); *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1031 (A) at 1030H-1031H; *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ)). In *Ex Parte Oppel & Another* 2002 (5) SA 125 (C) Ngwenya AJ said that where the child has a guardian the court will not appoint a curator (or presumably a trustee) save in exceptional circumstances He refused the application even though the applicants were the parents and felt they lacked the skills to manage the award and even though the RAF would be meeting the costs of curatorship. I do not think the court's discretion to act in the child's best interests is fettered by a test of 'exceptional circumstances', and the learned judge's contrary view does not seem to be borne out by the authorities he cited. The attitude of the guardian will, of course, always deserve careful consideration. In the present case the plaintiffs, duly advised by an experienced legal team, are in favour of a trust. In *Singh* the award was made to a trust. Although the terms of the trust were not in issue on appeal, the course followed was not questioned.

[77] A court might be reluctant to appoint a trustee if it were necessary for the court to engage in extensive drafting of trust terms. In the present case, however, the parties are in essential agreement on most of the terms. They concur that I have jurisdiction to determine the remaining points of difference on the basis of what I consider reasonable, bearing in mind IDT's best interests. Counsel agreed that the legal teams could settle the wording once I ruled on the substantive issues.

[78] The question may arise as to whether an award should be paid to a trust or to a curator bonis. I referred the parties in that regard to the judgment of Bertelsmann J in *Modiba NO: In re Ruca v Road Accident Fund* 2014 ZAGPPHC 1071. All counsel, including counsel for the amicus, submitted that IDT's best interests would be served by the more sophisticated mechanism of a trust. That is also my prima facie view. I note that the plaintiffs' proposed trust deed requires the trustee to furnish the same information and documentation to the Master as a curator bonis would have to do. The defendant's version obliges the trustee to furnish information and documentation to the Master on request. However counsel agreed that the Master

should be invited to comment on the question before I take a final decision. The present judgment will make provision for that to happen.

[79] In regard to the top-up and clawback provisions of the trust deed, I have explained why the terms offered by the defendant are favourable to IDT. Mr Irish said in argument that because of s 66 of the PFMA the plaintiffs believed and still believe that the undertakings offered by the defendant are of questionable validity and they thus do not attach much weight to them. He said that the plaintiffs' primary goal was to ensure that the trust received upfront the full amount of damages conventionally assessed. They have always been willing to agree to the defendant's reversionary interest, whether or not accompanied by top-up undertakings. If the top-up undertakings are honoured or prove to be enforceable, so much the better. IDT's interest in the net medical fund will cease with his death. The persons affected by the reversionary interest would be his heirs. His parents, who are his current heirs, do not seek any benefit for themselves from the residue of the medical fund.

[80] This being the plaintiff's' attitude, I think I can allow the top-up and reversionary provisions to be included in the trust deed without making a legal determination that the top-up undertakings are valid (though naturally the defendant will be bound unless the undertakings suffer from a statutory defect). And because the defendant is willing to offer the top-up provisions and the plaintiffs are willing to offer the clawback provisions, I need not and do not decide whether (assuming a development of the common law) they are the sorts of provisions which it would be reasonable and fair to impose on a defendant or plaintiff in the absence of agreement.

[81] There are some minor points of detail on the trust deed which it is more convenient to address at the end of this judgment. I thought it important, though, to explain the controversy regarding the top-up and clawback provisions before proceeding further since otherwise the curious reader might have wondered why it was necessary for me to hear 45 days of evidence and four days of argument largely devoted to assessing future medical costs.

(Paras 82 – 619, dealing with life expectancy, past and future medical and related expenses, loss of earnings, contingencies and general damages, are not reproduced.)

Remaining trust issues

[620] I have already dealt with the top-up and clawback provisions. I deal now with the remaining trust issues.

Plaintiffs as founders?

[621] The defendant initially contended that the MEC should be the founder of the trust. The plaintiffs objected to this and pleaded that they should be the founders. The defendant no longer contends that the MEC should be the founder. The defendant submits that the court itself should be the founder. The defendant's counsel submitted that if the court ordered the plaintiffs to register a trust as founders there was a risk that they might later contend that it was not their intention to establish a trust in the form proposed by the court.

