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**IN THE COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT PRETORIA)**

CASE NO: 11619/07

DATE: 09 NOVEMBER 2009

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

IN THE MATTER BETWEEN:

OS B. obo O. B.

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

SERITI, J

1. INTRODUCTION

This matter came to Court by way of an action.

The Plaintiff, acting in his personal capacity and in his capacity as father and legal guardian of his minor child O. B., instituted an action against the Defendant, in which action he claims certain amounts of money for delictual damages:

(a) past medical, hospital and related expenses. R240,10;

(b) estimated future hospital, medical and related expenses: R150 000,00;

(c) future loss of earnings and earning capacity: R850 000,00;

(d) general damages: R450 000.00

The minor child on 23 February 2001 was a passenger in a motor vehicle driven by the Plaintiff which motor vehicle was involved in an accident with another motor vehicle and the minor child sustained certain physical injuries.

At the beginning of the hearing, the Court was advised that the merits of the case were settled on the basis that the Defendant would pay 60% of the Plaintiffs proven damages. Plaintiffs Counsel further advised the Court that the dispute between the parties is the nature, extent and *sequelae* of the injuries sustained by the minor child.

2. PLAINTIFFS EVIDENCE

Ms V. B., the minor child's mother, testified that the minor child was born on [...] and was injured in the accident mentioned above. She was injured on the right side of the head and on the face. The child was taken to hospital by ambulance and according to the hospital records the following is noted "MVA - No neuro deficits - no open wounds - X-ray NAD".

She further testified that the child was crying and at that time the child was about [...] years old. Her pregnancy was normal and the child was delivered at full term - no significant illness nor injury prior to the accident. After discharge from hospital the child was crying, fearful and not sleeping properly. She was complaining about headaches, painful neck and right arm.

A few days after the accident and on 25 February 2001, she took the child to Dr Combrinck, and in his report the doctor noted the following:

"Pasiënt het groot haematoma regs parietaal 4x5 - baie pynlik - geen ander beserings nie."

When the child started school, she was still complaining about headaches, painful neck and right arm and being unable to sit down in class for too long - she gets irritated easily and always bit her younger sibling - when given instruction she forgets easily.

Under cross-examination she testified that after the accident X-rays were taken. They were concentrating on head injuries and she is not sure if other injuries were checked. At that time the child could not speak and she was just crying. Now that the child is at school she helps her with her home-work and the child has problems with reading. The child complains about headaches three to four times a week.

Dr Mazabow, a clinical psychologist, also testified on behalf of the Plaintiff. He assessed the minor child on 3 March 2009. The minor child was accompanied by her mother. At the time of the assessment he had the following documents: RAF form, casualty records, letter from Dr Combrinck dated 25 February 2001, report prepared by a neurosurgeon Dr Du Plessis dated 11 February 2009 and school reports for 2004, 2007 and 2008 and after the assessment he prepared a full report dated 5 March 2009.

He confirmed the contents of his report. In his report he stated that the mother of the child informed her that the pregnancy of the child was uncomplicated and that the birth was full term and via normal delivery with birth weight of 2,6kg. All developmental milestones were attained appropriately.

The report further notes that Dr Combrinck, in the note dated 25 February 2001 (two days post accident) states that O. had a large haematoma in the right parietal region, which was very painful with no other injuries. He referred to the report of Dr J du Plessis a neurosurgeon. In his report the latter expert wrote

'Injuries sustained - she sustained an isolated injury according to the clinical documentation.

A subcutaneous scalp haematoma was noted in the right parietal area ... Based on this information one would be reluctant to postulate a significant concussive head injury. She probably sustained mild concussion."

Dr Mazabow stated that it is not possible to determine the precise severity of the concussion on the available information, given the fact that the injured was less than [...] years of age at that time. In 2004, when the child was [...] years old, it was reported by the nursery school teacher that the child was "unfriendly", complained of headaches and was very tearful. The child had reading problems at school although the mother was assisting her. He commented that an educational psychologist should conduct an evaluation of the child's specific scholastic skills, including reading comprehension and also interview her present and former teachers. The minor child reported to him that she experiences neck pain and backache when she bends forward and she has pain and weakness in her right arm when writing for long or when playing netball. The mother of the child informed him that the child tends to be irritable and cheeky at home, refuses to carry out tasks and lights with her little brother. She experienced nightmares and was fearful of motor vehicles for some six months after the accident, but these symptoms have since resolved.

