

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

- (1) NOT REPORTABLE.
- (2) NOT OF INTEREST TO OTHER JUDGES.
- (3) REVISED

Case number: 6670/2013

Date: 10/8/2017

In the matter between:

LEBESA MAMOHLOMI OBO T

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PRETORIUS J.

- (1) The plaintiff, on behalf of her minor son instituted action against the defendant for damages suffered as a result of personal injuries sustained in a motor vehicle accident that occurred on 28 June 2009 when he was 10 months old. The merits had been previously conceded and the defendant is liable for 100% of the plaintiff's proven or agreed damages.
- (2) Both counsel argued the matter without leading any evidence. All the

reports, apart from the defendant's industrial psychologist's report, which was served totally out of time, were admitted by both counsel for the plaintiff and the defendant as evidence. The joint minute of the educational psychologists and occupational therapists were handed to the court and admitted by both the plaintiff and defendant. The only dispute between the parties is the percentage of contingency that should be applied post-morbid.

- (3) T, the plaintiff's son, was a passenger in a taxi on 29 June 2009 when the tyre burst and several passengers were killed. He was thrown out of the taxi. He was 10 months old at the time and sustained a head injury and facial injuries. He was taken to Senekal Hospital, but was transferred to Bloemfontein Medi-clinic for further treatment. T had various injuries to his scalp, which were stitched under anaesthesia. T was kept in hospital for 10 days. The letter on the Free State Provincial Letter Head declared the injuries as follows: *"Degloving scalp injury ale (on examination) injury pattern as above, no fracture nor dislocation, soft tissue injury."* A CT brain scan was done on 29 June 2009 and the report stated that there was soft tissue swelling left frontal with indications of foreign objects and material in the soft tissue. There was no skull fracture and no intra-cranial bleeding.
- (4) According to the neurologist, Dr Townsend, the post-accident sequelae that T suffers from are in keeping with a moderate traumatic brain injury. He suffers from post-traumatic migraines secondary to traumatic brain injury and from post-traumatic epilepsy secondary to traumatic brain injury. Presently the epilepsy is in remission.
- (5) Dr Berkowitz, the plastic surgeon, noted the following scars and marks:
 - "1) *There is a scar measuring 100mm x 5mm extending from the left frontal region of the scalp, forwards across the anterior hairline, onto the middle third of the forehead and then extending onto the left side of the forehead;*
 - 2) *There is a scar measuring 40mm x 5mm in the left parietal region of the scalp, just below the vertex;*
 - 3) *There is a scar measuring 20mm x 4mm in the left parietooccipital region of the scalp, just below scar number 2);*

- 4) *Minor scarring was noted in the occipital region of the scalp;*
- 5) *There is a scar measuring 25mm x 4mm running transversely across the dorsum of the metacarpophalangeal joints of the left index and middle fingers."*

Dr Berkowitz is of the opinion that surgery would improve some of the scars, but this revisional surgery can only take place when T reaches the age of 17 years.

CONTINGENCIES:

- (6) The educational psychologists agreed *"that T was probably of high-average to superior potential pre-accident."* Furthermore they agreed that he would not have been restricted in his choice of tertiary education. The parties agreed that, for the sake of the case, that T has the potential to attain an Honours degree. They further agreed that: *"T (TL) is best placed in a school for learners with special educational needs (LESN) - for fulltime remedial education, as he has persistent high learning support needs... T (TL) will probably obtain an NQF Level 4/technical equivalent - in the remedial/LESN school".*
- (7) In **Southern Insurance Association v Bailey N.O.**¹ Nicholas JA stated:
"In a case where a Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informal guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis."
- (8) In the present instance the plaintiff furnished the court with actuarial calculations on which a finding can be made. The defendant did not provide any actuarial report or evidence.
- (9) I have been furnished with several authorities but I am aware that each

¹ 1984(1) SA 98 AD at p114 C-D

case has to be considered on its own merits. In **Protea Assurance Co Ltd v Lamb**² Potgieter JA found:

"It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry to become a fetter upon the Court's general discretion in such matters."