[622] I do not intend to go into the question whether, in the case of a court-ordered trust, the court itself could be treated as the founder. The plaintiffs are IDT's parents. Even if it has only symbolic significance, their recognition as founders of the trust is entirely appropriate. They have agreed that the award should be paid to a trust. To the extent that there is disagreement on the terms of the trust, the plaintiffs have submitted to my jurisdiction to determine the disputed terms. It is fanciful to suppose that they could or would challenge the binding force of the court's order.

Geographic accessibility

[623] The defendant's proposed trust deed contains a provision that the case manager must be 'geographically accessible' to the beneficiary.[5] The plaintiffs object to this qualification.

[5] Clause 19.2.

[624] I agree with the plaintiffs' submission that the qualification should not be included. Apart from anything else, the expression is inherently vague. From a practical perspective, those responsible for the appointment of the case manager (which is to be made by the trustee in accordance with the defendant's selection made from three candidates proposed by the parents or next of kin) are unlikely to appoint a case manager who is too distant to make case management practical or cost-effective. I doubt whether a suitably qualified professional would accept a case management assignment in such circumstances.

[625] The parents, trustee and proposed case manager would also take into account my decision to exclude fees for travel time in computing the future cost of case management. While my judgment will not bind the trustee in regard to future expenses to be incurred for IDT's benefit, the parents and trustee will be aware of the risk that the payment of fees to a case manager for travel time might be successfully challenged as unreasonable or unnecessary.

Co-residence

[626] The defendant's trust deed contains a provision which confers on the trustee the power, in its discretion, to allow 'interested parties' (in context this would primarily be IDT's parents or next of kin or curator ad personam) to use and enjoy any property owned by the trust on such terms and conditions as the trustee may determine subject to the proviso that the costs of such use should not be borne by the medical fund.[6]

[627] The plaintiffs have no objection to a provision that the medical fund should not bear any costs brought about by the enjoyment of trust property by interested parties. They object, however, to a provision which allows the trustee to determine whether they or IDT's next of kin should be entitled to the enjoyment of trust property. The trust is likely to acquire a residential property for IDT. An agreed item of damages is the cost of adapting a residential property for IDT's special needs. It is likely that his parents or next of kin will reside with him in the house.

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[6] Clause 22.9.

[628] It seems to me to be inconsistent with the notion of trust property that someone other than IDT (as the beneficiary of the trust) should be entitled to use trust property without the trustee's consent. On the other hand it is perfectly understandable that IDT's parents, and in the event of their demise his next of kin, would wish to reside with him. That will probably be in IDT's best interests. I think a fair balance would be struck by a provision to the effect that an interested party may have the use or enjoyment of trust property with the consent of the trustee, which consent shall not be unreasonably withheld. There should also be a provision that any costs reasonably associated with such use or enjoyment shall not be defrayed out of the medical fund.

The parents as co-trustees?

[629] The proposed trustee is Nedgroup Trust (Pty) Ltd ('NGT'). The plaintiffs do not wish to be appointed as co-trustees though they will abide the court's decision if I conclude that one or both of them should be so appointed.

[630] Counsel for the parties are agreed that in the circumstances I should not compel either of the plaintiffs to become a co-trustee with NGT.

[631] Mr Dutton for the amicus devoted a considerable part of his written and oral submissions to the desirability in general that a family member should be a co-trustee of a personal injury trust established for the benefit of a child.

[632] Where a parent wishes to be a co-trustee, a court would naturally give careful consideration to making such an appointment. However trusteeship comes with considerable responsibilities. Unlike the position of the founder, the office of trustee is neither transient nor symbolic. While trustees can agree to delegate certain functions to one of their number, this does not relieve them of responsibility in the event of default. The administration of this trust calls for financial and other skills which the parents cannot reasonably be expected to have.

[633] I have been informed that NGT, as the proposed trustee, has furnished the parties with proof that it has appropriate professional indemnity cover. On this basis

they have agreed to waive the requirement for security. Although this aspect was not mentioned in argument, I can see that the defendant and the Master would not necessarily take the same attitude towards a family member. It is unlikely that a family member could obtain appropriate insurance.

[634] I think I should also take into account that the parties have dealt with NGT on the basis that it will be the sole trustee. Trusteeship could well be more burdensome for NGT if there were a family member as a co-trustee.