After performing several tests. Dr Mazabow wrote as follows:

"O.'s particular pattern of test scores is strongly suggestive of focal brain dysfunction involving the right parieto-frontal region, which is the precise location of the head injury sustained in the accident.

It would appear that O.'s areas of focal neuropsychological difficulty have not affected her scholastic functioning thus far, although the possibility that these may have more significant effects in future (as she progresses to higher grades) should be investigated by an educational psychologist."

During his oral testimony Dr Mazabow testified that during his testing of the minor child in March 2009, the child demonstrated a pattern of scores that is compatible with

focal injury to the right parietal frontal region, which area is the precise point of impact on the head. It suggests that impact was unaccompanied by compression of the underlying tissues. He then referred to a report prepared by Dr G Capitani where the following is stated:

"In conclusion, her current neurocognitive test profile may possibly be associated with the presence of a minor brain injury with a right hemisphere focal brain injury in the temporo-parieto-occipital area."

He further stated that although the child is coping at school, she might not cope with her studies when she reaches higher grades. Non-verbal functioning is the child's main problem. Her main areas of difficulties are focal and include visuographic reproduction, visuospatial organisation and non-verbal concept formation, etc.

The next witness to testify was Dr Louis Linde, an industrial psychologist. He assessed the minor child on 25 February 2000 and he was in possession of all the reports filed in this matter. In his report, he noted the complaints of the child as noted by previous expert, the family's background, minor child's relationship with her siblings and that she struggles to read. Psychometric test was not used to assess minor child's general level of cognitive and psychosocial functioning as the child had been extensively tested by the Educational Psychologists. Professors Swanepoel and Skuy and the clinical psychologist. Dr Mazabow.

During the interview, the minor child communicated with good English pronunciation and understanding and was confident in her approach. In the report, it is also stated that Professor Swanepoel is of the opinion that the minor child may have had the potential to have completed Grade 12 in mainstream education comfortably, even tertiary education. He agrees with the said view and postulated the following two scenarios.

Scenario 1 is entering open labour market with a three years National Diploma through a University of Technology. After Matric, she would have undertaken full time

three years study program at University of Technology and she would have entered the open labour market within the Paterson B1-level. With time she would have progressed to a position within the Paterson C3 level. Because of scarcity of jobs, she would have started with temporary position probably for three years and thereafter a permanent position.

Scenario 2. A possibility exists that after obtaining a Diploma, she could have continued and obtained a B Tech. Duration of the said degree is one to two years full time studies. She would have entered the open labour market within the Paterson B3 level - she could have progressed to the Paterson C4/C5 levels.

In his view, scenario 1 is the most probable scenario. She would retire at the age of 65. The minor child has suffered a potential future loss of earnings and earning capacity. He referred to the report of Professor Swanepoel where it is stated that the minor child would encounter difficulties academically as she progress through the higher grades and may find it difficult to complete Grade 12 with university entrance requirements. She would not be able to reach her full potential.

The report of Dr Linde further states that writer was also concerned to note that Dr Mazabow identified rapid fatigue upon his testing; the Occupational Therapist noticed slow work speed and the Educational Psychologists found fall-out in reading ability which was also reported by her mother. These reduced abilities will have a significant impact on her future employability and may influence her ability to function in a higher level or cognitive more challenging positions. During his oral evidence he confirmed his findings as contained in his report.

The next witness to testify was Professor Swanepoel, counselling and Educational Psychologist. She confirmed the contents of her report. In her report it is stated that she consulted with the minor child and her mother on 16 June 2009 and also carried out certain tests. She had at that time reports from Drs Mazabow, Du Plessis, Professor Skuy (Clinical and Educational Psychologist), CJ Nel (Industrial Psychologist) and MMF1 medical report. She also had school reports for the following

years: 2004, 2007, 2008 and 2009.

Her report states that according to the MMF1 form she sustained a large haematoma on the right parietal area. The minor child was complaining of back and neck pains when she sits for long periods. She was told by the minor child that she does not enjoy reading, although she enjoys technology and mathematics. The child was psychometrically evaluated - the minor child told her that she wants to be a teacher.

