

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

CASE NO: 3214/2017

In the matter between:

H P FOCHE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 04 OCTOBER 2023

CORAM: JORDAAN, AJ

DELIVERED ON: 11 MARCH 2024

[1] On the 16th of October 2016 HP Fouche (the Plaintiff), then a minor 13year old, and his sister, was enjoying a ride on the back of their family bakkie on the road from Henneman in the direction of Kroonstad, when their Nissan NP300 bakkie with registration numbers [...] FS (the bakkie) was rear-ended. The impact of the collision catapulted the Plaintiff off the back of the bakkie

onto the tarmac road surface. The impact further propelled the bakkie to ride over the left side of the Plaintiff's body as he was lying on the tarmac.

[2] As a result of the accident, the Plaintiff suffered the following injuries:

- 2.1 Fracture of the right clavicle
- 2.3 Fracture of the left humerus
- 2.4 Fracture of the left scapula
- 2.5 Fractured left rib
- 2.6 A pneumothorax on left and right side
- 2.7 A pulmonary contusion
- 2.8 Soft tissue injury to the left knee
- 2.9 Lacerations to the face
- 2.10 Anterior wedge fractures of T3 and T4
- 2.11 A mild concussive head injury
- 2.12 A crush injury

[3] Action was consequently instituted in terms of the provisions of the Road Accident Fund Act 56 of 1996, as amended, to recover damages. The aspects of loss of earning capacity and future medical treatment were settled on the 26th of August 2021 and in terms of Rule 33(4) separated from the claim for general damages. In the circumstances, the only head of damages for determination by this court is the plaintiff's general damages.

[4] By agreement between the parties, the Plaintiff testified and the expert reports of both parties were accepted as evidence. At commencement of the trial, the Plaintiff moved an amendment to increase the claim for general damages to R1 500.00, to which the Defendant indicated they have no objection to such amendment but that they will argue that the amount is exorbitant, the amendment was accordingly allowed.

[5] The Plaintiff testified that he was taken up and treated in hospital for approximately two weeks as a result of the multiple injuries he sustained in the accident. He testified that his ribs were broken of which one rib punctured his lung. It was his testimony further that as a consequence of the bakkie

driving over his shoulder and fracturing it, he cannot properly lift his left arm, he cannot lift heavy items and he experiences pins and needles sensation and pain in the arm. Because of the knee injury he sustained, he cannot herd his cattle as his knee pains and gives way as a result, he has to make use of a quadbike to herd his cattle. He further testified that his spine was injured in the accident causing backpains. During cross examination it was his evidence that he left school after grade 10 because he could not carry his school bag on his back anymore and the pressure was too much, he thus elected to leave school and start his farming career with the money he received as compensation.

[6] Dr Enslin, an Orthopaedic Surgeon who examined the Plaintiff at the instance of the Plaintiff, reports that the Plaintiff sustained a fracture of the right clavicle, a pneumothorax on the left and right side, a soft tissue injury to the left knee, a mild concussive head injury, multiple abrasions over his left knee and lower legs, a laceration on his face, a fracture of the left proximal humerus, an injury to the thoracic spine, a fracture of the left scapular, a pulmonary contusion, a crush injury and a fractured rib on the left side¹. Dr Enslin reports that the Plaintiff has pain and discomfort over his chest, upper back, left knee, left shoulder and lifting heavy objects exacerbate his symptoms. The Plaintiff cannot carry his school bag due to the pain and discomfort in the left shoulder. The Plaintiff struggles to use his left arm due to the loss of movement in his left shoulder especially abduction and flexion of the shoulder. The Plaintiff no longer plays rugby. The Plaintiff struggles to lift his arm above shoulder height.²

[7] The report of Dr Enslin further states that the Plaintiff has unsightly scars over his chest, both legs left knee and face, is very aware of the scars and attempts to hide them. Dr Enslin reports that the Plaintiff has symptoms of post-traumatic stress and a depressed mood. Dr Enslin reports that Plaintiff

¹Paginated Bundle: Expert Notices Volume 2 page 170.