- (10) The amount to be awarded is still in the court's discretion and the court will use amounts awarded in similar cases only as a guideline to exercise its discretion. All the other facts of the matter must play a roll and I am mindful that no two matters are the same regarding facts and circumstances.
- (11) I have not compartmentalized the injuries in respect of the facial and head injuries, but deal holistically when determining the loss of earnings. It must however be mentioned that the joint minutes of the occupational therapists concluded: *"We agree that considering his age and his residual physical occupational performance components it is likely that he might be remediated with optimum treatment and likely secure some form of sympathetic employment"*.
- (12) The dispute relates to what percentage must be applied for the post.. morbid scenario. Counsel for the plaintiff submits that a contingency of 20% will be reasonable in the present circumstances. The reason is that there has already been a concession by the plaintiff to apply the median between a Honours and Masters degree when dealing with future loss of earnings. The occupational and educational therapists are *ad idem* that T should be placed in a LSEN school, where he can receive the required remedial support, as needed.
- (13) The defendant argued that a contingency of 30% should be applied as there may be an improvement during the years. T had suffered a moderate to severe head injury. There is no basis to decide that the improvement foreseen by defendant's counsel will take place, as the therapists are all in

² 19 71(1) SA 530 AD at p535 H - 536 A

agreement that he will need assisted schooling, including special and remedial education. Furthermore, it was agreed that he would most likely have to secure "*sympathetic employment*".

- (14) In this matter the court need not look into a crystal ball to determine the figure for the loss of income, as Mr Kramer, the Actuary's report contains all the relevant information. In **Bailey's case**³ at 116G - 117A the court found:

"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He had "a large discretion to award what he considers right". One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case."

- (15) Mr Kramer, the actuary, furnished a report setting out his reasons for his findings. He took into account the cap that was introduced by the **Road Accident Fund Act**⁴.
- (16) I have listened to both counsel, have read the necessary reports and taken into account the joint minutes of the therapist. I must agree that a contingency deduction of 20% pre-morbid is fair to both parties. In the circumstances where it is not clear that T will get to matric, I find a contingency deduction of 15% post-morbid is fair.
- (17) The loss of earnings was calculated as follows:

³ *Supra*

⁴ Act 56 of 1996

Future loss of income (uninjured)	R8 766 530 20% contingency pre-morbid
Future loss of income (injured)	R2 723 768 15% contingency post-morbid

When the aforementioned contingencies are applied, a future loss of income in the amount of R6 451 372.00 is the amount to be awarded. An amount of R6 450 663.00 should therefore be granted.

GENERAL DAMAGES:

(18) In **Sandler v Wholesale Coal Suppliers Ltd**⁵ Watermeyer JA held:

"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 on the Judge's view of what is fair in all the circumstances of the case."

(19) The amount should be reasonable to both the plaintiff and defendant as found in **De Jongh v Du Pisanie NO**⁶ where Brand AJ admonishes on p 4741 to 475A:

"Die bedrag van sodanige kompensasie moet ook billik wees teenoor die verweerder. Dit is juis in 'n geval soos hierdie waar die Hof moet waak teen die menslike geneigdheid om te oorkompenseer."

(20) And in **Hulley v Cox**⁷ where Innis J held:

"We cannot allow our sympathy for the claimants in this very distressing case to influence our judgment."

(21) Having regard to these warnings and admonishing I will now try to

⁵ 1941 AD 194 at 199

⁶ 2005 (5) SA 457 (AD)

⁷ 1923 AD 234 at 246

determine an amount which would be fair to both the plaintiff and the defendant. Counsel for both parties referred me to several comparable cases to use in determining the amount of damages that should be awarded.

