

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



Case number: 78479/2017

Date:

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

3/03/2023 *[Signature]*
DATE SIGNATURE

S STESTENKO

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

TOLMAY, J:

- [1] In this matter plaintiff was a passenger in a motor vehicle, which was involved in an accident that occurred on 20 April 2017. The defendant conceded merits, but all the heads of *quantum* remained in dispute, and despite not filing any expert reports, a representative of the state attorney presented argument on behalf of the defendant. The plaintiff filed reports from experts, from which the nature, severity of the injuries and their effect on the plaintiff's life can be ascertained. No evidence was led and the court was merely referred to the expert reports.
- [2] According to the documentation and the heads of argument filed on behalf of the plaintiff, the plaintiff sustained the following injuries:
- a. Fracture of the mid-body of the sternum.
 - b. Fractures of the anterior right 4" and lateral right 6" ribs with hemopneumothorax.
 - c. Spinal fractures involving superior end plate of T12, compression fracture of L1, superior end plate fracture of L2 and burst fracture of L5.
 - d. Blunt abdominal trauma with small bowel perforation.
- [3] The plaintiff did not lose consciousness. She underwent an exploratory laparotomy with repair of the perforated small bowel and an intercostal drain was inserted into the right side of the chest. The plaintiff was in the Intensive Care Unit for eight days and in a General Ward for four days thereafter.

- [4] The plaintiff developed wound infection in the laparotomy wound and vacuum dressings were used to treat the wound. She received physiotherapy after she was discharged.
- [5] The plaintiff also suffered some scarring as a result of the injuries including,
- a. A pale cruciate scar measuring 25 mm in diameter on the lateral aspect of the right hemithorax. This scar is the result of the placement of an intercostal drain.
 - b. A markedly hypertrophic left paramedian laparotomy scar measuring 195 mm x 8 mm.
 - c. A fine scar measuring 30 mm x 2 mm lying obliquely in the right iliac fossa, this scar is the result of the placement of a drain.
- [6] At the time of the collision, the plaintiff worked as a bookkeeper in a transport company which is a family-owned business, run by her daughter and she is still employed, but works fewer hours due to the sequelae of the accident.
- [7] According to Dr Kelly, a neurosurgeon, who saw the plaintiff approximately three years after the accident, the plaintiff was involved in a motor vehicle accident and sustained a mild traumatic brain injury. However there seems to be no evidence available to support this conclusion. It seems that he based this diagnosis on the hospital records which merely reported that she was fully conscious upon arrival. No skull

X-ray or CT Scan was performed. He also apparently based this diagnosis on the fact that she told him that she suffers from headaches and memory problems. She however has not consulted any health care facility for this problem, nor is there any indication of such problems relating to her employment. His report is very cryptic and did not really assist the court in determining the seriousness of this alleged traumatic brain injury. Furthermore a head injury was not recorded anywhere else, even in the heads of argument where the injuries are listed, no mention is made of a mild traumatic brain injury. Dr Kelly relies on the report by Ms Hovsha, whom he described as a neuropsychologist, who did neurocognitive testing and who confirmed the presence of verbal and visual memory loss. However, Ms Hovsha's report indicates that she is a clinical psychologist, "with an interest in neuropsychology". As such a question may legitimately be placed on her ability to make expert neuropsychological findings.

[8] Ms Hovsha opined that based on the history of the accident in which plaintiff sustained a pneumothorax, there is a possibility of her having sustained some brain injury due to hypoxia. However, there is no expert medical evidence to substantiate this finding, neither is Ms Hovsha qualified to make such a diagnosis. I therefore reject the evidence that attempts to prove a mild traumatic brain injury.

[9] Ms Hovsha, furthermore says that the plaintiff is mildly to moderately depressed which may have had some negative influence on her

performance of the assessment. She stated that the plaintiff also suffers from chronic pain and fatigue, which could be exacerbating her depression and thereby contributing to her poor performance on some areas of the assessment.

[10] According to Ms Greeff, an occupational therapist, she noted a tendency by the plaintiff to decide whether she will be able to participate in a task even before attempting it, with adjusted task execution related to fear of re-injury and causing pain noted throughout the assessment. According to her the plaintiff is unable to maintain work endurance for more than 3 hours at a time and leaves work early and goes to her daughter's or her own residence to rest. She experiences pain in the back after sitting for approximately 30 minutes and requires change of postures frequently. She is unable to participate in social activities that she previously enjoyed. She states that the plaintiff experiences loss of amenity enjoyment as a result of mostly pain and discomfort as well as altered task approach.

