

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



- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED **NO**

DATE: 02 JULY 2023

SIGNATURE:

Case No. 17336/2017

In the matter between:

MASEMOLA LESHIDI ELSIE

PLAINTIFF

VS

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KHWINANA AJ

INTRODUCTION

- [1] The plaintiff Leshidi Elsie Masemola instituted action proceedings against the defendant for damages in terms of the Road Accident Fund Act 56 of 1996, pursuant to a motor vehicle collision, wherein she was a passenger.

- [2] The plaintiff claims Future hospital and medical expenses in form of an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, Loss of earnings at R 6 906.773.00, General damages at R 1 200 000.00, Interest at 7.5% per annum calculated from date of delivery of the summons to the defendant including date of payment, Costs of suit including VAT and qualifying fees where applicable.
- [3] The matter was set down for the 02nd and the 3rd day of March 2023 as the defendant prior to the hearing conceded to negligence and tendered the section 17(4)(a) certificate for future medical expenses, general damages which offer has been withdrawn.
- [4] I have dealt with the application for postponement as well as amendment summarily. The amendment has been effected taking into consideration the dies as prescribed and the amended pages that have been filed on caselines. The application for postponement was refused and I made an order that the matter be proceeded with.
- [5] I am ceased with the determination of quantum in respect of loss of earnings and general damages.
- “An expert’s opinion must be underpinned by proper reasoning in order for a Court to assess the cogency of their opinion.”

BACKGROUND

[6] The plaintiff was a passenger at the time of the accident collision that occurred on 25 July 2012. The driver of the motor vehicle lost control of the vehicle when the left rear tyre burst. The vehicle overturned several times, and the plaintiff sustained a fracture of her left leg and had lacerations on her forehead. The plaintiff was transported to Langebaan Hospital by an ambulance and immediately thereafter transported to 2 Military Hospital for medical treatment.

[7] The plaintiff was sent for x-rays of her left knee which revealed a proximal closed intra- articular left tibial plateau fracture. On 08 August 2012 the plaintiff's left leg was treated by an open reduction and internal fixation of the left tibia and thereafter discharged on crutches.

INJURIES AND SEQUELAE

DR MARIN ORTHOPAEDIC SURGEON

[8] Dr Marin says he is an orthopaedic surgeon. He qualified in 2001 and got the College of Medicine South Africa exam. He studied at Wits University and has been in private practice for the past 20 years. He has been conducting Road Accident Fund matters for about ten years. He saw the plaintiff on the 2nd of August 2019. He says he checked the clinical history provided from Military Hospital then there was a RAF4 and a RAF1.

[9] He opined that the plaintiff sustained a serious injury as the orthopaedic injuries were classified as a serious long-term impairment or loss of a

body function under the narrative test. On inspection, he noted an incisional scar on lateral side of knee, which was painful over the medial and lateral joints with restricted flexion. He referred to the X Rays which noted the following:

9.1 Previous lateral tibia plateau fracture with modulation deformity of the lateral left tibial plateau.

9.2. Internal fixation in situ with a lateral plate and screws.

8.3. Breaking of the tibial eminences with early marginal osteophyte formation suggestive of osteo degenerative change.

9.4. Osteopenia of the visualized left knee.

[10] He diagnosed the plaintiff with left tibial plateau fracture treated with ORIF (open reduction and internal fixation) resulting in painful instrumentation, post-traumatic osteoarthritis of the knee joint and restricted range of movement. He recommended the removal of the instrumentation and based on the probability that the degeneration in her knee will progress to end stage osteoarthritis, total knee replacement. However, the artificial joint still has a limited lifespan of 12 (twelve) to 15 (fifteen) years.

[11] He therefore recommended that provision should be made for a revision surgery every 12 (twelve) to 15 (fifteen) years, taking the plaintiff's age into consideration. He concluded,

(i) that the injury had a profound impact on the plaintiff's productivity, working ability and amenities of life, and will continue to do so in future and

(ii) that the plaintiff will need to be accommodated in a sedentary/light duty position and

(iii) if accommodated in a light duty/sedentary position, the plaintiff will be able to work to the retirement age of 55 (fifty-five) – 60 (sixty) years.

[12] Counsel for the defendant cross-examined Dr Marin about his qualifications and years of practice which he reiterated. He says he had limited clinical records which he explained to mean the operation itself he did not see and that there were no records from Langebaan hospital. He however stood by his opinion as raised in examination in chief. Counsel for the plaintiff re-examined Dr Marin and he said "You can actually tell what happen, the fracture extends into the joint, which means very possibility of osteoarthritis". He says he used pain, restrictive range, swelling, muscle atrophy, and X-rays to confirm his opinion.

DR DK MUTYABA

NEUROSURGEON

[13] Dr DK Mutyaba, says he conducted a full clinical examination. focussing on the neurosurgical aspects. He says he is a fellow of the College of Neurosurgeons of South Africa

since May 2015 and has been, in private practice for the last seven years. He has been doing Road Accident Fund case for the past five years. He saw her on the 17th of September 2020. He says he had an instruction letter, an RAF1 form, an injury report from the South African Defence Force, the medico-legal report by Dr Marin, and a report by, an occupational therapist.

[14] He says he conducted an examination with the plaintiff wherein he found that she sustained a head injury, bilateral shoulder injuries, and a left knee injury. He says she said she woke up in the hospital or woke up with people around her and did not know what happened and how she got there. She had no recollection of the events following the accident. She had a healed two by three centimetres, just below the left eye. She complained of headaches, and reported blurred vision which he opined is important to see the percentage of concussions suffered as the patient would be left with niggling symptoms like that, headaches, and difficulty concentrating which she did not have.

