




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 20810/2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>04/02/2020</u>	
DATE	SIGNATURE 

In the matter between:

MUKWAZVURE ADMIRE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Coram: Sardiwalla J

Motor vehicle Accident - Damages – motor vehicle accident – bodily injury – loss of portion of left hand and cognitive deficits – disability resulting in a reduction of 20% of earning capacity as a general labourer.

JUDGMENT

SARDIWALLA J:

Introduction:

[1] The plaintiff was injured as a passenger in a motor vehicle accident on 25 September 2016 in Pretoria, Gauteng when the known driver drove into his vehicle.

[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 loss of earnings and/or capacity.

[3] At the commencement of the trial in respect of the quantum I was informed that the claim for General damages was settled.

[4] The defendant shall also issued a certificate to the plaintiff 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 loss of past income for which the plaintiff should be compensated for.

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

[7] As far as future loss of income is concerned the plaintiff contends that he has suffered a loss of earnings or earning capacity and that a contingency deduction of 15% for past loss and 0% for future loss should be applied.

[8] The defendant's contention is that in the first instance the plaintiff 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 10% for past loss and 15% should be applied in respect of future loss of income.

[9] 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

[10] 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:

"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

¹ *Union & National Insurance Co Ltd v Coetzee* 1970(1) SA 295 (A) at 300A; *Santam Versekering Maatskappij Bpk v Byleveldt* 1973 (2) SA 146 (A); *Dippenaar 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).

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."

[11] 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. In *casu*, the court must calculate the total present monetary value of all that the plaintiff would have been capable of bringing into his patrimony had he not been injured, and, the total present monetary value of all that the plaintiff would be able to bring into his patrimony after sustaining the injury. The difference between the two (if any) will be the extent of the patrimonial loss.

[12] At the same time the evidence may establish that an injury may in fact have no 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.

[13] 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 Linksfeld Park Clinic (Pty) Ltd and Another***² 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

² 2001 (3) SA 1188 (SCA)

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.

[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). . . .

[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

'(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)

[14] Orthopedic surgeon Dr Bongobi lists the injuries sustained by the plaintiff as:

- 16.1 Traumatic brain injury with intracranial bleeding;
- 16.2 Deep laceration forehead; and
- 16.3 Fracture left distal humerus.

[15] Dr Bongobi notes the treatment plaintiff received as follows:

17.1 He was taken to Kalafong Hospital by ambulance;

25/09/2016

17.2 he was conscious presenting with a deep laceration (15cm) on the forehead and swollen and tender left arm;

17.3 he was sent for brain and cervical spine CT scan and X-rays of the skull, neck, left upper limb and chest;

17.4 brain and CT scan revealed:

- i. a skull fracture;
- ii. left subdural, subarachnoid hemorrhage;
- iii. normal cervical spine.

17.5 X-rays revealed a distal humeral fracture in the left arm;

17.6 the laceration was clean and sutured and a U-slab was applied on left arm.

17.7 he was admitted in the neurosurgery ward.

26/09/2016

17.8 he was treated conservatively with Mannitol and anti-epilepsy treatment;

17.9 he was scheduled for a brain re-scan;

17.10 he received analgesics and antibiotics intravenously;

06/10/2016

17.11 he was taken to theatre for craniotomy;

17.12 the shattered skull bone fragments of the frontal bone and Glabella were removed;

17.13 a titanium mesh was applied to close the skull defect.

07/10/2016

17.14 he was referred to orthopedics to repair the open reduction and internal fixation (ORIF) of the humeral shaft fracture.

19/10/2016

17.15 ORIF was not done on the left humeral fracture;

17.16 X-ray showed a formed callus bridging the fracture and he was discharged.

[16] The plaintiff, who was self-employed as a builder in the building construction industry prior to the accident performed job functions included brick laying, tiling and painting. Post-accident he has not returned to work.

[17] 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.

[18] 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:

18.1 Orthopedic Surgeons: Dr Bongobi and Dr S.S Mukansi;

18.2 Neurosurgeons: Dr MD Ngqandu and Prof P.L Lekgwara;

18.3 Industrial Psychologists: Ms T Maitin and Ms Moipone Kheswa;

18.4 Occupational Therapists: Ms Mathala & Ms Sophy Mothapo;

18.5 Plaintiff's Actuarial joint minute calculations by Munro forensic Actuaries.

[19] At the commencement of the trial both parties handed up written heads of argument. 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, fracture to the left distal humerus and its *sequelae*.

[20] However, defendant's counsel submitted that plaintiff had to prove that he has suffered patrimonial loss given his impairment is not permanent. It was submitted that plaintiff's injuries have not comprised employment prospects. The question then is whether or not plaintiff has proved that he is entitled to an award for loss of future income.

[21] The orthopedic surgeons noted in their joint minute that the orthopedic injuries have not resulted in any permanent disability. They defer to the Neurosurgeons.

[22] In their join minute the Occupational Therapists agreed that the plaintiff has the capacity to work within light to medium occupations in an open labour market. They also agreed that he failed to meet the open labour market standards in continuous lifting of light to medium objects due to the left shoulder pain. They noted that the Clinical psychologists reports stating that the claimant's psychomotor speed was within low range, and his performance for nonverbal domains with significant speed component can be attributed to a combination of cognitive deficits arising from

the traumatic brain injury, psychological stress and pain interfering with the allocation of cortical resources. Ms Mthala was of the opinion that he would remain an unemployable and vulnerable individual to compete with his abled bodied peers and therefore has been left in a compromise regarding his participation in the one labour market. Ms Mothapo noted that the orthopedic surgeon does not recommend further treatment and that from a neuropsychological perspective, the plaintiff prospects on the open labour market have not been compromised since he has retained broadly average neuropsychological capacity. They defer to the industrial psychologists.