[11] According to Ms Rossouw, an industrial psychologist, the plaintiff completed and passed her pre-school, primary school, and high school education in Russia, without any failures or repeats. From 1983 until 1987, the plaintiff pursued a Master's Degree in Chartered Accountancy and Auditing, which she obtained at the University of Russia. After obtaining her master's degree, the plaintiff was employed as a

Chartered Accountant for about 13 years in Russia. When she moved to South Africa during or about 2012 she resigned.

[12] She stated that the plaintiff reported no significant pre-existing physical, cognitive or psychological obstacles that would have prevented her from maintaining her capacity to work at her pre-accident levels of productivity. Thus, but for the accident, it is likely that she would have maintained her pre-accident levels of productivity with respect to efficiency, endurance, and stamina. She opined that with intact productivity, the plaintiff would likely have been able to continue in her pre-accident occupational capacity.

[13] She furthermore opined that in light of all of the available information, along with plaintiff's relatively advanced age (50 years old), limited working experience, she only having worked for about three companies, mainly in Russia, and her limited command of the English language, it is evident that the plaintiff would probably have been restricted to working for her daughter's co-owned company regardless of the accident. Therefore, she would probably have had difficulty in securing alternative employment on the open labour market even pre-accident.

[14] Her basic monthly salary at the time of the accident was R7,500.00 (in 2017's monetary value). As an uninjured employee, she would probably have continued to work from Monday to Friday from 08:00 to 17:00. The plaintiff's commencement earnings had been low, especially

considering her level of education. Therefore, she would have received annual increases of 10% per annum (as confirmed by Ms Sofia Stestsenko, the plaintiff's daughter, until retirement.

[15] The plaintiff was reportedly healthy and fit prior to the accident. As she had been employed by her daughter, she would not have been restricted to an official retirement age (as confirmed by her daughter). However, the plaintiff's daughter estimated that she would probably have worked until the retirement age of between 65 and 68 years. However she will now probably retire at age 60.

[16] Ms Rossouw reported that plaintiff has remained employed in the same position to date. However, her working hours had been reduced (without a reduction in her earnings) she is currently only working from 08:00 until 14:00 from Monday to Friday. Her daughter also reported that she frequently allows her mother to leave work earlier, as she is unable to cope with her work demands, because of her accident-related difficulties. The plaintiff is occasionally required to perform some work from home (estimated at around two hours, about three times per week). Nonetheless, her duties have remained unchanged at the company.

[17] In 2018, as per the salary advice (dated from 2018.01.20 until 2018.06.20), the plaintiff's basic monthly salary increased to R8,250.00 per month. With reference to the salary advice in 2019 and 2020, her basic monthly salary continued to be R8 250-00. Her daughter reported

that her mother has not received an annual increase since her last increase, which was at the end of 2017, as she is currently accommodating her mother by allowing her to work half-day. For the same reason, her daughter noted that plaintiff will most probably not be eligible for an annual increase.

LOSS OF EARNINGS

[18] At the date of accident the plaintiff was working for DSC Transfers as a Chartered Accountant/Bookkeeper. She commenced service in 2012. At that stage she was earning R7,500 pm (R90,000 pa). She was off work for 8 months and was paid in full. She then returned to work but her working hours were reduced. Her salary was not affected and In 2018 her salary increased to R8,250 pm (R99,000 pa). The loss of income has been calculated by the actuary from January 2018. He states that, but for the accident, the plaintiff would have continued to receive increases of 10% pa until retirement (taken to mean real increases of 4% pa). She would have retired at about age 66.5. It was assumed that her income would have increased between January 2018 and the valuation date at the inflation rate applicable over this period plus an additional 4% per annum. Her income at the valuation date would therefore have been R154 597-00 pa. It was assumed that her income would have increased after the valuation date at 4% pa in real terms until retirement. Thus she would have been earning R 231 029-00 pa in current money value by age 66.5.

[19] The claimant has not received any increases since 2018. The Industrial Psychologist states that she will remain in the same position in future. Thus assuming she still earns R99,000-00 pa. She will not receive any increases (inflationary or otherwise) in future. She has suffered from a decrease in productivity and is now employed sympathetically and will probably retire at age 60.

[20] The actuary states that she is now more vulnerable and an unequal competitor on the open labour market. If she were to lose her job she would likely remain unemployed, this assumption loses sight of the fact that she would in any event have been limited to working for her daughter, for the reasons set out above. The above factors and all other risks affecting her income should be taken into account in the general contingency deduction.