[15] He says a Concussion is a clinical diagnosis, so the absence of imaging, will not sway his diagnosis. He says a low GCS, of less than eight will point me toward a severe traumatic brain injury. He saw her again in September 2020 and diagnosed her injury as a mild traumatic brain injury (TBI) / concussion

evidenced by the period of alteration in the level of consciousness and the soft tissue facial injury, indicating acceleration/deceleration forces applied to the cranium and her current complaints of headaches can be classified as post-concussion headaches.

[16] Counsel for the defendant cross-examined the doctor and he says without the CT scan you can conclude that there is a mild traumatic brain injury. He says a GCS of fifteen does not rule out head injury. Counsel for plaintiff re-examined and referred the doctor to 014-3 on caselines "Female involved in MVA." "*Cannot remember much except that bus was rolling.*" He reiterated that he examined her cranial nerves, her motor system, and by that he meant her muscle movements, her power, and her spine. He also examined her sensation, her cerebellum system. her cardiac, respiratory and gastro-intestinal systems.

[17] He opines that his finding was that the plaintiff in addition to the left tibial plateau fracture she suffered a mild head injury and when he saw her at the time she was displaying signs and symptoms of post-concussion headaches.

DR KATJENE

CLINICAL AND NEUROPSYCHOLOGIST

[18] Dr M Katjene is a Clinical psychologist as well as a neuropsychologist. He has a Bachelor of Science, Bachelor

of Science Honours in Psychology and MSC in clinical psychology, a PhD in Psychology as well as post-graduate courses which qualifies me to be a clinician that can be able to, to do these assessments. He qualified in 2002 and started working as a clinical psychologist and has been doing medio-legal work from 2008 to date. He says he did the first assessment on the 26th of July 2019 and the second assessment was conducted, on the 18th of January 2023.

[19] He says he first did a clinical interview, clinical impressions, standardised mental mini mental state examination, brief neuro-psychological cognitive examination, back depression inventory, and DSM-5 criteria for post-traumatic stress disorder. He used a personal test, trail-making test, modified tailor complex figure drawing, substance of the Wechsler Adult intelligence scale South African version where he tap into comprehension, arithmetic reason, block design, picture completion, digit span, coding similarities, controlled or a word association test, five-point test, grooved pegboard test, post-concussion symptom checklist.

[20] He says the purpose was to determine three aspects in terms of the person's functioning based on the sustained injuries as he wanted to determine the neuro-psychological, neuro-cognitive as well neuro-behavioural

functioning of the plaintiff. He noted that the plaintiff presented with mild mood disturbance, post-traumatic stress disorder and adjustment difficulties impacting negatively on his emotional and psychological well-being compounded by the negative effect of accident-related scars on her self-image/self-esteem.

[21] He further noted that the plaintiff's cognitive functioning is characterized

by the following:

21.1 She performed above expected limits in tasks that require immediate auditory attention span, short-term visual memory, information processing ability, long-term memory, language comprehension and concrete thinking, visual-motor speed and manual dexterity.

21.2 She performed within expected limits in tasks that require complex-double conceptual tracking, vision-construction, deductive reasoning, sequencing, visual attention and scanning, visuo-spatial attention, visual complex attention, perceptual tracking, short-term perceptual memory, planning and organizing and working memory.

21.3 She performed marginally below expected limits in tasks that require visual motor integration and visual recognition.

21.4 She demonstrated fluctuating application of logical reasoning, verbal reasoning, abstract reasoning, verbal fluency (positive) and attention and concentration.

21.5 She is experiencing neuropsychological and neurocognitive disturbances, post-concussion symptoms and adjustment difficulties.

21.6 She continues to experience post-concussion headaches.

[22] Dr Katjene testified that his overall impression from the clinical psychological perspective is that the plaintiff's test score profile revealed moderate and fluctuating cognitive functioning and the presenting cognitive challenges as determined in the evaluation could be a result of the negative effect of her poor emotional and psychological functioning characterized by mild mood disturbance, post-traumatic stress disorder, adjustment difficulties, post- morbid challenges as well as the disturbing impact of reported mild to very severe reactive symptoms, dizziness, memory problems, poor concentration, fatigue, irritability, noise sensitivity, light sensitivity, visual problems and auditory problems.

[23] Dr Katjene opines that the presenting challenges will most likely impact negatively on her work functioning as no further spontaneous recovery can be expected in her functioning. Counsel for the defendant cross-examined the doctor and he says the pre-morbid and the post-morbid inferences are imperative in his assessment. He says the fact that you were involved in an accident does not go away there is a nexus between the person you dealing with and

what transpired. He says the period that has lapsed has no effect on the evidence.

[24] During re-examination he reiterated that the plaintiff is still affected at those three levels that he highlighted earlier being neurocognitive disturbances, neuropsychological deficits as well as neuro-behavioural.

DR RS LSHILO

PSYCHIATRIST

[26] Dr RS Leshilo, is a psychiatrist, graduated in 2017, starting practising in 2018 as a psychiatrist. His qualifications are Masters in Medicine, Psychiatry and he is a fellow of College of Psychiatry. He testified that he assessed the plaintiff on the 17 September 2020. He did a psychiatric assessment in relation to the traumatic event that happened. He noted that clinically, the plaintiff presented with signs and symptoms suggestive of primary psychiatric illness that is due to the mental trauma sustained in traumatic event (the collision) and now suffers from major depressive disorder: depressed mood (fluctuating mood), sleep disturbance, fatigue, loss of energy, withdrawn. He further noted that the plaintiff's prognosis as major depressive disorder and that her depressive disorder hinders on her ability to manage her social and occupational life and other related activities.

