General damages:

Have we been getting it wrong all along?

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Any practitioner who is familiar with personal injury law has come across the anomaly that is general damages. Gubbay JA stated in *Minister of Defence and Another v Jackson* 1991 (4) SA 23 (ZSC):

'It must be recognized that translating personal injuries into money is equating the incommensurable; money cannot replace a physical frame that has been permanently injured. The task therefore of assessing damages for personal injury is one of the most perplexing a Court has to discharge.'

General damages is the broad term applied to non-patrimonial loss. This will include items such as pain and suffering, loss of expectation of life, loss of amenities of life (a diminution in the full pleasure of living) and disfigurement *Reyneke v Mutual and Federal Insurance Co Ltd* 1991 (3) SA 412 (W).

To date, the common practice used by our courts to estimate general damages is to have reference to previous cases that deal with similar injuries and their *sequelae*, relying on

'basically a conventional figure derived from experience and from awards in comparable cases'

Ward v James 1965 (1) All ER 563 (CA) at 576E.

The amount awarded in the precedent decision is then adjusted to arrive at a current day value thereof. In *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A), Grosskopf JA concluded:

'The need for even-handedness requires that, when comparing awards in comparable cases, regard must be had to the purchasing power of the currency at the time when such cases were decided, otherwise one would not be comparing comparables.'

This observation has led to the general practice of increasing past awards for general damages by the rate of inflation (as measured by the consumer price index) over the period from the date that the award was made until present time.

The objective of the consumer price index (CPI) published by Statistics South Africa is to measure changes in the *cost of living* of the majority of South African households. The CPI represents a comparison between the current weighted average of sampled prices and the corresponding average in a previous period. Currently around 400 items make up the CPI basket.

The loss of amenities that is compensated by the general damages award refers to

'any disability – physical or mental, temporary or permanent – which diminishes the victim's enjoyment of life, thus preventing him from participating and enjoying life as he previously could' (Neethling *et al*, *The Law of Delict* (2001) Butterworths, (Durban), at 246).

This loss was described further by Hoexter JA in *Administrator-General, South West Africa, and Others v Kriel* 1988 (3) SA 275 (A) to be

'... those satisfactions in one's everyday existence which flow from the blessings of an unclouded mind, a healthy body, and sound limbs'.

The 'satisfactions' to which the judge refers point to a claimant's standard of living, and enjoyment of everyday life that has been reduced or denied. While this enjoyment has an obvious link to the cost of living, it is arguable that inflation is not the ideal rate by which previous awards should be adjusted.

In contrast, gross domestic product *per capita* (GDPPC) is often used as an indication of the *standard of living* in an economy. Gross domestic product is defined as the total market value of all final goods and services produced in a country in a calendar year. The reasoning behind gross domestic product *per capita* as a measure of the standard of living in an economy is that the entire population would benefit from increased economic production.

Further, one of the established principles for quantifying non-patrimonial loss as listed in *Minister of Defence and Another v Jackson* is

'awards must reflect the state of economic development and current economic conditions of the country'.

The South African Reserve Bank publishes gross domestic product *per capita* data in current prices under their time series code KBP6270J (www.reservebank.co.za). Statistics South Africa publishes the consumer price index for all items for metropolitan areas under their time series code VPI00000 (www.statssa.gov.za).

Set out in the table below is a comparison of an award of R10 000 made at different time intervals. In particular, if R10 000 was awarded in 1950, the value in 2007 money terms would be R683 333 using the CPI adjustment compared to R2 098 023 using the GDPPC adjustment.

Similarly, an award of R10 000 made in 1970 would be R367 949 in 2007 using the CPI adjustment compared to R722 753 using the GDPPC adjustment.

Comparison of CPI and GDPPC adjustments

Year of initial award	Award of R 10 000 made in year x adjusted with the CPI to 2007	Award of R 10 000 made in year x adjusted with the GDPPC to 2007
1950	R683 333	R2 098 023
1955	R531 481	R1 575 828
1960	R478 333	R1 339 834
1965	R434 848	R1 026 162
1970	R367 949	R722 753
1975	R235 246	R381 072
1980	R132 870	R186 542
1985	R68 990	R102 777
1990	R33 844	R50 327
1995	R19 820	R29 546
2000	R14 350	R19 488
2005	R11 211	R12 638

In the considerations of 'even-handedness', practitioners should consider incorporating an adjustment based on the standard of living of their claimants in the interest of bringing general damages awards closer to true economic compensation.

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