

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 16867/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 10/5/2023

SIGNATURE:

In the matter between:

P[...] S[...] N[...] obo N[...] L[...] N[...]

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

OOSTHUIZEN-SENEKAL AJ:

Introduction

- [1] The plaintiff sued the defendant in her representative capacity as the mother and natural guardian of her minor child, P[...] S[...], for damages arising out of bodily injuries sustained by the minor in a motor vehicle accident that occurred on 4 November 2016, on Eskia Mphahlele Road, Pretoria, Gauteng Province.

[2] At the time of the accident, the minor was a pedestrian when a motor vehicle hit her while she was crossing the road. The minor lost consciousness and only regained consciousness at the Steve Biko Academic Hospital. She was transported to the hospital by ambulance where she remained for two (2) weeks.

[3] As a result of the accident the minor sustained the following injuries:

3.1.1. Head injury;

3.1.2. Mild traumatic brain injury;

3.1.3. Left proximal humerus fracture;

3.1.4. Right tibia-fibula fracture;

3.1.5. Loss of consciousness of unknown duration (GCS 14/15);

3.1.6. Subarachnoid haemorrhage right parietal lobe;

3.1.7. Subdural haematoma tentorial Cerebelli;

3.1.8. Right sided and forehead lacerations;

3.1.9. Left upper eyebrow laceration;

3.1.10. Left shoulder injury;

3.1.11. Emotional shock and trauma;

3.1.12. Psychological trauma.

[4] On 14 March 2019 summons was issued against the defendant which was served on the defendant on 22 March 2019. On 11 April 2019 the defendant filed a Notice of Intention to Defend and subsequently on 6 May 2019 the defendant filed its plea.

- [5] On 11 June 2020 Fourie J ordered the defendant to comply with rule 35(1) in terms of the Uniform Rules of Court and to file its discovery affidavit within 10 (ten) days from service of the court order. The defendant failed to comply with the said order and on 8 December 2020 Lukhaimane AJ ordered that the defendant's defence in the main application is struck out for non-compliance of the court order dated 11 June 2020.
- [6] The parties have settled the merits. The defendant conceded to 100% liability of plaintiff's proven or agreed damages. The issue of quantum in respect of future medical expenses has also been settled with the defendant agreeing to furnish the plaintiff with an undertaking as envisaged in section 17 (4) (a) of the Road Accident Fund Act, Act 56 of 1996 ("the Act").
- [7] The defendant did not file any medico-expert reports. The defendant elected not to participate in the trial and the matter was heard on a default basis.
- [8] The plaintiff filed the following expert reports:
- 8.1 Dr MA Morule (Orthopaedic Surgeon);
 - 8.2 Dr PM Mpanza (Neurosurgeon);
 - 8.3 Mr. Samuel Mphuthi (Clinical Psychologist);
 - 8.4 Ms. Talifhani Ntsieni (Industrial Psychologist);
 - 8.5 Sagwati Sebapu (Occupational Therapist);
 - 8.6 Munro Forensic Actuaries (Actuary).
- [9] At the outset of the hearing, counsel for the plaintiff made application in terms of rule 38(2) of the Uniform Rules of Court¹ that this court accepts the expert

¹ Rule 38(2) provides:

"The witnesses at the trial of any action shall be examined *viva voce*, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.

reports as evidence on oath. Having regard to the nature of the claim and the nature of the proceedings, together with the fact that the affidavits of the various experts and their reports are filed on record, I exercised my discretion to accept the evidence on oath.

The plaintiff rejected the defendant's offer for general damages, leaving the remaining issues to be determined by this Court, being the minor's future loss of earnings and/or earning capacity as well as general damages.

Expert Reports

Orthopaedic Surgeon: Dr M A Morule

[10] Dr Morule examined the minor on 2 December 2012. In the report compiled by Dr Morule he stated the following;

“13. OPINION ON DAMAGES

13.1 PAIN AND SUFFERING

- She suffered acute pains during the accident.

13.2 CHRONIC PAIN

- She still has chronic pains of the left shoulder and right leg.

14. NARRATIVE TEST

Considering the HPCSA narrative test guidelines and AMA Guides 6th Edition my findings are: Her calculated WPI is 2%
Her damages are less than 30% required by Law for Compensation.

“However, the claimant qualifies for Compensation for general damages under Narrative test 5.1 as indicated on the Serious Injuries Assessment report.”