[27] He says six years later it is obvious that the plaintiff is still struggling with her mental health following the, the accident. The PTSD is still as vivid from when you are interviewing her as she is in distress. He says she will need treatment, even possible admission, to be able to help her. Counsel for defendant cross-examined the doctor about Diagnostic Standardised Manual, to which he replied in each and every profession there is that book that guides you in terms of your, your specific work. He says she was left in a more of depressed mood, which is one of the symptoms that can come with PTSD.

[28] He says when assessing an individual they are not looking at

one thing, they look at contributing factors and in combination

of the contributing factors that also plays a role in the mental

state of the patient. During re-examination he says pre-morbid and post morbid must be taken into account when assessing the patient. The matter was adjourned to the 03rd March 2023.

MS L CROSS

OCCUPATIONAL THERAPIST

[29] Ms L Cross, testified that she assessed the plaintiff on 31 July 2019 the purpose of the assessment being to determine the physical impact of the injuries that she sustained in the accident and the effect thereof on her current functioning. He holds a bachelor's honours in occupational therapy and has completed the certified training for that type of assessment, called Work Well. He has been conducting examinations since 2018 practicing as an occupational therapist since 2017. It is now five years. He says the plaintiff's loss of earning potential is as follows:

29.1 The plaintiff completed grade 12 in 2002. She was not satisfied with her results and elected to repeat grade 12 in 2003. Thereafter, she enrolled for Bachelor of Commerce (Economics) degree but only completed one year of studies due to financial constraints. Later, in 2019, she completed a higher certificate in Economics Management Sciences.

29.2. The plaintiff's work history includes having worked as a cook and cleaner (light work), soldier: access control (light work) and boat crew and rifleman (heavy work).

29.3 Prior to the accident, the plaintiff's supervisor did not report to experience any challenges regarding the plaintiff's job performance and maintains that she is an excellent and diligent employee.

29.4 The plaintiff sustained a left tibial plateau fracture and a hit to her head / concussion. Surgical intervention was performed to the fracture of her left leg. After her discharge, in August 2012, she attended outpatient physiotherapy and biokinetics until 2014.

29.5. Post-accident employment, the plaintiff was placed on temporary incapacity leave and did not work for a period of three months. Following the period of temporary disability, she was found unfit to fulfil military duties as a rifleman and the temporary incapacity leave was extended for an additional three months. Thus, she was off from work, on incapacity, for a total of six months.

29.6. Upon her return to work in March 2013, the plaintiff was allocated a temporary position of administrator, while the military found her a permanent alternative position to fulfil.

29.7. Due to her injuries and the recommended intervention, Dr Marin has made provision for five years' early retirement.

29.8. In July 2016, the plaintiff was placed in the position of fuel attendant (light work).

29.9. In dealing with her residual capacity and impact on employment Ms Cross found the following:

29.2.1 The plaintiffs tested abilities on the day indicated from a postural endurance and mobility point of view, she can perform sedentary work,

from a weight handling perspective, she can perform medium work and from a cardiovascular point of view, she can perform light work.

29.2.2 The plaintiff does not meet the postural and mobility or weight handling job requirements of soldier as performed before the accident.

29.2.3 The plaintiff reports that she was found unfit to perform duties of a soldier as she could not run or pass the physical testing procedures. Thus, she was found unfit to perform duties of a soldier, at the time of her return to work, in 2013, which is in line with her current tested abilities.

29.2.4. The plaintiff is not suited to return to her pre-accident occupation of soldier, even after the recommended surgical intervention, from a joint protection principle (weight handling and running are contraindicated).

29.2.5 When comparing her tested abilities to her work demands at present, the plaintiff does not meet the full job requirements of fuel attendant as performed after the accident. She does not meet the frequent standing and walking demands.

29.2.6 The plaintiff reports to experience left knee pain and discomfort after standing for more than 3 hours. Considering her tested abilities of occasional standing and walking, her complaints and experience of pain are valid.

[30] Ms Cross therefore opined that the plaintiff requires a sympathetic employer who is able to accommodate the plaintiff's challenge's so as to allow the

plaintiff may continue in this light work position. Referring to the prognosis of Dr Marin, Ms Cross noted that it is expected that with successful treatment and surgery that her productivity will improve. However, as degeneration in her left knee progresses, her productivity will then decrease again, and she will continue to suffer from deficits due to the injuries sustained.

[31] Ms Cross concluded that the plaintiff's future work should be limited to sedentary work or light work, even with the recommended intervention and that she may retain the ability to engage in light work, if she can alternate between sitting and standing throughout the workday. From a joint protection perspective, she should limit frequent walking or climbing. From a weight handling perspective, it is not recommended that the plaintiff handle medium or heavier weights. This could contribute to and hasten degeneration of the left knee joint.

[32] Counsel for the defendant cross-examined the doctor and says the plaintiff no longer does work of heavy duty, but rather sedentary kind of work, and that will not change her report neither does the fact that she has been promoted. During re-examination the doctor opines that the period from the time the report was done is imperative to note any changes. She reiterates that the report will not change.

MS CHRISTO DU TOIT

INDUSTRIAL PSYCHOLOGIST

[33] Ms Du Toit, testified on the virtual platform. That the plaintiff loss of earning potential and noted the following:

33.1. Considering the plaintiff's present age of 36 years, selection for the next course in a week's time, additional commitments to complete her degree and acknowledging her comments about the possibility of being able to change to a civilian job, continuation of her career in the SANDF is projected as a probability.

33.2. Considering all relevant information to date, the following pre and post-accident earning scenario is projected. Straight-line progression is suggested, because it is impossible to comment about time parameters for progression to different ranks i.e. in an injured and uninjured state. Notches for the different scales also overlap.

