7-7-70

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G.P.-S.33967—1968-69—1,000.

J. 219.

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE Provincial Division.)
(Provinsiale Afdeling.)

Condonation and

Appeal in Civil Case.
Appèl in Siviele Saak.

UNION & SOUTH ~~WEST~~ AFRICA INS. ~~CO. LTD.~~ *Appellant,*

versus

HENDRIK JOHANNES BARNARD *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Webber & Son

Respondent's Attorney / *Prokureur vir Respondent* Symmonds - Klerk

Appellant's Advocate / *Advokaat vir Appellant* G. Friedman S.C.

Respondent's Advocate / *Advokaat vir Respondent* M. Kuntzen S.C.

Set down for hearing on / *Op die rol geplaas vir verhoor op* 27-11-70

1.6.7 10.11

Coram: van Blerk A.C.J, Jansen J.A, Smit, Corbett et Muller A.JJ.A

(E. C. D.) Condonation of late lodging of Record granted.

9.45 am —— 11.00 am

11.15 am —— 12.20 pm.

C.A.V.

Muller A.J.A

Appeal dismissed with costs.

Writ issued
Lasbrief uitgereik

Date and initials

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

UNION AND SOUTH WEST AFRICA INSURANCE COMPANY LIMITED.....Appellant.

AND

HENDRIK JOHANNES BARNARD .....Respondent.

Coram: VAN BLERK, A.C.J., JANSEN, J.A., SMIT, CORBETT ET MULLER, A.JJ.A.

Heard: 27th November, 1970. Delivered: 11th December, 1970.

J U D G M E N T.

MULLER, A.J.A.:

Appellant, a registered company in terms of the Motor Vehicle Insurance Act, No. 29 of 1942, was the insurer of a motor vehicle which collided with, and seriously injured respondent while he was cycling on a public road in Port Elizabeth. On account of the injuries suffered by him, respondent sued appellant for damages in the Port Elizabeth Circuit Court Local Division, and was awarded compensation in a total sum of R32,057.30 made up as follows:

(i) Medical expenses R1,479.33

2/ (ii) future .....

(ii)	future medical expenses	R1,757.00
(iii)	actual loss of earnings	R3,820.97
(iv)	loss of future earnings and earning capacity	R10,000.00
(v)	general damages for pain suffering, loss of amenities and disfigurement	R15,000.00
		R32,057.30

The appeal to this Court is directed solely at the quantum of damages awarded and is specifically limited to the items under paragraph (iv) and (v) above. In order to prosecute the appeal application was made for condonation of appellant's delay in complying with Rule 5(4) of the Rules of this Court; which application, not being opposed, was granted.

Before dealing with the grounds upon which it is contended that the awards under paragraphs (iv) and (v) above are excessive, it is convenient at this stage to give a resumé of the nature of the injuries suffered by respondent and the effects thereof, both past and present.

Respondent, a European male, between 36 and 37 years of age at the time of the collision, sustained the following injuries:

(a) a compound fracture of the left humerus;

(b) compound fractures of the right tibia and fibula;

(c) a ~~closed~~ fracture of the right femural shaft;

(d) a fracture of the left fibula;

(e) lacerations and partial degloving of the left calf, thigh and groin;

(f) contusions and lacerations of the right arm;

(g) abrasions of the left side of the face;

(h) abrasions of the right hand;

(i) abrasions and lacerations of the left foot.

He was admitted to hospital on the day of the collision (17 February 1967) and was discharged on 9 December 1967, as from which date he was confined to his home until February 1969 when he again commenced work. While in hospital, several major operations were performed on him. The first, shortly after admission to hospital, was to stabilise the left humerus by inserting an intramedullary nail. Such a nail was also inserted into the right tibia. The laceration of the left thigh was sutured. This was a very large laceration involving the anterior aspect of the thigh below the groin and ~~internally~~ virtually degloving one third of the thigh. Respondent's right leg was placed in a Thomas'

splint and suspended on a special frame with cord and weights. On account thereof he was immobilised, lying on his back for many months. While so immobilised, and approximately one month after admission to hospital, he developed bladder trouble, necessitating the insertion of a urethral catheter. As a result of having this catheter inside his urethra, respondent developed a urinary tract infection which was complicated by severe infection of the left epididymis and testis. Although the urinary tract infection was eventually cured by antibiotic therapy, it ~~is~~ not only caused permanent damage to respondent's kidneys - chronic pyelonephritis - but also caused his left testis to become completely atrophied.