[635] Once one accepts that a substantial award of damages should be paid to a trustee or curator, there is inevitably a dilution of the control which the child's guardian would normally have over the money. That, after all, is one of the reasons for appointing a trustee or curator. Even if one of the parents were appointed as a co-trustee, the professional trustee could veto a decision proposed by the parent.

[636] Mr Dutton referred me to the judgment of Marshall QC in *SM V HM* [2011] EWCOP B30 which contains an exhaustive analysis of the considerations to be taken into account by the English Court of Protection when deciding whether to authorise the payment of damages to a trust rather than a deputy, the latter being akin to our curator bonis. Among the fundamental considerations, in her view, was the availability of a member of the child's family able, willing and suitable to act as a co-trustee (paras 59-60). In general the judge was sceptical about the claimed advantages of trusts, including supposed cost advantages, over deputyship. She interpreted the legislation as laying down deputyship as the norm, with a trust only to be authorised if the person seeking its establishment can show a clear and significant overall advantage.

[637] In England the position of a deputy is extensively regulated by the Mental Health Care Act 2005. One can infer from Marshall QC's judgment that the institution is effective and is reliably regulated. The same considerations do not necessarily apply here. The judge thought that having a family member as a co-trustee would result in the conduct of the professional trustee being more closely scrutinised. She was particularly concerned that the fees of a professional trustee,

unlike those of a deputy, were not regulated. Fees might thus 'drift without any check' (paras 114 and 169).

[638] Whatever the merits of these and other considerations may be in England, I am not convinced of their applicability here. We do not have legislation which decrees curatorship as the default position, even if hitherto that has been the more common procedure. If the parents or next of kin cannot, as interested outsiders, be relied upon to take a diligent interest in the professional trustee's conduct, why should one assume that they will be more diligent as co-trustees? It is usual to appoint a single professional person as a curator bonis and I cannot see why this should in principle be regarded as unacceptable in the case of a trustee. In regard to unchecked fees, the problem can be addressed, as has been done here, by specifying the fees in the trust deed (an ad valorem charge, not hourly fees).

[639] I do not have evidence as to the likely costs of a curatorship as against a trust. (The prescribed rate for curators is 6% on income collected and 3% on distribution or payment of capital on termination of the curatorship.[7]) In *SM v HM* the defendant settled the claim at a significant discount and there was no specific allocation to the cost of administering the award. The defendant was not involved in the subsequent proceedings to establish a trust. If administering the trust were more expensive than deputyship, this would have reduced the amount of the settlement available to meet the child's needs. One can thus understand the court's concern to know what the competing cost scenarios were. In the present case, by contrast, the defendant joins the plaintiffs in asking for the establishment of a trust. They have agreed upon the trustee's fees. There will be a separate award for the full net present value of the anticipated costs of administering the trust over IDT's full expected life span (see below). If trusteeship in the present case were to be more expensive than curatorship, it is not an increased cost which will prejudice IDT. Rather, it is a cost which both sides are willing to bear for the other advantages of trusteeship.

[7] Regulation 8(3) of the regulations promulgated under s 130 of the Administration of Estates Act 66 of 1965.

[640] The appointment of a sole professional trustee naturally does not mean that the parents have no voice. Both versions of the trust deed provide that the parents are among the interested parties who will have access to the trust's records. They will have a significant role to play in the appointment of the case manager. I would expect a professional trustee, in the proper discharge of its duties, to take due account of the parents' wishes. If this were not done an application for the trustee's removal might succeed.

[641] However, and to place the matter beyond doubt, I think the following additional provisions should be included in the trust deed:

- that one of the functions of the case manager is to act as an intermediary between the parents or next of kin and the trustee in order to convey any requests, wishes, views or preferences they may have in relation to IDT's care and well-being;
- that in the performance of its duties the trustee shall, without being bound to comply with same, have due regard to the reasonable requests, wishes, views or preferences of IDT's parents or next of kin in relation to the expenditure of trust funds for IDT's care and well-being.