²Paginated Bundle: Expert Notices Volume 2 page 173.

severe cosmetic disfigurement, qualifying for general damages in terms of the narrative test.³

[8] Dr Moloto, an Orthopaedic Surgeon who examined the Plaintiff at the instance of the Defendant, reports that the Plaintiff sustained a head injury, fractures of the ribs on the left side, fracture of the right clavicle, fracture of the left humerus, injury of the haemothorax. Dr Moloto further reported that the Plaintiff's present condition is sustained moderately severe injuries to the head, the left arm and the right clavicle, the chest and the left knee. of Dr Enslin further states that the Plaintiff has unsightly scars over his chest, both legs left knee and face, is very aware of the scars and attempts to hide them. Dr Moloto reports that the Plaintiff has symptoms of post-traumatic stress and a depressed mood. Dr Moloto reports that Plaintiff severe cosmetic disfigurement, qualifying for general damages in terms of the narrative test. Dr Moloto further report that the Plaintiff now feels pain on exertion of the left arm and that the Plaintiff has not over stated his complaints. Dr Moloto opines that the Plaintiff has recovered from his injuries and has a good prognosis, no future orthopaedic treatment will be necessary.⁴

[9] Dr Moagi, an Occupational Therapist who consulted the Plaintiff at the instance of the Defendant, reports that the Plaintiff's father complained that he bought the Plaintiff a trolley bag as he was unable to carry his schoolbag due to left shoulder pain.⁵ Dr Moagi reports that during the physical component assessment of the Plaintiff the Plaintiff reported mild pain in the lower back, the Plaintiff had restricted movement in the upper limbs with pain and he displayed an inconsistent asymmetrical pattern.⁶

[10] Dr Mutyaba, a Neurosurgeon who consulted the Plaintiff at the instance of the Plaintiff, he opines that the Plaintiff suffered a mild traumatic brain injury with a resultant post-concussion syndrome.⁷

³Paginated Bundle: Expert Notices Volume 2 page 174.

⁴Paginated Bundle: Expert Notices Volume 1 pages 4 to 6.

⁵Paginated Bundle: Expert Notices Volume 1 page 30.

⁶Paginated Bundle: Expert Notices Volume 1 page 34.

⁷Paginated Bundle: Expert Notices Volume 2 page 180.

- [11] There was no dispute as far as the Plaintiff's injuries and his treatment were concerned, except to clarify that it was the left and not both the left and right shoulder that was fractured. In the circumstances the Court accepts the evidence of the Plaintiff. The reports of the experts were further handed in by consent of the Parties. In the circumstances, those reports relevant to general damages were taken into account and accepted. The only issue between the Parties were the amount to be awarded for general damages. Accordingly, the Parties are ad idem that the Plaintiff sustained serious injuries as a result of the motor vehicle accident which caused pain and suffering for which the Defendant is liable to compensate.
- [12] The determination of an appropriate award for general damages involves a consideration of the Plaintiffs pain and suffering, loss of amenities of life and applicable disabilities. The determination is also factual, as it involves having regard to all the relevant facts and circumstances relevant to the Plaintiff and the nature and extent of his injuries. The permanency, severity and the impact of the injury sustained on the lifestyle of the Plaintiff form part of the consideration. The discretion of the court to award fair and adequate compensation is wide.⁸
- [13] The injuries that the Plaintiff sustained and the sequelae thereof have been documented above. The Plaintiff sustained an array of injuries and a multiplicity of orthopaedic injuries which not only caused physical pain but also functional impairment which he is still grappling with, having testified and indicated in court the limited extent to which he can lift of his left arm, the remaining pangs of pain during physical exertion and the remaining visible scars on his face.
- [14] The plaintiff claimed an amount of R1 500 000,00 for general damages and referred the court to a number of comparable cases, while the Defendant referred the Court to cases which in their view are comparable cases in support of their submission that the amount claimed is exorbitant. General

⁸De Jongh v Du Pisani 2005 (5) SA 547 SCA.

damages is often determined by comparing cases under scrutiny and those previously decided, it is generally accepted that previously decided cases are never similar and that their purpose stops at comparing them to the current.

[15] The Plaintiff referred the court to the case of:

Claassens v Road Accident Fund (35716/2016) [2019] ZAGPPHC 471 a 34-year-old male was involved in a motor vehicle collision. He suffered several severe injuries including a moderate to severe traumatic brain injury, rib fractures, lung contusions and lung infection developed in ICU. Claassens suffered from chronic headaches, traumatic brain injury sequelae with loss of short-term memory, chronic chest pain, severe surgical scarring, chronic lumber backache and an altered ability to work in the open labour market. The court awarded general damages of R1 200 000,00 which is equivalent to R1 412 000,00 in 2023.

Kruger v Road Accident Fund (27383/2009) [2022] ZAGPPHC 73 the Plaintiff suffered a skull fracture which resulted in a moderate to severe brain injury resulting in deficits in his neuro psychiatric, neuro behavioural and neuro psychological functions. He also suffered injuries to his cervical and lumber spine. Kruger experienced drastic personality changes as he was aggressive and anti-social. The court awarded R1 400 000,00 for general damages which is equivalent to R1 474 000,00 in 2023.