She suffered severe left shoulder and right leg injuries. She cannot play of participate in any sporting activities.”

Neurosurgeon: Dr PM Mpanza

[11] Following an examination of the minor Dr Mpanza made the following remarks and observations:

“10.1 Accident related injuries

- The claimant probably sustained a Mild traumatic brain injury, with a history of loss of consciousness of unknown duration. The recorded Glasgow coma scale is 14/15 with

a CT brain - Subarachnoid haemorrhage right parietal lobe, small subdural haematoma tentorial Cerebelli. On current examination, no neurological deficit detected, therefore I suggest no further management.
- She also suffered a Left proximal humerus fracture and s Right tib- fib fracture which I defer for an orthopaedic surgeon.

10.2 Post accident

- SF Mphuthi concludes that “the traumatic brain injury that Ms, N[...] sustained at the time of the accident has resulted in moderate long-term neurocognitive impairment that may be permanent due to the poor prognosis”. I suggest an educational psychologist assessment.
- She suffers from post-traumatic dizziness, this may be related to the head injury
- She suffers from post-traumatic headache; it becomes permanent in 20% of individuals at one-year post head injury. Provision for analgesia must be made.

10.3 Future complications

- The risk of post traumatic epilepsy is the same as those of the population at large.

16. INFUENCE ON AMENITIES, EDUCATION

- Amenities and enjoyment of life negatively affected by chronic headache and dizziness
- The brain with its neurocognitive sequelae negatively impact on education, future employment and activity of daily living.

17. IMPAIREMENT EVALUATION

Impairment rating: 6th Edition of AMA guide

- Alteration MSCHIF - WPI is 25% (Table 13,8, Class 3)
- Headache-WPI is 3% (Table 13.18, Class 2)

Total WPI is 28 %

I consider the injuries suffered by Ms. L.N N[...] SERIOUS, she qualifies under 5.3 on the narrative test."

Clinical Psychologist: Dr SF Mphuthi

[12] In the expert report compiled by Dr Mphuthi the following was stated;

"Based on the history obtained and documentation reviewed, we conclude that her very *low* performance can be attributed to neurocognitive deficits due to the traumatic brain injury (TBI) sustained, aggravated by chronic pain and stress response interfering with the allocation of cortical resources. There are three factors that are known to result in long-term (residual) neurocognitive deficits when they occur in combination at the time of TBI, irrespective of severity. 1. Trauma to the cranium (Head injury, laceration on left eyebrow) 2. Altered consciousness (GCS of 14/15). 3. A period of post-traumatic amnesia (PTA). The three indicators were present when Ms. N[...] sustained the brain injury. Further, the age at which Ms. N[...] sustained the brain injury rendered her vulnerable to greater fallout than would have been the case had the same injury

been sustained beyond the formative years. This is because head injuries sustained earlier in childhood interrupt developmental processes leading to neurological deficits when the meta-cognitive and self-monitoring skills emerge during the adolescent years (so-called Sleeper Effects). The sleeper effect is associated with poor prognosis for neurocognitive impairment and therefore his(*sic*) accident-acquired impairment can be considered as permanent. We defer to neurosurgeons regarding diagnosis of severity of the TBI at the time of the accident.

Her stress response combines direct reaction to physical pain and post-traumatic stress disorder symptoms which include mood dysregulation (intrusive symptoms involving nightmares, anxiety, and phobic reaction to traffic situations).

12.2.1 Impact of head/brain injury

Based on the foregoing, we conclude that the traumatic brain injury that Ms. N[...] sustained at the time of the accident has resulted in moderate long-term neurocognitive impairment that may be considered to be permanent due to the poor prognosis associated with the factors indicated in par. 9.3. We also note in par. 9.3 above the three factors that rendered her vulnerable to long-term neurocognitive impairment. We thus conclude that Ms. N[...] belongs to the population that sustains TBI and suffers moderate deficits in the identified neurocognitive domains tabulated in par. 9.2 above. These deficits negatively impact both her intellectual and social functioning, as described throughout this report.

12.2.2 Clinical psychological status and recommended psychotherapy

Ms. N[...]’s clinical psychological status is characterised by symptoms of post-traumatic stress mood dysregulation associated with diminished neurocognitive capacity as well as persistent pain and changed social functioning and status.