(22) In **Protea Assurance Co Ltd v Lamb**⁸ the court held:

"It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry to become a fetter upon the Court's general discretion in such matters."

(23) It is common cause that T, at the age of 10 months sustained a mild to severe head injury with scarring to his face. He will have to live with these scars until he is 17 years old, before surgery can take place to ameliorate the scars. He is presently 9 years old and will have to live with the scars for at least another 8 years. He spent 10 days in hospital and will have to return to hospital at the age of 17 years for at least 2 days.

(24) T will have to attend a special school where his special needs can be catered for. It was accepted by the defendant that T would have at least attained an Honours degree, had the accident not taken place. Now, it is not certain that he will pass grade 12. The occupational therapists even went so far as to find that it is likely that he may secure some form of sympathetic employment. This finding implies that he will find it difficult to obtain employment in the open labour market.

(25) The amount to be awarded is still in the court's discretion. The court will use amounts awarded in similar cases as a guideline to exercise its discretion. All the other facts of the matter, as set out above, must play a role and I am mindful that no two matters are the same regarding facts and circumstances.

(26) In **RAF v Marunga**⁹ the Supreme Court of Appeal confirmed the dictum of

Broom DJP in **Wright v Multilateral Motor Vehicle Accident Fund**¹⁰

"I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in the society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries."

- (27) In **Adlem v RAF**¹¹ which is similar to the present case, where a 17 year old claimant suffered a head injury, causing both focal and diffuse brain damage to the temporal and frontal lobes leading to cognitive impairment, memory difficulties, lack of concentration and attention, impaired judgment, insight and self-control, etc. She also sustained numerous orthopaedic injuries and scarring. She was awarded R400 000 (Four hundred thousand Rand) in November 2003 in respect of general damages. The current value is R860 000.
- (28) In **Matthys NO v RAF**¹² the synopsis of the injuries and after effects are recorded as follows:

"Head. Severe brain injury. Also minor orthopaedic injuries. Admitted to hospital with a Glasgow Coma Scale of 10115. CT scan showed diffuse brain swelling with point bleeds in both hemispheres. Unconscious and semi-conscious for a period of 19 days and confused for a further 11 days. Left with significant cognitive deficits. The list of his (permanent) sequelae is extensive and he has insight into his condition. He has undergone a change in his disposition...he has become forgetful, angry, temperamental, unsociable, and struggles to express himself clearly. His memory has also become poor. When at home he is unclean and unhygienic and isolates himself from family and friends. He suffers from fatigue and low

⁸ 1971(1) SA 530 AD at p535H to 536A

⁹ 2003(5) SA 164 (SCA) at 170 F - G

¹⁰ 1997(4) SA (C)

¹¹ The Quantum of Damages, Carbide and Honey Vol5 J2 - 41

¹² **2013 (6A4) QOD 273 (GNP)**

energy levels. He experiences difficulty concentrating and has, as a result, become less productive in the workplace. He will not be able to sustain his current employment and it is unlikely that he will be gainfully employed again."

- (29) An award, in current terms of R556 000, was made.
- (30) In this instance T has severe attention deficit disorder symptoms and neuro-psychiatric symptoms which result in him having to attend a special school. The occupational therapists were of the opinion that *"his perceptual skills and cognitive deficits might negatively affect his occupational performance"*.
- (31) T's life had changed dramatically at a very young age from having a bright future, obtaining tertiary education to a person who may or may not obtain a matric certificate in a special school. Having considered all the evidence, factors and circumstances relevant to the assessment of damages and having regard to past awards and the more modern approach by the SCA as expressed in the **Marunga case**¹³ I find that an amount of R600 000 will be reasonable and fair to both the plaintiff and the defendant. I do not set out separate amounts in respect of pain, disfigurement and loss of amenities.
- (32) I make the following order:
1. The Defendant shall pay to the Plaintiff the capital amount of R7 051 372.00 (Seven million fifty one thousand three hundred and seventy two Rand) together with interest a tempore morae calculated in accordance with the Prescribed Rate of interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996.
 2. Payment will be made directly to the trust account of the Plaintiffs' attorneys within fourteen (14) days:

Holder .	De Broglio Attorneys Inc
Account Number	[....]
Bank & Branch	Nedbank - Northern Gauteng

¹³ *Supra*

Code 198 65

Ref L424

3. Defendant shall furnish Plaintiff and/or the Patient with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, No. 56 of 1996, to reimburse the costs of the future accommodation of the Patient in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to him, arising out of the injuries he sustained in the motor vehicle collision on 29th of June 2009, and the sequelae thereof, after such costs have been incurred and upon proof thereof. In addition, the undertaking shall include the costs of the creation of the trust referred to in paragraph 6 below, the costs of annually obtaining a security bond as required, and the cost of the trustee in respect of the administration of the trust, limited to the costs recoverable by a Curator Bonis in accordance with the statutory tariffs published from time to time.
4. The issues of Past medical expenses is separated and postponed sine die.
5. The Plaintiff's attorneys of record shall retain the aforesaid amount, net of the attorney's costs, in an interest-bearing account in terms of Section 78(2)(A) of the Attorneys Act, for the benefit of the Plaintiff, pending the creation of the trust referred to below and the issuing of letters of authority. From the aforesaid amount, an amount of R100 000.00 (One hundred thousand Rand) shall be paid to the Plaintiff and not to the trust.
6. The Plaintiffs' attorney of record shall pay the amount set out in 1 above less the amount referred to in paragraph 5, together with any accrued interest, over to the trustee of a trust. In respect of which trust, the following shall apply:
 - 6.1 The trust shall be created in accordance with the trust deed which shall contain the provisions set out in annex A hereto and which is to be established in accordance with the provisions of

the Trust Property Control Act, number 57 of 1988, in favour of T O L as sole beneficiary;

6.2 The trust shall have as its trustee, Standard Trust Limited, registration number 1880/000010/06, with those powers and duties as set out in annex A hereto;

6.3 The trustee shall:

6.3.1 be obliged to render security to the satisfaction of the Master of the High Court;

6.3.2 be entitled to administer on behalf of the patient, the undertaking referred to in 4 above and to recover the costs covered by such undertaking on behalf of the trust for the benefit of the Plaintiff.

6.3.3 at all times administer the trust to the sole benefit of the patient.

6.4 The Deed of Trust shall not be capable of being amended without leave of the court.

7. The Trust shall terminate upon T O L attaining the age of 25 (Twenty Five), and the remaining net assets shall be distributed to him upon such date.

8. The Defendant shall pay the High Court costs of the cause of the Plaintiff, including the following costs of:

8.1. The costs attendant upon the obtaining of payment of the full capital amount referred to in paragraph 1 above; and

8.2. The preparation, qualifying and reservation fees of experts, including the costs of obtaining expert reports in respect of the Plaintiff and the costs consequent upon the preparation of joint minutes; and

8.3. The Plaintiff's travel and accommodation costs to attend the Defendant's and own experts; and

8.4. The costs of all the Plaintiff's expert reports, addendum reports and joint minutes;

- 8.5. The costs of senior counsel, including counsel's appearance;
 - 8.6. any and all previously reserved costs, which are declared costs in the cause; and
 - 8.7. the Plaintiff as well as subpoenaed witnesses are declared necessary witnesses.
-
9. The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record.
 10. The Plaintiff shall allow the Defendant fourteen (14) days to make payment of the taxed costs.

Judge C Pretorius

Case number: 6670/2013

Matter heard on: 31 July 2017

For the Plaintiff: Adv M Chaitowitz SC
Instructed by: De Broglio Attorneys

For the Defendant :Adv Mathape

Instructed by :Tsbane Molaba Inc

Date of Judgment :10 August 2017