IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:74547/15

In the matter between:

THOBEGA BOTSHELO MERCY **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

RANCHOD J:

[1] The plaintiff was injured as a passenger in a motor vehicle accident on 18 February 2013 in Kuruman, Northern Cape when the driver lost control and the vehicle overturned.

[2] Liability has been conceded 100% in favour of the plaintiff by the defendant and the only issue for determination is the quantum of plaintiff's damages.

[3] At the commencement of the trial in respect of the quantum I was informed that the claim for past medical expenses is to be postponed sine die.

[4] The defendant shall also furnish the plaintiff with an undertaking in terms of s17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of future medical, hospital and related expenses.

[5] It was also agreed that there is no loss of past income.

[6] It is future loss of income (if any) that is in issue and the contingency deduction to be applied, and general damages.

[7] As far as the claim for general damages is concerned plaintiff's counsel submitted that R800 000.00 would be appropriate while defendant's counsel suggested R450 000.00. I will revert to it presently.

[8] As far as future loss of income is concerned the plaintiff contends that she has suffered a loss of earnings or earning capacity and that a contingency deduction of 15% for past loss and 40% for future loss should be applied, i.e. a contingency spread of 25%.

[9] The defendant's contention is that in the first instance the plaintiff suffered no past loss of income and she has not proved any future loss of earning capacity, hence there should be no award under this head of damages. But if it is found that plaintiff has indeed suffered a loss of earning capacity then a contingency spread of 5% or, at most, 10% should be applied in respect of future loss of income.

[10] The legal position relating to a claim for diminished earning capacity is trite. The mere fact of physical disability does not necessarily reduce the estate or patrimony of the person injured. Put differently, it does not follow from proof of a physical injury which impaired the ability to earn an income that there was in fact a diminution in earning capacity.[1]

[11] In *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) the principle was articulated in the following terms:

> "In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss if such loss diminishes the estate. This was the approach in Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657 at 665 where the following appears:
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> "In later Roman law property came to mean the universitas of the plaintiff's rights and duties, and the object of the action was to recover the difference between the universitas as it was after the act of damage and as it would have been if the act had not been committed (Greuber at 269). Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland."

[12] A person's all round capacity to earn money consists *inter alia*, of an individual's talents, skill, including his/her present position and plans for the future and of course external factors over which a person has no control. A court has to construct and compare two hypothetical models of the plaintiff's

[1] *Union & National Insurance Co Ltd v Coetzee* 1970(1) SA 295 (A) at 300A; *Santam Versekering Maatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A); *Dippenaaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A); *Krugell v Shield Ins. Co Ltd* 1982 (4) SA 95 (T) at 99E; *Rudman v RAF* 2003 (2) SA 234 (SCA); *Prinsloo v RAF* 2009(5) SA 406 (SE).

earnings after the date on which he/she sustained the injury. In *casu*, the court must calculate on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss.

[13] At the same time the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this head would be nil. This is precisely what the defendant contends. In order to determine therefore whether, as a result of the injury sustained, the plaintiff's earning capacity has been compromised the evidence adduced needs to be considered and evaluated in order to decide whether the onus has been discharged.

[14] In *Rudman* it was stated that earning capacity must be considered as a whole. Earning capacity is a complex of abilities which together make up an asset in a claimant's estate and which becomes part of the *universitas* of her or his rights and duties which has allegedly been compromised and for which compensation is sought. One must not isolate individual elements of the ability to earn a living, which have been compromised and place a monetary value on them, without considering whether they bring about a diminution in her or his earning capacity as a whole.

[15] The plaintiff relies on the evidence of the several expert witnesses. A court's approach to expert testimony was succinctly formulated in *Michael and*

Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA) *where the court stated-*

> *"[36] . . . what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority* [1997] UKHL 46*;* [1998] AC 232 *(HL (E)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.*
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> *[37] The Court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The Court must be satisfied that such opinion has a logical basis, in other words, that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion' (at 241G-242B). . . .*
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> *[40] Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of Dingly v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 *and the warning given at 89D-E that*
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> *'(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence."* (emphasis added)

[16] Orthopaedic surgeon Dr Barlin lists the injuries sustained by the plaintiff as –