By August 1967, and while respondent was still immobilised in hospital, it was discovered that the right femur had not united and a further operation was performed to insert another intramedullary nail. At the same time a bone graft was performed. Also this operation proved unsuccessful, as a result of which a further operation was performed during October 1967 to plate the humerus with a 6 hole plate and screws, around which a bone graft was packed.

5/ It .....

It was some time after this last operation that respondent could for the first time be taken out of the Thomas' splint in which his leg had been kept suspended. Thereafter physiotherapy commenced, and respondent was discharged from hospital on 9 December 1967. For the next 14 months respondent was confined to his home. He could not get about unassisted and had to use crutches and a caliper to support the one leg.

While in hospital, respondent, for lengthy periods, suffered severe pain and discomfort, particularly after each of the major operations performed on him. The pain was even worse while he was subject to treatment for the urinary trait infection. Even while convalescing at home, over the period December 1967 to January 1969, he was not free from pain. Respondent will at some future date have to undergo further operations for the removal of the intramedullary nail from the right leg and for removal of the plate from the left humerus.

According to the evidence given at the trial by a specialist orthopaedic surgeon and a ~~nomologist,~~ neurologist ~~permanent disability~~ respondent has suffered permanent disability in the following respects:

1. There is a 1¼ inch shortening of the right leg and a limitation of movement of the right

knee. This necessitates the wearing of specially built up shoes and a below knee caliper.

2. There is limitation of movement of the left arm.
3. He has for all practical purposes lost the left testis, and will in all probability have to undergo an operation for the removal of the atrophied testis. As a result of the damage to his testis his sexual potency has been substantially diminished.
4. He has, as a result of the urinary tract infection, suffered permanent damage to his kidneys and will, because of that condition, have to be kept under medical supervision indefinitely - regular urine check-ups will have to be done. Moreover, other changes brought about by the condition of his kidneys, such as hypertension and attacks of pyelonephritis, can be expected.
5. As a result of his injuries he will in future have to wear a spinal support in the form of a corset, and will require physiotherapy to his back.

In addition to permanent disability, respondent has also suffered disfigurement in the nature of unsightly scars on his legs and a wasting of the left thigh.

It is also clear on the evidence that respondent has, as a result of his injuries, suffered loss in his enjoyment

7/ of .....

of the amenities of life. He gets tired very quickly and cannot walk very far. Nor can he ride his bicycle, which before the collision was his only means of transport. Before the collision he found pleasure in gardening but, because of the condition of his leg, he can no longer do so.

His injuries have also had a serious effect on his earning capacity. Before the collision he was employed as a furnace operator with a firm which produces armourplate glass. Because of the partial disablement of his leg and one arm, he can no longer perform the work of a furnace operator, in consequence of which his employers now employ him as a production inspector. The basic wages of inspectors are less than those of furnace operators, but his employers, very charitably and by reason of his good services in the past, raised his wage as an inspector to the same level as the present basic wage of a furnace operator. In his new position there are however definite disadvantages - he no longer earns a production bonus, nor can he work overtime, which he usually did as a furnace operator. Moreover, inspectors receive lower and less regular wage increases than furnace operators. There will accordingly, by reason of his incapacity, be a sub-

8/ -stantial .....

stantial loss of future earnings.

In computing ~~comparing~~ respondent's loss in respect of future earnings the learned Judge a quo, Cloete J., worked on the assumption that respondent could be expected to remain in employment until his 65th birthday, thus giving him a further 27 years of remunerative employment. The reasoning of the learned Judge in arriving at a figure of R10,000.00, as representing respondent's loss of future earnings and earning capacity, is set forth as follows in the judgment:

> " He is uneducated and at the age of 37 with his disabilities, is unlikely to be able to qualify for other skilled work. On the figures given by Mr. Leonard, it seems probable that the plaintiff's average yearly income (calculated at the rate of R166.70 per month, which he was receiving at the time of the accident) would, capitalised at 5 per cent, would be R23,370.00. His actual loss calculated on this basis being the difference between the sum of R29,286.00 and R23,370.00 is therefore R5,916.00. These figures do not allow for the fact that the evidence shows that there are no parallel increases in the rates of pay of the two forms of employment. This tends to depreciate the actual difference between the two. In my view the figures should be

minimal. It seems to me that a more realistic figure would be R10,000.00 and I propose awarding this figure."

