NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO:13337/01

DATE:2004-02-1 9

In the matter between

RADIFALANE PUSELETSO Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

WILLIS. J: The plaintiff claims against the Road Accident Fund in her capacity as mother of P R. The claim arises from a collision, which took place on the 21st of November 1998 at or near Kommer Road, between a vehicle, having registration number FMG253GP ("the Insured Vehicle") driven by one Vuyani Sipambo ("the Insured Driver"), which collided with the plaintiff's daughter who was a pedestrian.

The plaintiff claimed estimated future medical expenses and loss of earning capacity and

general damages for pain and suffering, loss of amenities of life and disability- The total of the plaintiff's claim prior to an amendment was R2 887 128,00.
At the commencement of the trial, the defendant conceded the merits in favour of the plaintiff. The defendant then applied for a separation of issues in terms of Rule 33(4). I made the Order accordingly, as it seemed to me that the separation (now that the defendant had conceded the merits) was academic, and that in any event, the Rule effectively required me to make such an Order in accordance with a standing practice.
The defendant then applied for a postponement, which I refused, for reasons which I have already given in the earlier ruling relating to that matter.

During the course of the trial, the plaintiff applied to amend the figure claimed for loss of earning capacity from R939 582,00 to R1 430 834,05. I granted this amendment, precisely because it became it clear at the time that it was applied for that the figure calculated by the actuary, Mr Rolland, was based upon a supposition, which was at variance with the evidence, which had been led by virtually all of the plaintiff's expert witnesses in regard to likely work or employment, which the plaintiff's daughter would obtain upon adulthood.
The defendant also, once the trial had commenced, conceded a figure for general damages, for pain and suffering, loss of amenities of life and disability in an amount of R130 000,00. This figure was
The defendant also, during the course of the trial, gave an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act No. 56 of 1996, in terms of which it agreed to compensate the plaintiff and/or her daughter P, as the case may be, for her estimated future medical expenses arising from the collision and which related to the items claimed in the particulars of claim namely psychiatric treatment, psychotherapy, family therapy, treatment for epilepsy, occupational therapy, the employment of an assistant, remedial schooling,

septoplasty and speech therapy.

The only issue which therefore remained for me to determine was the quantum in respect of the loss of earning capacity. Neurologist experts from both sides agreed that the plaintiff's daughter, P, has suffered mild to moderate head injury as a result of the collision.

During the course of the evidence, it seemed clear, on a balance of probabilities, that the primary locus of this injury was in the frontal lobe of the brain. It also seemed clear from the evidence that subsequent to the collision, and as a result thereof, the plaintiff's daughter P has suffered from periodic epileptic fits, although these appear to have decreased in frequency from the period immediately after the collision.

As a result of admissions made by the defendant, it no longer was necessary for the plaintiff to call all the experts, which she had originally intended. The following experts were, however, called:

1. Ms Eleanor Bubb;
2. Ms Marilyn Aiden;
3. R. Wortley;
4. Ms Wilma Van der Walt; and
5. Mr D. G. Rolland.

The evidence of Ms Tikiso who had been the teacher of P in the year in which the collision occurred, testified that she had been an average pupil of average ability, who showed some leadership qualities before the collision occurred.

The school reports, which were put before me, largely confirmed this impression of Ms Tikiso. In other words, she was, for want of a better description, an utterly "normal" child. She was neither particularly clever nor was she particularly stupid.

It would appear that she repeated that year, although the reason therefore is not clear, but it

may well relate to the fact of the collision, which occurred towards the end of that particular year.

Ms Magagane who was the teacher of P, when she was in Grade 3 in 2001, confirmed the evidence relating to the plaintiff's daughter, P, suffering from periodic epileptic fits, which would result in her incontinence and passing water in the classroom. She confirmed that in her view the plaintiff's daughter, P, was not normal and that there was something wrong with her.

Her academic performance was at or near the very lowest performance in the class and she would indeed have wanted her to have repeated this year, but school policy prohibited it, in view of her having repeated a year previously.

Ms Eleanor Bubb, who is a clinical psychologist, Ms Marilyn Aiden, who is a counselling psychologist with a special interest in clinical neuro psychology, Ms Wilma Van der Walt who is an occupational therapist and Professor Skuy, who is a clinical and educational psychologist (who testified on behalf of the defendant), all testified to the effect that after having done tests on P, her general functioning level was that of the very bottom of the normal range, and that she bordered upon being classified as a person who was mildly mentally retarded.

Professor Skuy raised the possibility as a hypothesis, rather than his confirmed belief, the question of the plaintiff's daughter P having been a malingerer, who succeeded in "faking bad" to produce the poor results that were shown on the tests. He conceded that this hypothesis could not be sustained in the light of the evidence of Ms Wilma Van der Walt that the tests

which she conducted, in particular relating to her sensory motor functions were of such a nature that she would not have been able to perceive the direction in which the tests were leading and that she could not reasonably have been a malingerer.

