



Together we can solve SA's medico-legal crisis.

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Determining damages in medical malpractice claims

📅 OCTOBER 2ND, 2019

📁 MEDICO-LEGAL

A recent medico-legal claim against a **Gauteng** hospital and one of its doctors delivered the unusual result of the plaintiff being awarded higher damages than she asked for.

Donald Dinnie, consultant to **Natmed Medical Defence** and Aneesa Bodiati, head of legal : Natmed Medical Defence, write:

This is a useful judgment of *M on behalf of L and Another (7202/2008) [2019] ZAGPPHC 128 (24 April 2019)*.

The patient brought a claim in her representative capacity as the mother and guardian of a minor child, who she alleged suffered harm due to the wrongful insertion of a drip in his forehead, which led to injuries and scarring.

The plaintiff was successful in her claim.

Judgment

The plaintiff claimed on behalf of her minor child for injuries and scarring on his forehead which emanated from the wrongful insertion of a drip in his head. At the time of the incident the minor child was approximately 3 weeks old and was admitted to hospital on an initial diagnoses of anaemia. His condition deteriorated and he was diagnosed with tuberculosis, among other things.

A drip was inserted in the left side of the minor child's scalp, and it became septic and developed skin necrosis.

The defendants admitted 100% liability for the plaintiffs' proven damages as a result of the injury and scarring sustained by the minor child. The defendants also admitted liability and the costs of future medical expenses in the amount of R110,000 (based on expert evidence by plastic surgeons).

The issue before the court was the appropriate award of general damages and whether the defendants are liable for the minor's loss of earning capacity if any. It was agreed that the scar was cosmetically unsightly and disfiguring, conspicuous and difficult to conceal and also permanent (with some prospects of improvement by way of scar revision techniques). The patient would feel self-conscious in social settings and it would affect his social life.

However, the effect on the child's future work prospects was not properly argued and no evidence was brought in that regard. The plaintiff did not obtain any expert reports regarding the minor child's loss of earning capacity.

Therefore, on the evidence the court could not find that the minor child's capacity to be employed is diminished due to the scarring on his head (therefore no award was made for loss of earning capacity).

In looking at previous awards in similar cases as a guide and at the particular facts of this case, the court found that an award of R450,000 for general damages was appropriate (the defendant argued that R100,000 would be appropriate, the plaintiff argued for R400,000, so the court's award is actually quite high).

The comparable case law looked at related to a dog bite on the cheek (R64,000 awarded), a dog bite on the face (R101,000 awarded), a scar on the forehead due to a motor vehicle accident (R 400,000 awarded) and injuries due to burns on the wrists, knee, arms and breast (R450,000 awarded).

Legal principles

The court confirmed that the method for determining general damages entails a flexible approach in which previous awards made in similar cases must be used as a guide. The court has never set out firm rules or a uniform approach for general damages awards. One must be careful in looking at previous awards though, because that must be done with reference to the facts of the specific case as a whole (and few cases are directly comparable). Previous cases are a useful guide; no more. Inflation must also be taken into account.

With regard to awards for loss of earning capacity, the court noted that those enquiries are speculative by nature because it involves prediction as to the future "without the benefit of crystal balls". All the court can do in such a case is to make a rough estimate of the present value of the loss.

Takeaways

Expert evidence is important in determining loss of earning capacity. Past awards and the factual context are important in determining general damages.

Judgment

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