Her tests revealed that on the whole she seems to be functioning above average and on an age appropriate level she does not like reading on the full scale she is average to high average and also her non-verbal score is also average to high average. Her verbal intelligence index is below average and her non-verbal reasoning index is average.

The report further states that -

"The results in both intelligence tests suggest that her non-verbal intelligence is higher than her verbal intelligence. This may be due to a lower functioning on her reading abilities. On the other hand the lower verbal intelligence may lead to lower reading abilities."

The report further states that she has been doing well academically and she has never failed a grade. She is achieving above average, but her poor reading and comprehension ability will obviously have a detrimental impact on her scholastic performance. Her functioning suggests that she may have had the potential to have completed Grade 12 in mainstream education comfortably even tertiary education. Indications are that as the demands in higher grades increase, she may find it difficult to complete Grade 12 with university entrance requirements. Her head injury in the accident seems to be a direct contributing factor. Remedial education and therapy is suggested.

Under cross-examination she testified that the minor child has deficits as a result of the head injury and that treatment will help her to deal with the deficits but will not take them away. She cannot attain a Diploma. Her comprehension is not what it should be because she cannot read properly.

The next witness to testify was Ms Santie Gropp, an occupational therapist. She confirmed contents of her report dated 12 January 2009 - she perused, prior to completing her report, reports by Drs Combrinck, Du Plessis, Mazabow and Professor Skuy. She interviewed the minor child and her mother.

In the report the family background of the family is noted including school history of the minor child. School reports were perused. According to the said report the following complaints were brought to her attention: painful neck and forearm when minor child writes, back pain when she has to bend or sit for long and that she finds it difficult to throw when playing netball. It also recorded that she is slow to learn spelling or reading, but there are no particular complaints from school. Formal tests were performed. The report further states that: Her conclusion is that although she performed well in the tests, she experienced physical discomfort, displayed some postural control difficulties - her mother reported that she has had a slow start at school which necessitated them to put extra effort into her work. Report further states that it appeared that she responded to this and her work improved, but she still has some basic perceptual, perceptual motor and sensory motor delays that slow her progress - the fact that she responded to the extra effort and improved, indicates that she would therefore have the necessary potential to benefit from further and appropriate interventions. Certain occupational therapy was recommended.

Plaintiff closed his case.

3. DEFENDANTS EVIDENCE

The first witness to testify on behalf of the Defendant was Dr G Capitani, a Clinical Psychologist. She testified that she saw the minor child on 16 October 2008 and

produced a report on 4 September 2009. She confirmed the contents of her report. When preparing her report she had reports from various experts including Professor Skuy.

In the report history of the family is set out and the school history of the minor child. Medical history of the minor child is noted and the interview with the mother is also noted.

Certain tests were performed and report states that her English reading was variable, some reading was good but she misread other words which she did not understand fully. Her work pace and speech pace were good and there was no evidence of mental slowing. Her reading ability suggested some problem, possibly involving a visual perceptual problem or alternatively related to English as her second language which is her medium of education. In the report it is also stated that "Her English reading showed some difficulty ... This suggests a pre-morbid difficulty and/or associated with the start of her education and scholastic development in her second language and/or possibly alternatively a focal right hemisphere injury involving the temporo-parieto occipital region."

During her oral evidence she testified that she is presently coping at school but if her English does not improve she will struggle at high school.

Under cross-examination she disputed the possibility of head injury and insisted that her poor reading ability has nothing to do with head injury. She also testified that the minor child will not experience any difficulty at high school.

Under re-examination she testified that there are no signs of focal dysfunction.

The next witness called by the Defendant was Dr Du Plessis a neurosurgeon. He confirmed the contents of his report dated 11 February 2009. In the report it is stated that the minor child sustained an isolated head injury according to the clinical

documentation. A subcutaneous scalp haematoma was noted in the right parietal area. It measured 4x5cm. No neurological deficit was noted. Other complaints are noted. The report further states that based on the available information, one would be reluctant to postulate a significant concussive head injury. She probably sustained a mild concussion.

In his oral evidence he testified that it is possible that a person can sustain focal brain injury and the MR scan might not detect it, but normally such brain injury will be minor. In his view, mild or minor injury in this case is not ruled out.