[16] The Defendant referred the court to amongst others the case of:

April obo a minor Verney Road accident fund [2021] LNQD 32 GJ the plaintiff suffered serious injuries which included a head injury and facial abrasions, loss of consciousness, neck pain, right distal radius and ulna fracture, an injury to the right ulna nerve, left clavicle fracture, a pelvis fracture and multiple abrasions. The sequelae included a decrease in cognitive functioning and general concentration ability and a decrease in reading ability. The minor suffers from chronic daily headache and loss of use of the dominant right arm due to ulnar nerve injury with residual pain. The minor further suffers from post-traumatic stress disorder and has symptoms of major depressive disorder. Find scarring on the forehead, two scars on the

right wrist, two scars on the right arm and a scar on the left for arm. The plaintive was awarded an amount of R500,000 for general damages in 2021.

Malangabe V Road Accident Fund [2021] LNQD 24 (FB) the plaintive suffered a base of skull fracture and otorrhea, mild traumatic brain injury, lacerations on the forehead and scalp and right acromioclavicular joint dislocation. The sequelae include complaints of short-term memory, poor concentration and recurrent headaches, painful right shoulder exacerbated by the lifting of heavy weights and cold weather. The court awarded general damages in the amount of R400000,00.

Ndaba v Road Accident Fund (EL 321/08) [2011] ZAECELLC 6 a 42-year-old female, was travelling with her youngest child, a mere baby, when the collision occurred. The plaintiff's legs were trapped inside the vehicle and she had to pass her baby through the window to onlookers while waiting to be freed from the mangled vehicle. This caused her much distress.

Upon admission the following injuries were noted: A straddled pelvic fracture, a right femoral "midshaft" fracture and a bladder injury (rupture) as a result of blunt abdominal trauma. She also sustained an injury to her right shoulder and a dashboard left knee injury. The latter injury she sustained being trapped between the seats of the taxi she was traveling in. At the hospital, a Denham pin was inserted in the region of the right proximal tibia. A balanced skeletal traction was performed and the wound on her arm was stitched. A catheter was inserted as a result of the ruptured bladder. The fractured femur was also treated by means of a delayed internal fixation with a plate, screws and a bone-grafting procedure. When the plaintiff presented with multiple complaints of a painful right shoulder pain in the pelvic area backache, a painful right hip and right knee. She still suffers from all of the aforementioned. The plaintiff has difficulty in using her right arm. She is unable to lift it above her shoulder. Pain in the pelvic area is increased when she climbs stairs or walks, and during sexual intercourse. The plaintiff walks with a limp and her knee is often painful and swollen. She is unable to bend forward or stand for more than a few minutes without pain. All her orthopaedic complaints are aggravated by inclement weather. She suffers permanently from discomfort and intermittent

pains. The court awarded general damages in the amount of R400 000.00 in 2011.

[17] In the case of *Dikeni v RAF* 2002 (5) 171 GP Van Heerden J stated:

“Although these cases have been of assistance, it is trite law that each case must be adjudicated, on its own merit. No one case is factually the same as the other. It only provides a guide in the assessment of damages.”

[18] This court had regard to the cases submitted to it and have come to the conclusion that few cases are directly comparable; no two cases can be on all fours. The cases submitted by the Plaintiff deals with severe traumatic brain injury and in the case of mild to moderate brain injury there are deficits in neuro psychiatric, neuro behavioural and neuro psychological functions, which the Plaintiff *in casu* does not suffer from.

[19] Compensation must be fair and adequate. In *Tshongolo v RAF*⁹ the court awarded R500 000,00 to a teenager who suffered a very mild brain injury not rendered unconscious after the accident, as well as abrasions to her face and fracture of her right clavicle. Hospitalised for approximately three days returning to follow up examinations which included a procedure draining excess fluids from a haematoma of her head. Experiencing occipital headaches almost on a daily basis as well as right shoulder pains induced by lifting heavy objects. She suffered lower back pain induced by inclement weather or prolonged sitting and a soft tissue injury to her thoracolumbar spine. Neurocognitive deficits including in respect of concentration, attention and working memory. The award currently translates to R524 950, 00.

[20] Having considered past awards and all the factors relevant to the assessment of damages in this particular case, I have formed the view that an amount of R525 000.00 would be fair and just compensation to the Plaintiff for general damages.

⁹ Case No. 19958/2014 (Judgment 2 November 2021) GSJ.

[21] In the result, the following order is made:

1. Defendant shall pay to the Plaintiff the sum of R525 000,00 as and for general damages;
2. Defendant shall pay interest on the sum aforesaid at the legal rate of interest from a date fourteen (14) days after judgment to date of payment;
3. Defendant shall pay the Plaintiff's party/party costs which shall include the trial dates of the 03rd and 04th of October 2023.

M.T. JORDAAN, AJ

APPEARANCES:

Counsel on behalf of the Applicant:

Instructed by:

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VZLR INC. c/o DU PLOOY

ATTORNEYS

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