33.3. Various attempts were made to obtain more recent salary scales, but without success. Analytic also confirmed that they are only in possession in the 2019 scales.

[34] She recommended that to work on a straight-line progression from what she earned in 2010, R102 240.00 per annum towards the upper level of salary scales for Captain i.e., R409 063.33 per annum per Analytico 2019 scales as an estimated career ceiling towards age 45 years. The retirement age is 60 years per SANDF policies. The plaintiff will probably successfully complete the course to progress to Petty Officer within the next 4 months, she will qualify as the post of Petty Officer to the rank of Sergeant. She will follow the notches, progressing to Senior Petty Officer.

[35] She further said acknowledging updated information available, with specific reference to her present age of 36 years and collateral input obtained, it is unlikely that she will be able to progress further than the rank of Petty Officer/Senior Petty Officer. It is recommended that January 2023 payslip (Notch R256 002-00) be acknowledged. The plaintiff noted that no substantial increase in salary in the rank of Petty Officer is expected, maybe around R200 per month. Therefore, a straight-line progression from what she earned in January 2023 to the upper notch of Senior Petty Officers (equivalent to Staff Sergeant) i.e., R342 290.38 as per the Analytico scales 2019 towards age 45 years is projected as a career ceiling.

[36] Dr Marin, opined that she will be accommodated in light duty/sedentary position and will be able to work to the retirement age of 55 to 60 years.

THE LAW

LOSS OF EARNING CAPACITY

[37] It is accepted that earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven the loss may be compensated if it is quantifiable as a diminution in the value of the estate.¹

It must be noted, a physical disability which impacts the capacity for an

¹ *Prinsloo v Road Accident Fund* **2009 5 SA 406** (SECLD) at 409C-41A

income does not, on its own, reduce the patrimony of an injured person. It is incumbent on the plaintiff to prove that the reduction of the income earning capacity will result in actual loss of income.²

[38] The actuarial calculations are based on proven facts and realistic assumptions regarding the future. The Actuary guides the court in making calculations. The court has a wide judicial discretion and therefore the final say regarding the calculations. The actuary relies on the report of the Industrial Psychologists, who would have obtained information from the plaintiff and any other relevant source.

[39] The court, in the case of *Road Accident Fund v Guedes*³ at paragraph 9 referred with approval to *The Quantum Yearbook*, by the learned author Dr R.J. Koch, under the heading 'General Contingencies', where it states that:

“...[when] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court...” (My Emphasis)

[40] Nicholas JA⁴ stated the following at p.113 paragraph G-H

“Any enquiry into damages for loss of earning capacity is of its nature speculative. because it involves predictions as to the future. All that the court can do is to make an estimate, which is often a very rough estimate of the present value of the loss.

It has opened to it two possible approaches.

One is for the judge to make a round estimate of an amount that seems to him to be fair and reasonable. This is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment. by way of mathematical calculations. on the basis of assumptions resting on the evidence. The validity of this approach

² *Rudman v Road Accident Fund* [2003 \(2\) SA 234](#) (SCA) at para 11, *Union and National Insurance Co*

³ 2006(5) SA 583

⁴ *Southern Insurance Association LTD V Bailey* NO 1984(1) SA 98

depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. There are cases where the assessment by the court is little more than an estimate; but even so. if it is certain that pecuniary damage has been suffered, the court is bound to award damages”.

[41] It is now well-settled that contingencies, whether negative or positive, are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to the parties. There is no hard and fast rule regarding contingency allowances. Koch in *The Quantum Yearbook* (2011) at 104 said:

*“General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. There are no fixed rules as regards general contingencies.”*⁵

GENERAL DAMAGES

[42] In ***Sandler v Wholesale Coal Suppliers Ltd***⁶ Watermeyer JA held:

“The amount to be compensation awarded as 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.”

[43] In ***RAF v Marunga***⁷ the Supreme Court of Appeal confirmed the dictum of Broom DJP in ***Wright v Multilateral Motor Vehicle Accident Fund***⁸:

“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.”

⁵ Gwaxula v Road Accident Fund (09/41896) [2013] ZAGPJHC 240 (25 September 2013)

⁶ 1941 AD 194 at 199

⁷ 2005(5) SA 457 (AD)

⁸ 1923 AD 234 at 246

- [44] In **Ncama v RAF 2015 (7E3) QOD 7 (ECP)** Eksteen, J awarded R500 000.00 to a female cleaner in November 2014. The present day value of the award is R650 000.00. The injuries are dissimilar to those *in casu*. The plaintiff sustained a fracture of her right femur causing an open reduction and internal fixation to be performed whereafter she acquired crutches to ambulate. She also sustained a skull fracture, a neck injury and soft tissue injuries to her pelvic ring and sacro-iliac joints. It was predicted there was a 30% chance that a fusion at C5/6 will be required. Clearly, this plaintiff sustained further injuries to her pelvis, neck and head, but the extent of her lower limb injuries is much less severe than that of the plaintiff *in casu*⁹.
- [45] In **Abrahams v RAF 2014 (J2-1) QOD 7 (ECP)** Eksteen, J awarded R500 000.00 to a 41 year old spray painter. The present day value of the award dated 29 May 2012 is R727 000.00. Although the judgment is found in segment J, it is apparent that the plaintiff did not really suffer multiple injuries. The court found that the head injury complained of was really minimal and no cognisance was taken thereof in considering the amount to be awarded for general damages. In that case the plaintiff sustained a badly comminuted fracture of the right proximal femur as well as fractures of the right distal fibula, patella and medial malleolus. Open reductions were performed on all three areas with internal fixation. The lower right leg was shortened and plaintiff had to wear an assistive device. The injuries in this case, as in the case of *Smit supra*, are not too dissimilar to that of the plaintiff *in casu* and will be duly considered in adjudicating the plaintiff's claim¹⁰.
- [46] In **Mgudlwa v Road Accident Fund**¹¹ the court made an award for general damages in the amount of R300 000.00. The plaintiff had sustained an extremely comminuted fracture of the lower end of the femur and scars on the upper end of the left tibia. The injuries had significant adverse effects on his legs, spine and hips.
- [47] In **Kaduku vs RAF**¹² (2017 - R 650 000. 2020 value R734 000). Kubushi J, in determining the claim for general damages, referred to the injuries suffered by the plaintiff, which included: a left tibia and fibula fracture and head injury with a laceration of the scalp. He was treated with an open reduction and internal fixation with tibial nails was done for the left tibia fracture. He was treated