The last witness to be called by the Defendant was Ms Cecile Nel Venter an industrial psychologist - she confirmed the contents of her report. At the time she prepared her report, only reports of Dr Mazabow and Professor Skuy were available.

She testified *inter alia* that in the absence of a MR scan she cannot express an opinion about the possible existence of a head injury.

Defendant closed its case.

4. FINDINGS

In his report Dr Du Plessis stated that according to clinical documentation the minor child sustained an isolated head injury. A subcutaneous scalp haematoma was noted in the right parietal area. The report further states that the minor child probably sustained a mild concussion.

In his oral evidence he stated that in his view mild or minor head injury in this case is not ruled out. The note of Dr Combrinck dated 25 February 2001 stated that the minor child had a large haematoma in the right parietal region.

The evidence mentioned above indicates that the minor child had mild physical head

injury.

Dr Mazabow in his report stated that the test results are suggestive of focal brain dysfunction involving the right parieto frontal region. He also confirmed said point during his oral evidence. Professor Swanepoel who also prepared a report and testified in Court, during cross - examination stated that the minor child has certain deficits which are a direct result of her head injury. Her conclusions in the report and during oral evidence are or were well motivated I cannot find any reason not to rely on her report and evidence. The same applies to Dr Mazabow.

On the other hand Dr Capitani, who testified on behalf of the Defendant, disputed the fact that the minor child had any head injury she ruled out that possibility despite the fact that in her written report she did not rule out such a possibility. I do not believe that the Court can rely on her evidence. Her evidence was not satisfactory at all.

Dr Mazabow testified that although the minor child is coping well at school, she might not cope with her studies when she reaches higher grades. Professor Swanepoel expressed the same opinion.

I find that although she is coping at school presently, she will find studies difficult when she goes to higher grades.

Professor Swanepoel testified that but for the accident, the minor child had potential to pass Grade 12 in mainstream education, even tertiary education. Dr Linde agreed with the view of Professor Swanepoel. There is no reason not to accept the said evidence.

Dr Linde postulated two scenarios, namely the minor child entering the open labour market with a three year National Diploma and the second scenario where the minor child enters open labour market with a degree. He testified that scenario 1 is the most likely scenario and I agree with his view on this point, as it is clear to me that the minor child's earning potential is compromised

On the facts of this case, my view is that the question of future loss of earnings should be dealt with on contingency basis as suggested by Dr Linde – pre- morbid and post- morbid contingency deductions of 20% and 50% will be fair in the circumstances of this case.

In the Heads of Argument, the Plaintiff's Counsel submitted that an award of R400 000.00 for general damages will be a fair award.

On the other hand, the Defendant's Counsel submitted that an award of R60 000,00 will be fair in this case.

My view is that the amount suggested by the Defendant's Counsel is too low and on the other hand the amount suggested by the Plaintiffs Counsel is too high.

During oral argument I was not referred to any comparable case nor could I find any. My view is that an award of R260 000,00 for general damages will be a fair award in this case.

As far as future medical expenses are concerned, the Defendant has offered an Undertaking in terms of section 17(4)(a) of the Act, which undertaking I believe will adequately cover the future medical expenses.

The past medical expenses are not in dispute.

As stated earlier, merits were settled 60/40 in favour of the Plaintiff.

The Court therefore makes the following order:

1. The Defendant is ordered to pay the Plaintiff by way of delictual damages the sum of R633 612.00 directly into the trust account of the Plaintiffs Attorney of Record.

2. The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996 in favour of O. B. limited to 60% of such costs.

3. The Defendant is ordered to pay the Plaintiffs taxed or agreed part and party costs of suit to date hereof including the costs of the reports of and consultations with, as well as the preparation, qualifying, reservation and attendance fees, if any, of the following expert witnesses; Santie Gropp, Dr M Mazabow, Prof E M Swanepoel, Louis Linde, G W Schwalb; plus the travelling subsistence costs and loss of income, if any, for attending at court of the Plaintiff and his wife, both of whom are declared necessary witnesses and the costs of senior counsel

W L SERITI

JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 3rd NOVEMBER 2009

FOR THE PLAINTIFF: BPGEACH SC

INSTRUCTED BY: WAKS SILENT & GEACH ATTORNEYS

FOR THE DEFENDANT: A FROSCH

INSTRUCETD BY: MOTHLE JOOMA SABDIA INC