If compensation is granted, we recommend that funds be set aside for 45 sessions of neuropsychological and psychotherapeutic to address both reactive psychological problems and vulnerability to neurocognitive deficits identified in this report. The number of sessions may also be left open to those appointed to assist him(*sic*), especially where additional sessions may be required. At current medical aid rates, the cost of a session of psychotherapy averages R 1

500, depending on the practice. An amount of R 67 500 should therefore be set aside for psychotherapy.

12.2.3 Education and vocational consequences

From a neuropsychological perspective, her pattern of performances on cognitive testing and her clinical psychological profile indicate that she now tends to perform tasks at a slower pace, forgets important details, she may require more time to comprehend complex tasks, and she will have difficulty managing her levels of frustration in the learning environment. We defer to educational psychologists regarding diminished prospects of vocational at a level of complexity and span of control that was possible before the accident.”

Occupational Therapist: Ms S Sebapu

[13] Ms Sebapu noted the following in the report she compiled:

14.1 The minor had completed Grade 6 at the time of accident. Pain can have a negative impact on attention and concentration (i.e. primary cognitive abilities) which could result in fallouts with secondary cognitive abilities (e.g. memory). This in turn, will have a negative impact on her academic performance.

14.2 Having regard to the residual capacity, she is of opinion that once the minor has reached her full maturity, she will retain the residual capacity of sedentary to light occupations, with limited mobility and agility fallouts due to the right leg. She is thus expected to have difficulties to compete on the same level as her uninjured peers in the open labour market even in a job matching her residual abilities due to pain.

Industrial Psychologist: Ms Ntsieni

[14] At the time of the assessment the minor was 15 (fifteen) years of age and was in Grade

11. At the time of the accident in 2017 the minor was in Grade 6.

[15] Ms Ntsieni noted the following regarding the minor's pre-accident

employment prospects and earning potential:

“Taking into consideration her scholastic history, family background and also noting that the trend lately is that children often achieve more than their parents, academically and vocationally as the educational landscape has since changed to support the learners so that most are able to complete High School. The minor would have passed Grade 12 and progressed her studies to obtain a diploma level of education. With a Diploma/NQF 6 level of education, she would have properly entered the labour market as a semi-skilled worker within the formal sector at a Paterson B4 level. She probably would have progressed up to a Paterson C3/C4 median quartile level, total package at the approximate age of 45 years, and thereafter enjoy annual inflationary related increases.”

[16] Ms Ntsieni further noted the following regarding the minor's post-accident employment prospects and earning potential and she referred to three scenarios:

Scenario 1:

With a Grade 12 Level of Education - She would probably start off as an unskilled labourer or semi-skilled worker, depending on the position that she would acquire first, following a period of 03 years of unemployment. With reference to the non- corporative/informal sector, the following rates would be applicable starting from the lower quartile of the semi-skilled workers' scale.

Scenario 2:

With a Grade 12 and Certificate Level of Education -She would probably enter the labour market as a semi-skilled worker in the formal sector, with her earnings starting from Paterson B1/2. She may struggle to grow her earnings and would reach her ceiling at Paterson B3/4 level by the age of 45 years and further growth in her earnings is likely to be through inflationary related increases.

Scenario 3:

With a Grade 12 and a Diploma Level of Education - She would enter the labour market as a semi-skilled worker in the formal sector with her earnings starting from Paterson B2/3 Level and given the competitive nature of the formal sector, she may struggle to grow her earnings and may reach her ceiling at

Paterson B5/C1 by the age of 45 years and thereafter her earnings would grow through inflationary related increases.”

[17] Ms Ntsieni concluded “that the minor has suffered a medically justifiable loss of work capacity as a direct result of the accident, which has translated into loss of earnings and will most likely remain as such into the future. She is unlikely to reach her pre-accident potential and her earnings thereof. Noting the available information and the experts’ opinions, it is accordingly clear that her post-accident career is one that is likely to be characterised by some uncertainty, pains, and discomforts as well as restrictions. These risks should be further dealt with by way of higher post-accident contingencies.”