[642] Mr Dutton pointed out that the establishment of a trust links decisions about the child's patrimony to decisions governing his or her person. It is inevitably so that the vesting of an award of damages in a trustee or curator has the effect that the damages are not available to the parents for funding any expenditure, including medical expenditure, they wish to incur for IDT's benefit. The trust deed does not, however, take away the right of the parents to incur expenditure for IDT's benefit if they have the funds to do so. The trust deed also does not take away the parents' parental responsibilities and rights as set out in the Children's Act 38 of 2005.

[643] Furthermore the provisions of s129 of the Children's Act in relation to consent to medical treatment and surgical operations will remain applicable. There are three potential scenarios in relation to any particular medical intervention:

- The typical scenario would involve two relevant decisions, namely (i) consent to the treatment by the parents or other relevant person in terms of s 129; and (ii) a decision by the trustee to fund the expense.
- If the trustee considers that IDT should receive a particular medical intervention to which the parents do not consent, s 129 provides for substitute consent in appropriate circumstances. If consent cannot be obtained, the trustee cannot insist that IDT be subjected to the treatment.
- If the parents consider that IDT should receive a particular medical intervention which the trustee is not willing to fund, they would need to fund it themselves or forgo it or take action against the trustee if its decision were impeachable.

The second and third of these scenarios are likely to be rare. At the risk of stating the obvious, I should add that if IDT becomes capable of making his own decisions in regard to medical treatment, the required consent will his, not anyone else's.

[644] I did not understand either Mr Irish or Mr Budlender to adopt a contrary position in relation to the provisions of the Children's Act. However, to place the matter beyond doubt I think a provision should be added in the trust deed to the effect that its provisions do not derogate from the provisions of the Children's Act relating to IDT's rights as a child, parental responsibilities and rights, and consent to medical treatment and surgical operations.

[645] It is convenient here to mention another matter raised by Mr Dutton, namely that the creation of a trust has the potential to bifurcate IDT's patrimony – the award will be held in trust whereas other assets will have to be held by his parents or a curator bonis. I do not think this raises any real difficulty. The draft trust deeds authorise the trustee to accept donations and inheritances. IDT's only realistic source of additional assets is by way of inheritance. If he inherits an estate of any substance, the executor could transfer it to the trust. For obvious reasons such inheritance would not form part of the medical fund.

Cost of administering the trust

[646] It is common cause that my award of damages should include the present value of the future cost of administering the trust. The parties and NGT have agreed that the trustee's remuneration will be 1% p/a of capital under administration and 2% of the residual capital on termination of the trust. The capital under administration will not include the present value of the cost of administering the trust.

[647] The capital under administration will be reduced by permissible legal costs net of any taxed costs recovered from the defendant. For this reason it will not be possible to make an actuarial calculation of the administration costs until a bill has been drawn and taxed. In their heads the defendant's counsel record a tender to pay NGT a provisional amount of R2 million in respect of administration costs pending their final quantification.[8] This exceeds the provisional sum of R300 000 requested by the plaintiffs as a 'robust interim award'.[9] In the light of the dispute mentioned below, it would perhaps be safer if I were to reduce the provisional sum to R1 million.

[648] There is a dispute as to whether the costs of administration are to be included in the damages award for purposes of calculating the cap on the plaintiffs' attorneys success fee. This question will stand over for later determination.

IDT's rights

[649] The discussion thus far has been premised on the assumption that IDT will never be capable of managing his own affairs or have the capacity to litigate without assistance. It is too early to say whether that will be so. Although the parties themselves did not raise the issue, I think it desirable to include in the trust deed a provision that if, upon attaining majority, IDT has the mental capacity to institute legal proceedings without assistance, he shall have the right to apply to court for the variation and/or termination of the trust and that upon such application the court may

[8] "DH15" para 82.
[9] Full heads para 4.7.

in its discretion make such order as it thinks just and equitable in all the circumstances.

[650] The insertion of such a provision would not mean that termination or variation would be there for the asking. The circumstances in which the trust was established, including the circumstances of the present litigation, and its subsequent history might well militate against the termination or variation of the trust but IDT should at least in such circumstances have the right to be heard on the question.

Conclusion and order

[651] On several occasions during the trial the plaintiffs' counsel questioned the propriety of Dr Bass' conduct. He is a medical doctor employed by the defendant to oversee and coordinate its response to medico-legal claims. In fairness to him I must record that on the evidence before me the insinuations were unjustified.