⁹ Litseo v Road Accident Fund (5637/2016) [2019] ZAFSHC 52 (2 May 2019)

¹⁰ Ibid Supra at 9

¹¹ (818/2002) [2010] ZAECMHC 13 (5 February 2010)

¹² (83408/2014) [2017] ZAGPPHC 432 (22 March 2017)

medically for the head injury and the scalp laceration was sutured. The evidence indicated that he sustained a moderately severe diffuse brain Injur

SUBMISSIONS BY PLAINTIFF'S COUNSEL

[48] Counsel reiterated the legal position to prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss. That measure of proof is a preponderance of probabilities, which entails proving that the occurrence of the loss is more likely than not. That there must be proof that the disability gives rise to a patrimonial loss, which depends on the occupation or nature of the work which the patient did before the accident or would probably have done if he had not been disabled. The measure of proof is relaxed in cases where uncertainty prevails for instance, in the case of future loss.

[49] She referred to the judgement of Selikowitz J in Hendricks v President insurance Co Ltd¹³ the reason for establishing this exception becomes clear: “The principle applicable to the assessment of damages has as its ratio the policy that the wrongdoer should not escape liability merely because the damage(s) he caused cannot be quantified readily or accurately. The underlying premise upon which the principle rests is that the victim has, in fact, suffered damage(s) and that the wrongdoer is liable to pay compensation or a solatium.”

[50] In Phalane v Road Accident Fund¹⁴ it was ruled that: Contingencies are the hazards of life that normally beset the lives and circumstances of ordinary

¹³ 1993 (3) SA 158 C

¹⁴ (48112/2014) [2017] ZAGPPHC 759 (7 November 2017)

people. 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. Contingencies for which allowance should be made, would usually include the following the possibility of illness which would have occurred in any event; inflation or deflation of the value of money in future; and 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).

[51] In *Ubisi v Road Accident Fund*¹⁵ the Court, in awarding a premorbid contingency deduction of 20% and a post morbid deduction of 50% stated that: “On the value of income having regard to the accident it is submitted that a higher than usual contingency of 70% be applied, considering the opinion of Dr Blignaut, the defendants expert, with whom Dr Booyesen concurs that even after surgery he does not think that the plaintiff will be able to compete or secure work in the open labour market. The plaintiff has shown resilience on the objective facts, albeit conflicting at times by seeking employment unconstrained by his medical deficits.

[52] In *Maluleke v Road Accident Fund*¹⁶ where the plaintiff’s earning pre and post morbid were assumed to be the same, the Court held that post morbidly 55% should be deducted, arguing that: “ I am of the further view that the fact that post the collision, the plaintiff will henceforth primarily depend on sympathetic employment. I am of the further view that this finding should and can be mitigated by a moderately post-morbid higher contingency deduction,

¹⁵ (31563/2014) [2018] ZAGPPHC 453 (13 February 2018)

¹⁶ *Maluleke v Road Accident Fund* (98018/15) [2018] ZAGPPHC 218 (7 March 2018)

although not of the proportion as suggested by the plaintiff's counsel. This finding is in view of the fact that the plaintiff would be disadvantaged in an open labour market and thus should weigh in his favour,"

[53] In *Krohn v Road Accident Fund*¹⁷ the Court, in awarding a premorbid contingency deduction of 15% and a post morbid deduction of 50% stated that: "There is little doubt that having regard to the sequelae of his injuries fully canvassed by the experts, the plaintiff is at risk of losing his current position and the prospects of him obtaining another position are indeed very slim. The plaintiff is on the proverbial "knife's edge". He can be dismissed from his job anytime. There is no other option in my mind other than to apply a 50% post-morbid contingency deduction. By applying the 50% contingency deduction, the plaintiff is regarded as having a 50% chance to sustain his current employment, alternatively to obtain alternative employment. This is a conservative approach if one has regard to the plaintiff's condition."

[54] In *Road Accident Fund v De Bruyn*¹⁸ the court on appeal upheld a 60% post morbid contingency deduction. In addition, In this case, the plaintiff's post-morbid challenges should be considered and dealt with in line with the following cases.¹⁹ In these cases, the Courts have applied contingency deductions ranging from 10% to 20% on the uninjured earnings and 40% to 80% contingency deductions on the injured earnings. In order to determine a plaintiff's claim for future loss of income or earning capacity, it becomes

¹⁷ *Krohn v Road Accident Fund* (1402/2013) [2015] ZAGPPHC 697 (6 October 2015)

¹⁸ (15450/2013) [2015] ZAGPPHC 165

¹⁹ *Hall v Road Accident Fund* Case no. 11330/2008, *De Melin v Road Accident Fund* Case no. 19802/2010, *Fulton v Road Accident Fund* Case no.31280/2007, *Makuapane Road Accident Fund* Case no.12871/2012, *Saunders NO Road Accident Fund* Case no. 69330/2011, *Sayed NO Road Accident Fund* Case no. 49442/2013, *Patel NO Road Accident Fund* Case no. 74647/2010 33 (15450/2013) [2015] ZAGPPHC 165 017-34 017-34

necessary to compare what the claimant would have earned ‘but for’ the incident with what he would likely have earned after the incident. The future loss represents the difference between the pre-morbid and post-morbid figures after the application of the appropriate contingencies.