Actuarial Report: Munro Actuaries

[18] The actuary addressed the loss of earning of the minor in scenario 1, 2 and 3 as follows:

Scenario 1: Grade 12 only:

Capital Value of Loss of Earnings

Uninjured Earnings	Injured Earnings	Loss of Earnings Future
R 9 714 100	R 1 300 900	R 8 413 200
Total Loss of Earnings		R 8 413 200

Scenario 2: Certificate

Capital Value of Loss of Earnings

Uninjured Earnings	Injured Earnings	Loss of Earnings Future	R	9 714 100
	R 5 917 400	R 3 796 700		
Total Loss of Earnings			R	3 796 700

Scenario 3: Diploma

Capital Value of Loss of Earnings

Uninjured Earnings	Injured Earnings	Loss of Earnings Future
R 9 714 100	R 7 134 400	R 2 579 700
Total Loss of Earnings		R 2 579 700

[19] Counsel for the plaintiff argued that a contingency deduction of 15% in respect of the pre-morbid income and 35% in respect of the post-morbid income would

be suitable under the circumstances of this matter and furthermore, in view of the fact that the three scenarios catered for are probable, counsel proposed that the median between the three scenarios be awarded.

[20] Therefore, loss of earnings calculation, after the above-mentioned contingency deductions:

1. **Scenario 1-** (15% & 35% contingency deduction applied): R 7 411 400.00;
2. **Scenario 2-** (15% & 35% contingency deduction applied); R 4 410 675.00;
and
3. **Scenario 3 -** (15% & 35% contingency deduction applied): R 3 619 625.00.

[21] Thus, the intermediate between the three scenarios is:

$$(R\ 7\ 411\ 400.00) + (R\ 4\ 410\ 675.00) + (R\ 3\ 619\ 625.00) \div 3 = R\ 5\ 147\ 233.33$$

[22] It is trite that the determination of a suitable contingency deduction falls within the discretion of the court. In *Southern Insurance Association Ltd v Bailey*² the advantage of applying actuarial calculations to assist in this task was emphasised. It was stated that:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of a loss. It has open to it, two possible approaches. One is for the Judge to make a round estimate on an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try and make an assessment, by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a

² 1984 (1) SA 98 (A) at 113H-114E.

greater or lesser extent. But the court cannot for this reason adopt a *non-possumus* attitude and make no award”.

[23] It was highlighted, however, that the trial judge is not ‘tied down by inexorable actuarial calculations’ and that he (or she) has a ‘large discretion to award what he considers right’. In exercising that discretion, a discount should be made for ‘contingencies’ or the ‘vicissitudes of life’. These include possibilities such as the plaintiff experiencing periods of unemployment or having less than a ‘normal expectation of life’. The amount of discount may vary, depending on the facts of the case.³

[24] The learned author Koch⁴ has suggested that as a general guideline, a sliding scale of 0,5% per year over which the applicable income must be calculated, be applied. For example, 25% for a child, 20% for a youth and 10% in middle age, as referred to as the *normal contingencies*: the RAF usually agrees to deductions of 5% for past loss and 15% for future loss, the so-called normal contingencies.

[25] The minor is currently 17 (seventeen) years old. Having regard to her specific capabilities, coupled with her scholastic performance before and after the accident, I am of the view that a 15% pre-morbid contingency deduction will be fair and reasonable.

[26] Furthermore, I believe a 35% post-morbid contingency deduction is justified in the circumstances of this matter.

[27] All three scenarios are equally probable; thus, I am of the view that the average of R 7 411 400.00, R 4 410 675.00 and R 3 619 625.00, which amounts to R 5 147 233.33 is fair and reasonable compensation in respect of future loss of income.

[28] The plaintiff has claimed the amount of R2 500 000.00 for general damages. Counsel referred me to past awards that were made in comparative cases.

[29] I must determine an award for general damages that I regard as fair to both

³ Ibid at 116G-H.

⁴ Robert J Koch, The Quantum Yearbook, 2017, page126.

parties. I consider the amount of R 2 300 000.00 urged upon by counsel to be on the high side. This is so even when comparison is made to the awards in other cases. Having regard to the minor's physical injuries and the consequences thereof, as well as the mild brain injury, the psychological trauma and her loss of enjoyment of amenities of life, I consider an amount of R1 100 000 to be fair and adequate compensation to the minor in respect of her general damages.

[30] I have also noted the affidavit regarding the trust to be set up as well as the contingency agreement which all appear to be in order.

[31] Having considered the exhibits and having heard counsel herein, I make the following order:

1. The draft order marked "X" is made an order of Court.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand- down is deemed to be 16h00 on 10 May 2023.

DATE OF HEARING: **5 May 2023**

DATE JUDGMENT DELIVERED: **10 May 2023**

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