16.1 Concussion - but she regained consciousness in the taxi;

16.2 Multiple severely contaminated scalp and facial lacerations, abrasions and haematomas; and

16.3 Bilateral shoulder and knee contusions (but these are not mentioned in the hospital records).

[17] Dr Barlin notes the treatment plaintiff received as follows:

> 'She was taken by ambulance to the Tshwaragano Hospital in the Batlharos Village near Kuruman, where her facial lacerations were cleaned and sutured following which her scalp and face began swelling alarmingly.
> She was then taken by helicopter to the Kimberly Hospital, where she underwent a brain, skull and facial bone CT scan.
> She was diagnosed as having fractures of the floor and medial wall of the left orbit and fractures of the nasal and ethmoid bones.
> In addition, a metal foreign body was noted in the right frontal area . . .
> Three days later all her laceration wounds were opened, extended, debrided, irrigated and re-sutured over drains.
> She subsequently developed a right temporal scalp abscess from which blood and pus were aspirated.
> She was discharged 2½ weeks following her admission and returned for follow up a week later.
> She subsequently consulted a general practitioner in Kuruman at frequent intervals for a period of a year, during which she was given analgesics and anti-inflammatories for persistent shoulder and knee symptoms.
> Later, plastic surgeon Dr van der Walt reconstructed the left side of her nose with cartilage harvested from her right eighth costal cartilage.
> She consulted a psychiatrist at the Vista Clinic in Pretoria in August 2013, five months after the accident and was diagnosed as having post-traumatic stress disorder and severe depression for which she was put onto Lexamil, an antidepressant.

> She was readmitted to the Vista Clinic for a period of two weeks on 25 January 2016, two months prior to this assessment, following an attempted suicide.
> A diagnosis of bipolar disorder was made and she was put onto Epitec, Urbanol, Zopivane and simvastatin in addition to the Lexamil. She is due to consult her psychiatrist again in four months' time."

[18] The plaintiff, who was employed as a Junior Process Controller t at the Assmang Khumani Iron Ore Mine in Kuruman prior to the accident was off work for a period of five weeks following the accident and resumed her regular duties on her return. She has not taken any sick leave since then.

[19] Prior to the accident her responsibilities included monitoring the condition and functioning of machinery and mine water system from a control room of a section of a mining plant. Post-accident, she successfully applied for a vacant position as a training officer and has been in the position since October, 2013. Her main duties involve the conducting and monitoring of the implementation of the plant's Generic Skills Program (GSP). She arranges coaching and training opportunities and the assessment of learning against core and elective unit standards. She executes various administrative tasks to ensure compliance with plans and programmes.

[20] Medico-legal reports have been procured by both parties. The parties agreed that the reports are what they purport to be, without admitting the truth and content thereof, unless a party objects to a particular document in writing.

[21] By agreement between the parties all the joint minutes of several of the experts were handed in and their contents constitute evidence in this matter. Joint minutes were provided by:

21.1 Psychiatrists: Dr Naidoo and Dr Vorster;
21.2 Counselling/Clinical Psychologists: I Jonker and Dr Peta;
21.3 Neurosurgeons: Dr Lewer-Allen and Dr Okoli;
21.4 Orthopaedic Surgeons: Dr Barlin and Dr Swartz;
21.5 Occupational Therapists: Ms Pretorius and Ms Hankwebe;
21.6 Industrial Psychologists: Louise Schubert and Linda Krause; and
21.7 Plaintiff's Actuarial report by Ivan Kramer as based upon a joint minute by the Industrial Psychologists.

[22] At the commencement of the trial both parties handed up written heads of argument. As I said, no witnesses were led, it being agreed between the parties that the matter would be argued on the papers. Plaintiff's counsel submitted in the heads of argument that the only issue in dispute was the contingency to be applied in respect of loss of earnings or earning capacity considering the head injury and its *sequelae*.

[23] However, defendant's counsel submitted that plaintiff had to prove that she has suffered patrimonial loss given that her income has increased, post-accident, almost three fold. It was submitted that plaintiff's injuries have not impacted on her employment prospects. The question then is whether or not plaintiff has proved that she is entitled to an award for loss of future income.

[24] The orthopaedic surgeons noted in their joint minute that the orthopaedic injuries have not resulted in any permanent disability. Dr Barlin found that plaintiff's orthopaedic injuries have not affected her ability to continue working in her current capacity until retirement age.