Professor Skuy also relied upon an article that was handed into Court with the consent of the plaintiff, which was headed "Neurologic Clinics - Malingering and Conversion Reactions by Michael Winetraub". This article refers to certain precautions that can be taken to ensure that a person who is a malingerer does not succeed in deceiving the tester, and which can check as a safeguard to ensure that false results are not accepted as being true.

He accepted the general opinion of Mr Winetraub in this regard and it seems to me that the evidence as a whole clearly shows that there were sufficient safeguards present to enable one confidently to conclude that P was not a malingerer for the purposes of these tests, or that, if she was, she would not have succeeded as successfully as she did in producing a false reading of her intellectual capacities.

Mr Musi, who appears for the defendant, eventually conceded, during the course of argument, that the evidence as a whole shows that it could not be accepted that P, the plaintiff's daughter was a malingerer.
t should add that Ms Bubb, Ms Marilyn Aiden and Ms Wilma Van der Walt were all of the view that P had not been a malingerer. The evidence of the experts, as I have already indicated, all showed that the plaintiff's daughter, P, was a person who would function at the lower extremities of the normal range, and was on the borderline of being classified as mildly mentally retarded.

In my view the evidence as a whole, clearly links this fact with the collision, which has occurred. I come to this conclusion firstly because the evidence of the school teachers, who taught her both before and after the collision, corroborates this evidence which was given by her mother which evidence must obviously be accepted with caution, as she clearly has a considerable interest in this matter.

Furthermore, there is the fact that the records of the plaintiff's family and her children show that the other siblings, born of the marriage, were all either average performers or particularly good performers academically. Whilst this factor in itself does not necessarily demonstrate that the plaintiff's daughter P, had been functioning normally prior to the collision, it is, i believe, a factor which may legitimately be taken into account.

Then there is the fact that all of the experts, with a possible exception of Professor Skuy, traced the cause of the plaintiff's daughter, P's intellectual and general impairment to some kind of brain injury. It is common cause that the plaintiff's daughter P, did indeed suffer from brain injury as a result of the collision.

Accordingly, in my view, it may safely be accepted on a balance of probabilities, that the impaired functioning of P is directly attributable to the collision, and once again, Mr Musi, during the course of argument, conceded this fact.

I put it to Mr Musi that as a general proposition, it could safely be accepted that the plaintiff's daughter, P, IQ level dropped from around 100 to around 80 as a result of the collision. He could not disagree.

Ms Bubb's was that "Present information suggests that she (i.e. P) may experience difficulty in working on the open labour market. This is taking into account the problem areas noted in the previous section, as well as her uncontrolled epilepsy and mood swings. If she ever does work in the open labour market, it will be in a highly supervised, routine and sympathetic environment."

Ms Marilyn Aiden expressed her opinion as follows: "If she (i.e. P) does not receive the necessary remedial therapy, school work will become increasingly difficult for her, with the concomitant she obtains. At best, she will probably cope with low level, unskilled to semi skilled jobs, that do not involve working in dangerous environments or using machinery, taking her generalised seizure disorder into account."

Ms Van der Walt expressed her opinion as follows: "The comment of Ms Bubb that even with remedial input P's scholastic skills will be severely limited and of very limited use in the real word, is taken into account. It is foreseen that her career prospects will be limited to menial, laborious work of a repetitive nature. She would probably be dependent upon direct supervision and structure in the workplace. It is not foreseen that she would be able to perform skilled work and her prospects of performing semi skilled work seem limited."
Dr Wortley, the industrial psychologist called by the plaintiff noted as follows: "A study conducted in 1999 found that 88% of people with disabilities were unemployed and seeking work. This indicates that P is at a very high risk for unemployment."

He also expressed the view that: "P might "at best" be able to undertake low level unskilled work in a safe environment, there is very little of this sort of work, and has to look at the figures given above; she would be competing with the labour force of uninjured people, who

suffer from about a 40% unemployment level".

He was of the view that had P progressed normally, she would probably have matriculated and obtained some kind of tertiary level education. She would probably have gained employment somewhere between the A1 and C2 level in the well known Patterson System of Job Grading.

This would have put her income in the region somewhere between R2 500,00 and R10 000,00 at nett present value. The view was expressed that if one had regard to the general socio-economic level of the mother and father of the plaintiff's daughter, as well as her siblings, it was highly probable, that but for this collision, she would have had that kind of career path, outlined above.

I may mention that the plaintiff's mother is employed as a clerk at a firm of attorneys and her father is a bricklayer who manages his own business. The siblings of P have, as I have already indicated, been performing well or particularly well at school.