[55] Taking into account these considerations and how our courts have applied higher than normal contingencies, the plaintiff submits that the appropriate contingencies to be applied to the actuarial calculation is 50% in respect of the future injured earnings: in the present case, the appropriate contingencies to be applied to the actuarial calculation:

Past loss Value of income uninjured	R 2 460 902.00	
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Less contingency deduction 5%	R 123 045.00	34
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The amounts are as updated in the addendum actuary report dated 3 March 2023:

	R 2 337 857.00	
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Value of income injured	R 2 617 204.00	
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Less contingency deduction 40%	R 1 046 882.00	R 1 570 332.00
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Net Future Loss	R 767 535.00	
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Future loss Value of income uninjured	R 10 589 999.00	
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Less contingency deduction 10%	R 1 059 000.00	R 9 530 999.00
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Value of income injured	R 8 479 401.00	
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Less contingency deduction 60%	R 5 087 640.00	R 3 391 761.00
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Net Future Loss

R 6 139 238.00

NET TOTAL LOSS R 6 906 773.00

[56] Counsel for the plaintiff pray for an order along the following terms: Based on the expert reports and the actuary calculation, the amount of R 6 906 773.00 should be awarded to the plaintiff for the loss of earnings. Counsel for the plaintiff closed the plaintiff's case. Counsel for the defendant also closed the defendant's case. The matter was adjourned for the parties to file heads of argument and to be proceeded with on the 03rd April 2023. Counsel for the plaintiff did file her heads of argument as per the directive and counsel for the defendant submitted in court that he mixed up dates but he is almost done and would file on the same day. I ordered that the matter be proceeded with and counsel for the defendant to allude to arguments that he was to pen on paper in order to not compromise the plaintiff's counsel.

GENERAL DAMAGES

[57] Counsel the plaintiff that submits the Court in *Hendricks v President Insurance*²⁰ and the authors Visser and Potgieter *Skadevergoedingsreg*²¹ provide that the nature of the general damages to be awarded make quantifying the award a complex task. The SCA, quoting Holmes J in the *De Jongh*²² pointed out the fundamental principle relative to the award of general damages is "that the award should be fair to both sides, it must give just compensation to the plaintiff..."

²⁰ *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (C) at 166E

²¹ 3rd edition J M Potgieter, L Steynberg, T B Floyd (2003) 97

²² *De Jongh v Du Pisanie*, 2005(5) SA 457

[58] In *Mashigo v Road Accident Fund*²³ Davis J summarises the well-known approach to general damages and the use of previous comparable awards as follows: “A claim for general or non-patrimonial damages requires an assessment of the plaintiff's pain and suffering, disfigurement, permanent disability, and loss of amenities of life and attaching a monetary value thereto”. The accepted approach is the ‘flexible one’ described in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199, namely: the submissions were ‘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’.”

[59] The Supreme Court of Appeal has stated in *Protea Assurance co Ltd v Lamb*²⁴ “Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards which can be used as a yardstick. The court in these cases has discretion.

[60] In the case *Van Heerden J in Dikeni v Road Accident Fund*²⁵ stated “although these cases have been of assistance, it is trite law that each case must be adjudicated upon on its own merits and no one case is factually the same as another..... previous awards only offer guidance in the assessment of general damages.” In the case of *Marunga v The Road Accident Fund*²⁶ the Court stated that our courts have a tendency in our courts towards more

²³ *Mashigo v Road Accident Fund* (2120/2014) [2018] ZAGPPHC 539 (13 June 2018)

²⁴ 1971(1) SA 530 AD at p535 H - 536 A

²⁵ *Dikeni v Road Accident Fund* 2002 C&B (Vol 5) at B4 171

²⁶ 2003 (5) SA 164 (SCA)

generous awards for general damages. In this regard, and by virtue of the doctrine of stare decisis, the following previous awards is possibly useful in considering the appropriate and fair award in respect of general damages.

[61] In *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 170F the court held with approval the position from *Wright v Multilateral Motor Vehicle Accident Fund* 1997 (4) C&B E3-3 (N) where it was found that there is a tendency for awards to be higher than in the past. This, the court held, was a natural reflection of the changes in 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.

[62] *Mild Head Injury Noble V Road Accident Fund*²⁷ Synopsis of injuries and after-effects: The mechanism of the scarring was, in addition to the head and brain injury and fracture of the right femur and tibia, fractured patellae of both knees with extensive and associated scarring. Further scarring of the right thigh took place as a result of skin grafts taken from that area to the right lower leg. Summary of compensation awarded: General damages: R 600 000.00 Current day value: R1 037 000.00. *Tlou v Road Accident Fund* (17225/2011) [2016] ZAGPPHC 31 (25 January 2016) Injured person: A 25 year old female Synopsis of injuries and after-effects:

[63] The sustained a mild brain injury with loss of consciousness, neck and back injury. She suffered cognitive deficits which were classified as severe by the clinical psychologist. Summary of compensation awarded: General damages:

²⁷ 2011 (6J2) QOD 54 (GSJ)