Although the above passage does not properly elucidate the method by which the figure of R5,916.00 was arrived at - presumably because certain words were accidentally omitted in the process of typing - it seems clear that what the learned Judge intended to do was to establish the difference between the present capitalised value of respondent's income for the next 27 years as an inspector and the present capitalised value of the income that he would have earned over the said period had he continued to be employed as a furnace operator. The present value of R166.70 per month (the sum mentioned in the judgment) capitalised over a period of 27 years at 5% per annum is R29,286.00; but it cannot be established how the learned Judge calculated the figure of R23,370.00.

Counsel for appellant contended that what the learned Judge should have deducted from the sum of R29,286.00 was respondent's present income of R1,820 per annum (R35 per week), capitalised over 27 years at 5% per annum; which gives a figure of R26,650.00. The difference between R29,286.00 and R26,650.00

is R2,636.00 which is less than half the sum of R5,916.00 mentioned in the judgment. And therefore, so it was argued, even if allowance were made for the fact that increases in the basic wages of furnace operators are higher and more regular than those of inspectors, the award under this particular head cannot be anywhere near R10.000.00.

The present ~~case~~ is one of those cases where, by reason of many imponderable contingencies, a calculation, directed at establishing the loss of future earnings, cannot be attempted with any pretence ~~of~~ of seeking to arrive at something more than what has been described as "an informed guess" (Federated Employers Fire and General Insurance Company v. McKenzie, reported in Corbett & Buchanan, "The Quantum of Damages", Vol. 2 p. 27, and Union and National Insurance Co. Ltd. v. Coetzee 1970(1) S.A. 295 (A.D.) at p. 301).

Accepting the position that respondent's present wage as an inspector is, because of the generosity of his employers, about the same as that which he would at present have earned had he continued to be employed as a furnace operater, and assuming that he will continue in employment as an inspector

until his 65th year, then, over a period of 27 years, there will be a loss of earnings in the following respects:

(a) he will not receive a production bonus;

(b) he will earn no overtime pay;

(c) increases in his basic wage as an inspector will be lower and less regular than those of a furnace operator.

It is of ~~course~~ course impossible to make any prediction as to what production bonusses will be paid to furnace operators in the distant future, or as to the opportunities which will be afforded to furnace operators for working overtime. But if one were to assume that, if respondent had not been injured, he would have continued to earn bonusses and overtime ~~wage~~ pay on the same scale as in the past, then the following calculations are instructive:

Bonusses.

During the last 12 months over which respondent was employed as a furnace operator (February 1966 to January 1967) his bonusses totalled R255.45. The present value of R255.45 per annum capitalised over 27 years at 5% per annum is R3,740.55.

Overtime pay.

The overtime pay earned by respondent over the same

period was R321.23. The present value of R321.23 per annum capitalised over 27 years at 5% per annum is R4,703.77.

As in the case of ~~business~~ bonusses and overtime pay, it is impossible to predict how the increases in the wages of inspectors will over the next 27 years compare with the increases in the wages of furnace operators. From January 1966 to September 1969 the wages of furnace operators were increased from time to time. The pattern of such increases was to the order of R3 per week each year, whereas the total wage increases of inspectors over the last five years was about R3 to R4 per week, i.e. an average of less than R1 per week each year. If it is assumed that over the next 27 years the wage increases in the industry will be such that the average difference between the increases for furnace operators and the increases for inspectors will be 50 cents per week each year - which, having regard to the figures for the past ~~ten~~ few years, seems to be on the conservative side - then respondent's nett loss in respect of this item alone, capitalised over 27 years at 5 % per annum, would exceed R4000.