[25] In their joint minute Psychiatrists Dr Vorster and Dr Naidoo say they are in agreement that the plaintiff is presenting with neuropsychiatric symptoms more than two years after the accident in question which may be considered to be permanent. They recommend psychotherapy for the individual and the family and defer to the relevant experts to comment further on her level of functioning and vocation.

[26] Clinical neuropsychologist Dr Ormond-Brown noted that there was no loss of consciousness immediately after the accident. Plaintiff's Glasgow Coma Scale was recorded as 15/15 which dropped shortly afterwards to 14/15 which would usually classify the brain injury as mild. The plaintiff had informed him that she had been confused and disorientated for three weeks after the accident before normal mentation returned. Dr Ormond-Brown says it is likely that sedation and analgesia played a role in her impaired mental functioning at that time.

[27] Counselling Psychologist Ms Ingrid Jonker noted that the plaintiff's sister had been diagnosed with a Bipolar Affective Disorder (BAD), implying a genetic vulnerability. Ms Jonker says the plaintiff was also diagnosed with a mild form of BAD known as Cyclothimic Disorder. The BAD, which had likely

been latent, had been aggravated by the accident and its *sequelae*. She is of the view that the plaintiff's current neuropsychological presentation is the result of a concussive brain injury; psychological difficulties associated with a BAD and post-traumatic stress symptomatology as well as on-going physical pain.

[28] In their joint minute Ms Jonker and Clinical Psychologist Dr Amanda Peta agreed that the plaintiff sustained a mild concussive brain injury which has left her with ongoing neurocognitive and psycho-organic changes. In the employment context they agreed that she presented with cognitive, psychological and physical difficulties which have rendered her vulnerable in the open labour market and which have compromised her ability to progress occupationally at her pre-accident potential. They defer to the industrial psychologists.

[29] In their join minute the Occupational Therapists agreed that from a purely physical point of view, the plaintiff remains well-suited to her present occupation as an Assessor / Training Officer. From a cognitive perspective, Ms Hankwebe anticipates that the plaintiff will be able to continue with her current occupational duties. Ms Pretorius defers to the opinion of the neuropsychologist for comment regarding any cognitive challenges and the impact thereof on plaintiff's work capacity. They both agreed that she will benefit from psychological intervention in the context of her interpersonal relationships in the work place.

[30] In their joint minute the Industrial Psychologists Ms Louise Schubert (for the plaintiff) and Ms Linda Krause (for the defendant) refer to the joint minutes of the other experts. They agree about the plaintiff's pre-accident education and her career path and income up to date of accident. They also agreed that her retirement age at the mine for female employees was age 63. Normal contingencies, such as interruptions of employment, or periods of unemployment, would be applicable. They then deal with the post-accident scenario. They refer to the fact that the Neurosurgeons agreed that a mild head injury was sustained.

[31] Ms Schubert states in her report that despite the fact that the plaintiff reportedly suffered from pronounced levels of depression and other difficulties post-accident, she was promoted to Training Officer. After considering her pre and post-accident work history Ms Krause is of the view that based on the plaintiff's positive work feedback, her career progress and subsequent salary increments since her employment and even after the accident it seemed that her career and earnings have not been significantly negatively impacted upon. Both Ms Schubert and Ms Krause agree that although plaintiff's progress and future career prospects as per her employer feedback may be considered as exceptional it is possible, considering the collateral information that her progress had been delayed by at least a year as a result of her emotional and stress-related problems. They noted the "rather bleak picture", considering her psychological, psychiatric and neurological profile sketched by the relevant experts and agreed that those difficulties may in the future result in a possible delay concerning her career progress. They accordingly suggest

that a higher post-accident contingency be applied to cater for her vulnerability.

[32] Ms Krause recommends in her expert report that all treatments that are required to enable the plaintiff to function optimally should be applied. In their joint minute Drs Okoli and Lewer-Allen recommend neuropsychological treatment for the mood and behavioural changes. Dr Lewer-Allen's view is that 'the ultimate measure of the severity of brain injury will be determined by the degree of negative impact the head injury (as assessed by the psychological experts) has had on the patient's work and earning capacity' as compared to the pre-morbid situation.