R 600 000.00 Current day value: R797 000.00 Modisana v Road Accident Fund (3303/2009) [2012] ZANWHC 19 Injured person: 20 year old female Synopsis of injuries and after-effects: The minor child sustained a head injury with loss of consciousness and loss of recall and severe neuropsychological fallout, bruises/laceration over the right side of the face, neck injury, contusions both elbows and contusions left leg. Summary of compensation awarded: General damages: R 600 000.00 Current day value: R691 000.00 N [...] obo N [...] v Road Accident Fund (8935/19) [2021] ZAGPPHC 246 (6 May 2021)

[64] Knee Injury S M v Road Accident Fund (4719/2017) [2019] ZAFSHC 234 (6 December 2019) Injured person: A young female. Synopsis of injuries and after-effects: The plaintiff suffered left arm, right upper leg, right ankle and multiple soft tissue injuries. Summary of compensation awarded: General damages: R 700 000.00 Current day value: R 795 000.00 Litseo v Road Accident Fund (5637/2016) [2019] ZAFSHC 52 (2 May 2019) Injured person: An adult female. Synopsis of injuries and after-effects:

[65] The Plaintiff suffered injuries to the right upper neck and knee, the right lower leg and ankle and the left knee and lower leg. These will also require treatment and surgery in the future. The patent effect of the injuries is that they have rendered her an unfair competitor in the open labour market. This simply means that her opportunities have been nullified. Summary of compensation awarded: General damages: R 700 000.00 Current day value: R 795 000.00 Scarring Nxumalo v SA Eagle Insurance Company Ltd and others 1995 (4G5) QOD 1 (N) Synopsis of injuries and after-effects:

[66] The mechanism resulting in scarring involved and extensive degloving injury of the right lower limb from foot to groin leaving the plaintiff with severe scars on thigh and lower leg and permanent deformity and disability. The scarring to the lower leg involved 80% of the circumference with all skin and subcutaneous tissue having been lost and subsequently replaced by skin grafts but leaving particularly unsightly scarring which was hyper-pigmented and irregular. Summary of compensation awarded: General damages: R 600 000.00 Current day value: R425 000.00. Considering the injuries and relevant case law an amount of R1 200 000.00 as claimed by the plaintiff based on the cases referred to in the plaintiff's heads of argument is a fair and reasonable amount.

SUBMISSIONS BY COUNSEL FOR DEFENDANT

[67] Mr Shivhambo submits that all medico experts compiled their reports with missing or alternatively incomplete reports. He says the after the collision the Plaintiff was allegedly treated at Langebaan hospital, where she passed out and could not remember how the collision occurred. He says to date there are no hospital records received from the hospital including ambulance records indicating the plaintiff's GSC score. He says the alleged mild traumatic brain injury is too remote in that it is not mentioned anywhere on the MMF 1 and in the absence of medical records pertaining to the alleged treatment at the time of the accident an inference can be drawn that the Plaintiff did not sustain the alleged injury.

[68] He further argues that nexus between the accident and the alleged injuries cannot be established without proper production of documentary evidence,

namely hospital records. He says that in terms of the Hospital records that have been sought, that which all experts alluded to, there is no record that the Plaintiff bumped her head, in fact what appears is on records proving that she sustained fracture of the proximal (left leg) closed intra articular plateau. He says that Mr. Katjane's testimony under cross examination was inconsistent with the Neurosurgeon who found that Ms Masemola displayed no neurocognitive or neuropsychological deficits.

[69] He submits that the Neurosurgeon concluded that the mild traumatic head injury is not of a serious nature in that the WPI was 10%, and the Plaintiff does not qualify in terms of the narrative test. The Clinical psychologist completed his initial report without having been provided with the Neurosurgeons report, in actual fact at the time he completed his report he was only a clinical psychologist and not a Neuropsychologist. It is only in terms of his addendum report that he comes to say he is a Neuropsychologist, the Defendant argues that he did not provide proof of same and as result not entitled to make any finding in so far as neuropsychological sequelae are concerned.

[70] He submits that a negative inference be drawn in that the plaintiff was not called to testify. He says the appropriate contingencies to be applied to the actuarial calculation are that the calculation had already taken into account the five (5) year early retirement period. Therefore, the 60%/10% spread argued by the plaintiff is unreasonable and the defendant leaves it on the honourable court to exercise its discretion. He submits that there is no actual loss.

ANALYSIS

[71] The evidence as to how the accident occurred is not in dispute. The plaintiff was a passenger in a motor vehicle that overturned several times, and she cannot recall the details of the accident. The defendant conceded 100% with regard to the merits and what remained to be determined was the loss of earnings and the general damages. “In the case of *Bridgman NO v Road Accident Fund 2002 (1) ALLSA 1 (CPD)* the court held that in order to claim compensation for patrimonial loss a plaintiff must discharge the onus of proving on a balance of probabilities that such loss has indeed occurred. This does not necessarily mean that the plaintiff is required to prove the loss with mathematical precision however the Plaintiff is required to place before the court all evidence reasonably available to enable the court to qualify the damages and to make an appropriate award in his favour

[72] The evidence is that the plaintiff was transported to Langebaan Hospital by ambulance and immediately thereafter to Military Hospital. The X-rays that were taken from the left knee on the 25 July which revealed a proximal closed intraarticular left tibial plateau fracture. On the 8 August 2012 the plaintiff’s leg was treated by an open reduction and internal fixation on the left tibia by Military Hospital and then she was discharged, with crutches. Dr Marin the orthopaedic surgeon, opined that the plaintiff sustained a severe injury and in terms of the narrative test. He classified it as a serious long-term

impairment or loss of body function.