[23] In their joint the Neurosurgeons Dr MD Ngqandu and Prof P.L Lekgwara did not find any neuropsychological problems and defer to the clinical psychologist.

[24] In their joint minute the Industrial Psychologists Ms T Maitin (for the plaintiff) and Ms Moipone Kheswa (for the defendant) refer to the joint minutes of the other experts. They agree about the plaintiff's pre-accident education and his career path and income up to date of accident. They also agreed that his retirement age at the self-employed individuals was age 65. That suggested earnings for Koch (2018) for self-employed persons (between median and upper quartile with high pre-accident contingencies applied as he earned sporadically and because of the lack of proof of earnings. They then deal with the post-accident scenario. They refer to the fact that the Neurosurgeons agreed that he sustained moderate to severe head injury with no neuropsychological problems.

[25] They noted in their report that the orthopedic surgeons agree that he is suffering from pain as a result of his injuries and that he has sustained permanent scarring and disfigurement in the forehead and scalp. They further noted that people

with facial disfigurements suffer unfair discrimination when applying for jobs, where how one looks in an interview is an important determinant of success, or lack thereof. They noted that the occupational therapists agree that he presented with poor perceptual skills and that he was easily distracted by external stimuli.

[26] Ms Maitin reported that as he is self-employed, he is less competitive, less efficient and productive in comparison to his uninjured peers and that this is unlikely to change as he has reached MMI. She opines that he will struggle to return to his pre-accident job which requires physical exertion. Her opinion is that he has suffered past losses as he did not return to work and that he will suffer total loss of future earnings for the reasons cited above.

[27] Ms Kheswa reported that although the plaintiff reported cognitive maladies and headaches that this was not supported by evidence from the neuropsychological assessments conducted by the various experts. She noted that the orthopedic surgeons in their joint minute indicated that his injuries have a good prognosis; the neurosurgeons could not find any neuropsychological problems; clinical and counselling psychologist reported that "his test results evidence broadly retained capacity and functioning compared pre-accident capability, which we estimate to have seen within low average range; and finally the occupational therapists that he currently has the capacity to work within light to medium occupations without prolonged lifting which may exacerbate the pain symptoms.

[28] In conclusion the industrial psychologists that the reports from the above experts did not render the plaintiff functionally unemployable but rather a somewhat reduced functionality and job options as compared to his uninjured state and that he will

definitely not reach the pre-accident earnings and potential but most likely will reach the apex of his earnings at the medium quartile of self-employed persons according to the Koch 2019 by 45 years.

[29] While the plaintiff presents with certain difficulties post-accident as mentioned above, given all the facts, I agree that they do not present 'a bleak picture' as suggested by the plaintiff's industrial psychologists. The plaintiff is currently unemployed. Physically he would not be able to work to retirement age. Ms Mathala and Ms Mothap's view that in the employment context the plaintiff has been rendered vulnerable in the open labour market and has been compromised in his ability to progress occupationally at his pre-accident potential cannot be accepted in light of the evidence. The psychological disorder seems mostly due to his facial disfigurement and systematic pain. Psychological counselling, future management by physiotherapist for pain and arm stiffness and as well as other treatment suggested by the relevant experts should alleviate some, if not all of his current symptoms to a considerable extent. 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 in his career progress there is no offset by the fact that he would retire at age 45 instead of 63 there is a considerable loss of future earnings spanning 18 years which needs to be offset.

[30] In the defendant's view, therefore a 20% reduction from what he would have earned produces a realistic and considered assessment of what he will probably now be able to earn. This is fully supported by the evidence of the expert opinions and can be safely accepted. Counsel for the plaintiff submitted prepared schedules of calculations in this regard. The plaintiff's counsel makes provision for a higher

contingency deduction for adverse contingencies which is not justified in this case as there is a greater degree of certainty. Counsel for the Fund submitted that R 598 952.42 as appropriate compensation in this case. The actuarial report is based on the information provided by the industrial psychologists. I have accepted the defendant's evidence that the appropriate deduction in this case would be 20%. That is the scenario for which the actuarial report's second schedule of calculations makes provision.

[31] On the evidence before me the disabilities from which the plaintiff suffers or will suffer in the future, will, in my view, impair his capacity to do his work to this extent. The plaintiff has proved that his patrimony has been diminished due to any loss of earning capacity in the future resulting from his injuries and consequently has proved an entitlement to be compensated under this head of damage.

[32] I make the following order:

1. The defendant is ordered to pay the amount of R 598. 952.42 for loss of earnings within 14 days of this judgment with interest from the date of judgment to the date of payment.
2. 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.



SARDIWALLA J
JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing : 31 August 2019
Date of judgment : 04 February 2019

Applicant's Counsel : ADV.: V M MAGWANE

Applicant's Attorneys : Madima Inc

First Respondent's Counsel : ADV.: V MAASHAU

First and Second Respondent's Attorneys : T M Chauke Inc