[652] The interim payment of R1,5 million must be deducted from the total amount payable in terms of this judgment. This will be formally incorporated in the next order (ie once actuarial calculations have been done). I record that counsel agreed that no adjustment is required for inflation or interest between the date of the interim payment and the date of my judgment.

[653] I shall deal with interest in the next order. Since future medical expenses and lost earnings are based on current values, there will be no interest pre-dating the date of judgment. The plaintiffs' counsel confirmed this. In regard to past expenses, these appear to have post-dated the interim payment and so will probably not attract interest but the parties can address me on this if necessary before the next order is made.

[654] Costs by agreement stand over.

[655] I make the following order:

[1] All calculations which depend on IDT's life expectancy must be made on the basis that his life expectancy is 48 years from 12 January 2016, ie that his expected death age is his 55th birthday.

[2] The disputed items of future medical and related expenses must be calculated on the basis of the assumptions determined in appendix 1 to this judgment. Save where otherwise specified, the first outlay of expense in respect of any item shall for calculation purposes be assumed to have been incurred on the date of this judgment and any replacement cycle in respect of that item shall be reckoned from such date. Where the replacement cycle changes after IDT reaches a particular age, the new replacement cycle shall, unless otherwise specified, start from expiry of the full cycle during which IDT reaches the said age.

[3] The disputed items of past medical and related expenses are determined as set out in appendix 2 to this judgment.

[4] The claim for loss of future earnings must be calculated on the basis of the assumptions set out in appendix 3 to this judgment.

[5] General damages are determined at R1,8 million.

[6] Within two weeks from the date of this judgment the parties may deliver notices identifying: (a) the matters, if any, which need to be clarified or amplified to enable actuarial calculations to be made of the lump sums payable in respect of future medical and related expenses and loss of earnings; (b) any matters which should have been determined by this order but which the court has omitted to determine.

[7] Within one month from the date of this judgment the parties must file a minute setting out the agreed actuarial calculations of the lump sums mentioned in 6(a), alternatively identifying the points of dispute relating to such calculations.

[8] Subject to 10 below, IDT's damages shall be paid to a trust, the terms of which shall accord with the determinations contained in paras 46-81 and 621-649 of this judgment.

[9] Within one month from the date of this judgment the parties must file a minute attaching the agreed wording of a trust deed according with the determinations mentioned in 8, alternatively identifying the points of dispute relating to such wording.

[10] The Master of this court is directed, within one month of the date of this judgment, to furnish a report regarding the parties' proposal that IDT's damages be paid to a trust. In that regard the Master's attention is directed in particular to paras 24-25, 46-81 and 621-649 of the judgment. The Master must indicate in the report whether he/she wishes to be heard on any matters arising from the report.

[11] Forthwith on delivery of this judgment the plaintiffs' attorneys must forward a copy of same to the Master, drawing his/her attention to 10 above. The plaintiffs' attorney must also furnish to the Master the parties' proposed trust deeds. If and when the wording of the trust deed is agreed, the plaintiffs' attorneys shall forthwith send same to the Master.

[12] If and when it has been finally determined that IDT's damages will be paid to a trust, the defendant shall pay a provisional sum of R1 million to the trust towards the cost of administering the award pending the actuarial calculation of such cost. The said sum shall not, pending any contrary determination in terms of 14, be reduced by legal costs or contingency fees.

[13] The actuarial calculation of the costs of administering the trust shall stand over until the completion of the various steps needed to enable the calculation to be made, including the determination of taxed and permissible legal costs.

[14] Costs, including the question whether the costs of administering the award are to be included in the damages with reference to which the plaintiffs' attorneys' contingency fees are to be calculated, shall stand over for later determination.

[15] Following receipt of the minutes referred to above and the Master's report, the court will give directions regarding the further conduct of the matter.

[16] Agreement on the content of the minutes referred to in 7 and 9 shall be without prejudice to the rights of the parties to apply for leave to appeal against the determinations made in this judgment.

ROGERS J

APPEARANCES

For Plaintiffs	Mr D Irish SC, Ms W Munro (& Ms K Pillay for final day of argument) Instructed by Joseph's Incorporated Unit 1, Bompas Square 9 Bompas Road Dunkeld
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