[33] Three years post-accident, in 2016, the plaintiff successfully completed the 'OD ETD Practices – NQF level 4' and she attained on average pass mark of 82%. This is according to a statement of results dated 18 May 2016 provided by Global Prospectus Training Centre (Pty) Ltd in which it is also stated that the plaintiff 'fully participated in the course, and successfully completed her assignments as prescribed. . ..' Post-accident she was promoted to a Training Officer and is earning about three times her pre-accident salary as per the Industrial Psychologist's joint minute. Prior to that, she had completed an Education Training and Development Practitioner Certificate course on a part-time basis in July 2016 after having enrolled for it in February 2014 at the same institution. She is currently (2018) enrolled in a ten month leadership training course.

[34] While the plaintiff presents with certain difficulties post-accident as mentioned above I do not think, given all the facts, that they present ‘a bleak picture’ as suggested by the industrial psychologists. The plaintiff is currently earning almost three times her pre-accident salary. She has done very well even post-accident in terms of her educational advancement and should be able to progress further. Her salary will be further increased upon completion of her 10 month leadership course which she is currently undertaking. Given that she has achieved an average of 82 per cent in the studies she completed post-accident it seems reasonable to assume that she will complete the leadership training course. Physically she should be able to work to retirement age. Ms Jonker and Dr Peta’s view that in the employment context the plaintiff has been rendered vulnerable in the open labour market and has been compromised in her ability to progress occupationally at her pre-accident potential cannot be accepted in light of the evidence. The psychological disorder seems mostly due to her facial disfigurement. Psychological counselling as well as other treatment suggested by the relevant experts should alleviate some, if not all of her current symptoms to a considerable extent save those which the psychiatrists state to be permanent. The costs should be covered by the undertaking to be given by the defendant in respect of future medical and related expenses. Insofar as there may be a delay of a year in her career progress this is offset by the fact that she would retire at age 63 in her current job rather than 64.

[35] In the final analysis an award cannot be based upon speculation. It must have an evidential foundation. On the evidence before me the

disabilities from which the plaintiff suffers or will suffer in the future, will not, in my view, impair her capacity to do her work. The plaintiff has failed to prove that her patrimony has been diminished due to any loss of earning capacity in the future resulting from her injuries and consequently has failed to prove any entitlement to be compensated under this head of damage.

[36] I turn then to the issue of general damages. The plaintiff is a young unmarried lady. It is common cause that the plaintiff sustained multiple facial injuries involving fractures of the floor and medial wall of the left orbit and fractures of the nasal and ethmoid bones and injuries to the one eye socket, the nose and the mouth. She has undergone three surgical interventions to try and improve the scarring on her face and will require further plastic and reconstructive surgery. The disfiguring facial scar on the left side of her face and nose no doubt affects her self-image. Her psychological problems seem to stem to a considerable extent from the disfigurement as noted by clinical neuropsychologist Dr Ormond-Brown. This must be catered for in the award for general damages. Provision must also be made for the pain and suffering and trauma suffered as well as depression. Immediately after the accident the plaintiff suffered a concussion. She had multiple severely contaminated scalp and facial lacerations, abrasions and haematomas as well as bilateral shoulder and knee contusions.

[37] When it comes to general damages it is trite that no two cases are exactly alike and past awards can only serve as a guide. (*Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at para 24.) Plaintiff's counsel

suggested that general damages should be in the region of R800 000 whilst defendant's counsel suggested R450 000. I do not deem it necessary to detail the facts of each case referred to by both counsel in support of their views. Suffice it to say that I have considered them and a few others. I am of the view that an amount of R750 000 (Seven Hundred and Fifty Thousand Rands) to be reasonable for general damages.

[38] I make the following order:

1. The claim for past hospital and medical expenses is separated and postponed *sine die*.
2. The defendant shall furnish the plaintiff with an undertaking in terms of s17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of future medical, hospital and related expenses.
3. The Defendant shall pay the plaintiff R750 000.00 (Seven Hundred and Fifty Thousand Rands) in respect of general damages.
4. The defendant shall pay the plaintiff's costs either as agreed or taxed including the costs of those expert witnesses whose reports the plaintiff had delivered in terms of Rule 36(9)(b) and including the costs of the preparation of joint minutes. It is noted that no witnesses testified at the trial.

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N. RANCHOD
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiff	: Adv. M Chaitowitz SC
Instructed by	: De Broglio Attorneys Inc.
Counsel on behalf of Defendant	: Adv. ND Moses
Instructed by	: Maponya Inc.
Date heard	: 15 February 2018
Date delivered	: 30 July 2018