[21] In **Phalane v Road Accident Fund (48112/2014) [2017] ZAGPPHC 759 (7 November 2017)** it was ruled that:

Contingencies are the hazards of life that normally beset the lives and circumstances of ordinary people (AA Mutual Ins Co v Van Jaarsveld reported in Corbett & Buchanan, The Quantum of Damages, Vol II 360 at 367) and should therefore, by its very nature, be a process of subjective impression or estimation rather than objective calculation (Shield Ins Co Ltd v Booysen 1979 (3) SA 953 (A) at 965G-H).

Contingencies for which allowance should be made, would usually include the following:

- a. the possibility of illness which would have occurred in any event;
- b. inflation or deflation of the value of money in future; and
- c. other risks of life such as accidents or even death, which would have become a reality, sooner or later, in any event (Corbett, *The Quantum of Damages*, Vol I, p 51).

[22] It was argued that 0% contingency should be applied to the past loss of income. I do not agree with that, and 5% is both realistic and fair and take into consideration the hazards of life

[23] The following calculation was made by the actuary and 12.5% contingency was applied to the future loss of income and 5% to past loss. I consider this reasonable under the circumstances.

PAST		But for the Accident		Having Regard to the Accident	
Gross Accrued Value of Income		R	604 941,00	R	489 049,00
Less Contingency	5%	R	30 248,00	R	24 452,45
Total Value of Loss of Income		R	574 693,00	R	464 596,55
				R	110 096,45
FUTURE		But for the Accident		Having regard to the Accident	
Gross Accrued Value of Income		R	1 473 496,00	R	313 289,00
Less Contingency	12.5%	R	184 187,00	R	117 483,00
Total Value of Loss of Income		R	1 289 309,00	R	195 806,00
				R	1 093 503,00
Total Value of Loss of Income		R	1 864 002,00	R	660 402,55
					R 1 203 599,45

- [24] The defendant argued that plaintiff's pre and post morbid future earnings should be the same as she is still employed by her daughter. This however loses sight of the impact the injuries had on her earning capacity. The defendant argued that the plaintiff suffered no loss of income due to the fact that she was paid in full for the period of eight months that she did not work. However, the past loss of income was not calculated from date of accident, this much is clear from the calculation by the actuary. The loss of income has been calculated from January 2018 (ie the last date upon which she received an increase).

PAST MEDICAL EXPENSES

- [25] The plaintiff incurred medical and hospital expenses as a result of the accident and provided vouchers in the amount of R438 199-91. The defendant only offered R650-00, the reason being, according to the defendant, that some of the amounts paid were done by her daughter and some invoices remained unpaid. The defendant's argument does not have any merits as there is no requirement that all medical expenses need to be paid or need to be paid, by the plaintiff herself. Therefore the plaintiff should be compensated for the proven past medical expenses.

GENERAL DAMAGES

- [26] General damages falls within the discretion of the court, comparable cases often guide the court in determining a fair and reasonable amount.
- [27] The defendant referred me to the following cases:

1.1 Radebe v Road Accident Fund, [2019] LNQD 48 GP:

Plaintiff admitted to hospital. Given medication for the right leg pain and discharged on the same day. Started experiencing lower back ache. Consulted a general practitioner day after injury. Given analgesics. Physiotherapy treatment. Referred to orthopaedic surgeon 8 months after injury. X-rays and MRI done. Given pain medication. Admitted to hospital. Non-steroidal anti-inflammatory drugs administered. MRI showing disc changes at L5/ S1. Physiotherapy continued. Pain due to lumbar disc injury and degeneration at L5/ S1. Spondylosis predicted. Prolonged neurocognitive impairments. Suffers from somatoform pain disorder (form of mental illness that causes one or more bodily symptoms, including pain), depression and post-traumatic stress disorder with severe symptoms of anxiety and memory impairment. 3% future risk of seizures. Severe lower back pain at the time of injury. Acute pain treated with NSAIDS. Pain becoming chronic. Sill suffering from an agonizing lower back. Pain radiates to legs and right leg is more affected than left leg. Improvable with medical treatment. Unable to resume playing netball and football. Mobility has been seriously affected. Cramps and weakness in both lower limbs. Unable to sit or stand for long periods. Unable to do household chores and other activities of daily living due lower back pain. Experiences depression and post-traumatic stress disorder with severe symptoms of anxiety and memory impairment. The court awarded R450 000 in respect of general damages and the current value of the award is R472 600.00