On the basis of the assumptions on which the

13/ above .....

above calculations are made, the total loss suffered by respondent in respect of bonusses, overtime pay and wage increases, would far exceed R10,000.00. And that is without any allowance having been made for the fact that, with his disabilities brought about by the collision, respondent will be more prone to unemployment and to absence from work on account of ill health.

It was contended on behalf of appellant that some allowance should be made, on the other side of the scale, for the normal contingencies of life to which respondent's earning capacity would in any event have been subject; i.e. even if he had suffered no injury (see: Gillbanks v. Sigournay 1959(2) S.A. 11 (N.P.D.) at p. 17 and 1960(2) S.A. 552 (A.D.) at p. 569). But even if such an allowance were to be made, the sum awarded by the trial court in the present case would, in view of the abovementioned considerations, not appear to be excessive.

In the circumstances I do not think that interference with the award of R10,000.00 for loss of future earnings and earning capacity, is justified.

With regard to the award of R15,000.00 by the trial court as general damages for pain, suffering, loss of

14/ amenities ...

amenities and disfigurement, it was contended before us that the said amount is excessive. Counsel's argument in this regard was that the present case could not be described as falling within the more serious type of cases "inasmuch as respondent had suffered no mental disability and had not been left with any serious physical disability." It was further argued that, inasmuch as respondent had led a comparatively simple life and did not indulge in any special activities of a sporting or social nature, his injuries have not deprived him of any particular social or sporting amenity. And, in general, it was contended that the award R15,000.00 as general damages in the present case was out of line with awards in other decided cases.

It is true that respondent has not been left with any mental disability, nor with any serious physical disability of a particular kind. But, on the other hand, he has been left with a variety of disabilities each of a fairly serious nature, and all of which will contribute to produce substantial suffering for the rest of his life. Not only will he have to suffer the inconvenience of getting about with a shortened and stiff

15/ leg .....

leg, necessitating the wearing of special shoes and a caliper, but his back will require a special support in the form of a corset. There is also a limitation in the movements of his one arm. In addition the damage to his left testis, which will have to be removed, has substantially diminished his sexual potency, and he has been left with damaged kidneys which will require medical supervision indefenitely, and may cause further complications.

Respondent also suffers the disfigurement of his limbs by scarring and wasting.

Due weight must also be given to the pain suffered by him over a very lengthy period in hospital, where he had to undergo several major operations and was ~~offere~~ affected by a serious infection of the bladder and scrotum. After his discharge from hospital he was confined to his home for more than a year, still suffering pain, and unable to move about without the aid of crutches and a caliper. He will have to undergo further operations, with the prospect of suffering further pain.

It is also true that respondent lived a comparatively simple life and has not, by reason of his injuries been

deprived of any particular amenity of a social or sporting nature. But, on the other hand, he has been totally deprived of those simple things which gave him pleasure in life, namely walking (he now tires very quickly), riding a bicycle and gardening.

In contending that the award of R15,000.00 is excessive, it was argued that this Court should have regard to what counsel termed "comparable cases". We were referred by counsel for the appellant to several decided cases, some eight in number, and invited to weigh the severity of the particular injuries suffered by each of the individual plaintiffs in those cases against the injuries suffered by respondent in the present case and, on that basis, to compare the present award with what was awarded in each of the so-called comparable cases.

I personally do not think that any purpose can be served in making a detailed study of a number of cases selected by counsel and held out to the Court as a yardstick for measuring damages in an instant case. In fixing the quantum of general damages in an instant case, some guidance, but only in a broad way, can be obtained from the measure of damages awarded

in other decided cases (see: Capital Assurance Co. Ltd. v. Richter 1963(4) S.A. 901 (A.D.) at pp. 907/908, Marine and Trade Insurance Co. Ltd. v. Goliath 1968(4) S.A. 329 (A.D.) at pp. 333/334, and the judgment of this Court in Protea Assurance Company Limited v. Lamb delivered on 10 December 1970).

Approaching the matter on this basis, and having regard to all the circumstances of the present case, I do not think that the award of R15,000.00 as general damages for pain, suffering, loss of amenities and disfigurement is excessive.

The appeal is accordingly dismissed with costs.

MULLER, A.J.A.

VAN BLERK, A.C.J.)
JANSEN, J.A.) concur.
SMIT, A.J.A.)
CORBETT, A.J.A.)