Mr Rolland, the actuary, based his calculations upon the following: "I have been informed that Ms Radifalane will only pass Grade 10 at the end of the year 2010 when she will commence employment at an income of R49 308,00 per annum (R4 109,00 per month) on level A2. I have assumed that her income will then remain apart from inflationary increases until her retireable age of 65."

His computation in respect of the prospective loss of earnings was as follows:
"If the accident had not occurred: R1 912 181,00.

Now that the accident has occurred: R972 599,00.

Prospective loss: R939 582,00."

In other words, his calculation as to her prospective income now that the accident has occurred amounting to R972 599,00 was based on the assumption that the plaintiff's daughter P would indeed obtain employment at a level A2 earning an income of

R49 308,00 per annum.

As I have already indicated, the evidence led showed that P would have a 88% chance of being unemployed. In other words, the calculation based on an assumption that she would earn an income of R49 308,00 per annum had flawed assumptions.

The evidence before the Court suggested that even if P obtained sheltered employment, she would be extremely lucky to earn an income of R24 000,00 per annum. Mr Rolland re-did his calculations in this Court on the assumption that R24 000,00 per annum was the income that P would earn in sheltered employment.

I wish to emphasise that the evidence before this Court was to the effect that her chances of finding sheltered or protected employment were extremely bleak indeed. Re-doing Mr Rolland's calculations, the figure of R972 .599,00 aforesaid was revised to R509 292,00. This would leave a prospective loss of R1 402 889,00.

Since the case of Shield Insurance Co Limited versus Booysen 1979 (3) SA 953 (A): "It has become standard practice to make a 1 5% deduction from future losses to cater for contingencies that no one can predict."

Ms Goedhart who appears for the plaintiff very fairly conceded that it would be fair for me to reduce the figure of R1 912 181,00 by 15% to allow for such contingencies. 15% of Rl 910 181,00 is R286 827,00. This would have the effect of reducing the likely earnings of Priscilla if the accident had not occurred to R1 625 354,00.

Ms Goedhart drew attention to the evidence of Dr Wortley that P would have a 88% chance of

being unemployed for the rest of her life. She submitted that even if one accepted generously in favour of the defendant, that P would have a 20% chance of obtaining employment, this would have the effect of reducing the figure of R972 599,00 originally calculated by Mr Rolland as the income which P would be likely to earn now that the accident had occurred. This would reduce the figure for the prospective loss to R1 430 834,05. This is the amended figure, which I allowed earlier. I would summarise, it is calculated as follows:-

	Rl.912.181,00
Less: 15% Contingency	286 827,00
Earnings if the loss had not occurred	625 354 00
Less: 20% of R927 599 (Mr Rolland's original estimate)	191 519,00
Prospective Loss	1 430 834,05

The figure as to prospective loss inevitably involves a fair amount of guess work. It is never a precise calculation. It is interesting however that the allowance for contingencies and the 20% estimate of the plaintiff's daughter P obtaining employment comes very close to the calculation to which I have previously referred, where a deduction was made on the assumption that P would earn R24 000,00 per annum in sheltered employment. That figure, it will be recalled, came to R1 402 889,00.

Accordingly I propose to award R1 400 000,00 being the sum in respect of the loss of earning capacity for the future for the plaintiff's daughter P.

Ms Goedhart asked that in the costs order I include the qualifying fees of the various experts who had prepared to give testimony in this case. There is my view no reason why their qualifying fees should not be allowed.

The following order is made:

1. It is noted that the defendant has given an undertaking to the plaintiff in terms of Section

17{4){a) of the Road Accident Fund Act No. 56 of 1996 to compensate the plaintiff and/or her daughter P, as the case may be,for her estimated future medical expenses arising from the collision, which took place on 21st of November 1998, and which relate to psychiatric treatment, psychotherapy, family therapy, treatment for epilepsy, occupational therapy, the employment of an assistant, remedial schooling, septoplasty and speech therapy.

2. The defendant is to pay the plaintiff the following sums:

2.1 R130 000,00{being general damages for pain and suffering, loss of amenities of life and disability);

2.2 R1 400 000,00 (being the loss sustained by the plaintiff's daughter P, in respect of her prospective earning capacity);

3. the defendant is to pay interest on the aforesaid sums referred to in paragraph 2 above at the rate of 15,5% per annum from 14 days after the date of this judgment to date of payment;

4. the defendant is to pay the plaintiff's cost of suit, including the qualifying fees of Dr Gopal, Dr Saffer, Ms Adan, Ms Bubb, Ms Van der Walt, Dr Wortley, Dr Malakou, Ms Penn, Mr Rolland and Dr Shevel.