1.2 **Bester v AA Mutual Assurance 1972 LNQD 1 (C):**

Plaintiff sustained moderate injuries to the thoracic vertebrae, fractures of T5, T6 and T8, and to the cervical vertebrae, injury of C5, C6 and C8, a fracture of the sternum, rib fractures and a cracked jaw. Youthful age, intensity and duration of pain and discomfort and stress during treatment period and recuperation thereafter. Scarring caused by operation but scars to neck and face minimal. Latter only warranting a minimal award. Neck and back pain permanent. Future neck and back operations. Loss of activities such as badminton and running which continually exposes the back to stress. Scarring caused by operation. Hospitalised for 15 days. Admitted in unconscious state. Regaining consciousness after 3 days. Caved in chest making breathing difficult. Tracheotomy. On respirator for 5 days. Intravenously fed for 5 days. Unable to eat due to jaw injury. Intubated and fed through stomach tube. Also intravenously and with soft diet for 4 weeks. Discharged with bed rest for 1 month. Thoracic vertebral fractures only discovered after discharge from hospital. Further bed rest for 1 month. Noticeable spondylosis of the thoracic spine to the front causing abnormal mechanical loading when engaged in normal activities such as walking, running, sitting, typing, driving etc. resulting in pain and discomfort. Osteo-arthritis in back diagnosed as permanent. Fusion operation of neck and back vertebrae predicted. Scarring caused by operation but scars to neck and face minimal. The current value of the award granted by the court is R543 900.00.

[28] The plaintiff referred me to the following cases:

In the matter of **Dickson v SA Mutual Fire Insurance 1977 (2) C&B 725 (C)**, the Plaintiff was awarded R10 000.00 for general damages for two cervical fractures. In that matter, the Plaintiff fractured the C7 and C11 vertebrae and the Plaintiff herein fractured the C2 and C3 vertebrae. In that matter, the Plaintiff also suffered from a stiff neck. The current value of the award in that matter is **R436 502-50**.

[29] In **Lawson v RAF[2010 (6) QOD C4-I (ECP)** the Plaintiff suffered a spinal injury as he had sustained fractures of the L2, L3 and L4 on the right side of his spine together with an L4/L5 disc extrusion with L4 nerve root compression. The Plaintiff was in continual discomfort. However, in that matter, the Plaintiff was a medical doctor pursuing a career as a surgeon. Due to the accident, he could not pursue that career but had to enter into the field of specialist anaesthetist instead. Additionally, the Plaintiff was also a well-accomplished sportsman. The Plaintiff was awarded general damages in the sum of R300 000-00 with a current value of **R553 117-00**.

[30] In **M obo L v Thibedi & Another (7202/2008) [2019] ZAGPPHC 128 (24 April 2019)** the minor child suffered scars that were cosmetically unsightly and disfiguring, conspicuous and difficult to conceal and permanent but with some prospects of revision. He was awarded R450,000-00 which is **R569,920-00** in today's values.

[31] In this instance there is no question that the plaintiff was seriously injured and the injuries impacted in her life. However, the reference to a traumatic brain injury is not sustained by the facts. It is concerning that experts seem to draw inferences, in this case about a mild traumatic brain injury, without properly explaining to the court in their reports, what this diagnosis is based on. It is also concerning that experts venture out of their fields of expertise. This occurrence has become more prevalent in circumstances where reliance is placed on expert evidence without leading oral evidence. The plaintiff carries the *onus* to prove the damages and should therefore ensure that sufficient information is put before the court. Neither the case law, nor the evidence placed before this court justifies the proposed claim of R850 000-00 for general damages, which the plaintiff's counsel submitted is fair and reasonable.


[32] Taking into consideration all the circumstances of the case I am of the view that an amount of R550 000-00 in general damages is reasonable.

[33] The following order is made:

The defendant is ordered to pay to the plaintiff:

- a. Past hospital and medical expenses in the amount of R438 199-91;**
- b. In respect of general damages, R550 000-00;**
- c. For loss of earnings, R1 203 595-45;**
- d. To provide an undertaking in terms of section 17(4) of the Road Accident Fund Act, No 56 of 1996; and**

- e. To pay the costs of the action, including the qualifying fees of the experts who filed reports in this matter.



R G TOLMAY

JUDGE OF THE HIGH COURT PRETORIA

DATE OF HEARING: 1 FEBRUARY 2023

DATE OF JUDGMENT:

ATTORNEY FOR PLAINTIFF: DE BROGLIO ATTORNEYS INC

ADVOCATE FOR PLAINTIFF: ADV J ERASMUS

ATTORNEY FOR RESPONDENT: MKHONTO & NGWENYA INC

ADVOCATE FOR RESPONDENT: Me T K GAOKGWATHE