



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: 3238/2022

In the matter between:

Y[...] D[...] obo I D

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BESHE J:

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[1] Plaintiff instituted an action for damages on behalf of her minor daughter, **I[...] D[...]** who is 11 years old. The action is undefended. At the start of the proceedings and at the instance of plaintiff's counsel, *Ms Sidlai*, an order was made in terms of *Rule 33(4)* separating the issue of merits from that of the determination of the quantum of damages.

[2] Plaintiff, **Ms D[...]** is the only witness who testified in this matter. Her evidence revealed that her minor child, who was then 8 years old was hit by a Quantum taxi whilst crossing the R410/R396 road between Lady Frere and Queenstown. According to **Ms D[...]** this area where the accident took place is straight without any curves, with houses located a distance away from the road. The incident occurred at about 13h30 at the time when her daughter

was being dropped off by a van that transported her to and from school. **Ms D[...]** was herself waiting for a lift on the opposite side of the road in her home village of Mtsheko, intending to go to Lady Frere. It emerged from **Ms D[...]**'s evidence that their home is on the side on which the scholar transport (the bakkie) had stopped. Upon alighting from the scholar transport, her daughter crossed the road and proceeded towards her. **Ms D[...]** testified that the child saw her and crossed the road towards her. It was at that stage that a Quantum combi appeared at a high speed. She testified that both the child and the Quantum driver tried to avoid the accident but in vain. The Quantum hit the child and flung her into a ditch next to the road. **Ms D[...]** testified that the Quantum was driven at an excessive speed resulting in the driver not being able to keep the motor vehicle under control. The Quantum driver took the child to hospital because the ambulance took long to arrive. **Ms D[...]** expressed the view that the scholar transport driver was also at fault in that she did not supervise the children and the driver of the Quantum by driving at an excessive speed. She could not say at what speed he drove or what the applicable speed limit was. According to her, it was safe for her daughter to cross the road because when she did so the Quantum was still far. There is however no evidence that the child looked to see if there were any cars approaching.

[3] According to the accident report that was handed in as part of plaintiff's evidence, the accident is said to have occurred in the following manner:

"It is alleged that the driver was travelling towards Queenstown when a bakkie was offloading school kids. One child jumped out of the van and ran across the road towards a shelter and the driver applied brakes and drove to the other side of the road and accidentally bumped the child and the child fell into a donga."

We now know that the shelter referred to is the one under which **Ms D[...]** was standing.

[4] Plaintiff pleaded that the collision was occasioned solely as a result of the negligence of the insured driver. Plaintiff also relied on the fact that there was screeching of tyres when the Quantum driver applied brakes and it left skid marks on the road for saying he was driving at an excessive speed.

[5] Can it be said in these circumstances that the collision was solely as a result of the negligence of the Quantum driver?

[6] It is trite that the *Apportionment of Damages Act* does not apply to children under 7 years of age. In respect of children between 7 years and puberty, they are presumed to be *doli incapax*. In the absence of evidence to rebut this presumption, there is no proof of the child's accountability. She was 8 years old at the time of the accident.

[7] Be that as it may, the plaintiff correctly pointed out that the scholar transport driver was at fault. Had she supervised the children, including plaintiff's daughter, when they alighted from the motor vehicle, this collision would not have taken place. The child would not have crossed the road on the face of an oncoming motor vehicle. It will, however not be appropriate to apportion the liability for the accident because it can only be apportioned between a claimant who is found to have been partly at fault and the insured driver in this case. However, for reasons stated earlier, there has not been any proof of accountability on the part of the plaintiff's daughter or plaintiff. And no fault or negligence can be attributed to them. On the other hand, I am satisfied that the evidence that has not been gainsaid shows that the driver of the insured vehicle was negligent.

[8] Accordingly, defendant is ordered to pay to the plaintiff 100% of such damages as the plaintiff may in due cause prove. Defendant is ordered to pay plaintiff's taxed or agreed costs party and party costs of suit.

N G BESHE
JUDGE OF THE HIGH COURT
APPEARANCES

For the Plaintiff : Adv: A Sidlai
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Date Heard : 19 and 20 April 2023
Date Reserved : 20 April 2023
Date Delivered : 21 April 2023