[73] Dr Marin noted an incisional scar on the lateral side knee which was painful over the medial and lateral joints with restricted movement. That there was a previous lateral tibia plateau fracture with modulation deformity of the lateral left tibial plateau, internal fixation of the plate and screws that was still in place and that there was breaking of the tibial eminences with early marginal osteophyte formation suggestive of osteo degenerative changes and there was osteopenia of the visualised left knee. He diagnosed the plaintiff with left tibial plateau fracture which was treated with open reduction and internal fixation that that equipment or hardware resulted in painful instrumentation, posttraumatic osteoarthritis of the left knee joined and then the restrictive range of movement and fixation was then confirmed.

[73] He recommended that those instrumentation would have to be removed and he also noted that there was a probability of degeneration in the knee which would progress to end-stage of osteoarthritis requiring a total knee replacement. He indicated that the lifespan of the artificial joined based on the knee replacement would have a 12-to-15-year lifespan and therefore recommended that every 12-to-15 years she would then require revision surgery on the artificial joined in terms of a revision left knee replacement.

[74] He opined that the injuries had a profound impact on the plaintiff's productivity and workability and will continue to do so in future. He says the plaintiff will need to be accommodated in a sedentary and light-duty position. She will still have early retirement age which he postulates is between the ages of 55 and 60, the South African Navy Defence Force retirement policy is 60 years. The evidence has shown that she is currently in an accommodated work environment. The evidence through the Neuro-surgeon is that she had brief loss continuousness until the time that she gets to Langebaan, or 2 Military by that time she is fully recovered or fully regained continuousness and her GCS was recorded as 15/15.

[75] He noted soft tissue injury on her face, and he says this was indicative of an acceleration, a deacceleration force that was applied to the cranium which would then be the cause of the laceration on the forehead and that her current complaints of headaches can also be classified as post-concussion headaches. Dr Kajane concluded that she is experiencing neuropsychological and neurocognitive disturbances, first concussion symptoms and adjustment difficulties and she continues to experience post-concussion headaches. Dr Katjene further said with regard to plaintiff's work capacity the present challenges will most likely impact negatively on her work functioning, as no further spontaneous recovery can be expected.

[76] She has been diagnosed with major depressive disorder,

depressed mood, sleep disturbance, fatigue, loss of energy and is now withdrawn. Having considered the evidence that was presented with regard to the injuries albeit that the experts had limited information nothing suggest that the plaintiff did not sustain the injuries alluded to. The description of how the accident occurred is not in dispute but what has been raised as a concern is the information that the medical experts had when they assessed the plaintiff. They were confronted with regard to the information and they categorically stated that they would not change their reports nor their opinion.

[77] I have considered what the medical expert narrated during his testimony that the plaintiff had a brief moment where she could not recall what happened. He says that is not severe or moderate brain injury but what he termed mild brain injury. He says the fact that her glascoma scale was 15/15 does not mean there was no mild brain injury. Further in relation to the knee injury Dr Marin opined that she qualified her on the narrative test. She will be forced to have a knee replacement and it is imperative to take into account her age as she was 36 years at the time. I have considered the caselaw and the matter of Litseo and Nobel though not exactly the same but there are similarities in the matters. I am inclined to agree with counsel for the plaintiff that she must be compensated in the sum of R 1.2

million for general damages.

[78] In relation to loss of earnings it is evident that she will no longer be able to compete with other abled bodies. She is now seriously compromised. She has been fortunate that she is now accommodated in sedentary or light duty. It is evident that if she had not been injured she would have been able to progress in her then line of duty. I believe the actuary has taken into account the contingencies whether negative or positive.

[79] It is imperative to note that industrial psychologist postulated that the plaintiff might have to take an early retirement of five years. The fact that she might have a knee replacement and there are no guarantees that she could be completely healed. She already suffers from PTSD and as Dr katjane stated when confronted about post and pre-morbid that are being considered. The fact that the plaintiff was a military officer who was involved in a motor collision and has had to move to a different line of duty will not change it is a fact that she has to live with.

[80] Counsel for the defendant was seriously compromised in his argument as he did not have medico-legal experts and was only challenging the evidence of the experts with regard to their years of experience and the fact that they were not privy

to initial hospital records. The medical experts are trained and qualified to assess the injuries herein and that has not been disputed. Counsel for the defendant ended on the note that it is for this court to consider the contingencies. Actuarial Calculations are merely an aid to this evaluation process and should not be regarded as being prescriptive of or limiting the court's discretion²⁸. I have considered the merits and the demerits of this case I am satisfied that the actuarial report took into account the contingencies.

[81] The plaintiff has suffered loss of earning capacity as she will no longer be accommodated in the work that she use to do. I have considered the caselaw alluded to supra. The amount that is fair and reasonable for future loss of earnings is R 6 906 773.00 as per the calculations submitted by the actuary. The total amount for the award by Commission of Occupational Injuries to be deducted from the total amount awarded by this court being .

Order

I have considered the draft order and taken into account the Commission of Occupational Injuries final award must be deducted. The draft order to be made available by plaintiff's attorney/counsel.

ENB KHWINANA

²⁸ M S v Road Accident Fund (10133/2018) [2019] ZAGPJHC 84; [2019] 3 All SA 626 (GJ) (25 March 2019)

**ACTING JUDGE OF NORTH GAUTENG
HIGH COURT, PRETORIA**

COUNSEL FOR PLAINTIFF:

ADV L. HASKINS

INSTRUCTED BY:

RAMAESELE MPHAHLELE

ATTORNEYS

COUNSEL FOR DEFENDANT:

MR SHIVHAMBO (ATTORNEY)

INSTRUCTED BY:

STATE ATTORNEY

DATE OF HEARING:

03/04/2023

DATE OF JUDGMENT:

02/07/2023