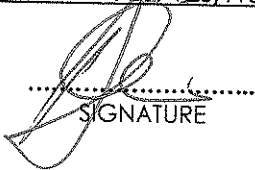


REPUBLIC OF SOUTH AFRICA



IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 1332/12

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>20/8/2013</u> DATE	
 SIGNATURE	

In the matter between:

GIL MARIO PATRICK ZAVALA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

J U D G M E N T

TSHABALALA, J:

[1] The plaintiff, who was 32 years and a pedestrian at the time, was involved in a motor vehicle collision on 12 September 2010 on the N12 Southgate, Johannesburg. The present action has been instituted against the

defendant to recover damages suffered by the plaintiff following such a collision. He is now 35 years old.

[2] The case was presented as a stated case with the merits conceded 90:10 in favour of the plaintiff.

[3] The parties agreed, which agreement I had endorsed, to lead no further evidence but to rely on the following experts' reports:

3.1 For the plaintiff:

3.1.1 Dr Engelbrecht – Orthopaedic Surgeon

3.1.2 Ms Cathy Motake – Occupational Therapist

3.1.3 Ms Lisa Roets – Industrial Psychologist

3.1.4 Algorithm Actuary CC

3.1.5 Dr Jaap Earl – Neurosurgeon

3.1.6 Dr Phil Pierce – Ophthalmologist

3.1.7 Dr Mogotsi – RAF 4

3.1.8 Ms Lufuno Modipa – Clinical Psychologist

3.1.9 Dr D Kessow – Radiologist

3.1.10 Ms Bev van Zyl - Neuropsychologist

3.2 For the defendant:

- 3.2.1 Dr Swartz – Orthopaedic Surgeon
- 3.2.2 Dr Rolene Hovsha – Neuropsychologist
- 3.2.3 Dr Okoli – Neurosurgeon
- 3.2.4 Dr Thabisa Caga – Occupational Therapist
- 3.2.5 Independent Actuaries and Consultants

[4] Reliance was also placed on the minutes of the pre-trial, the joint minutes of the following experts: orthopaedic surgeons, neurosurgeons, occupational therapists and neurologists, the clinical records from the hospital and the assessment report of Dr Mogotsi.

[5] According to the stated case the parties had also agreed on the following:

- 5.1 The plaintiff was rendered unconscious and unaware for four days following and as a result of the collision.
- 5.2 According to the reports of the various experts he had suffered the following injuries:
 - 5.2.1 Severe multiple injuries which included.
 - 5.2.2 Fracture of the right humerus.
 - 5.2.3 Fracture of the left femur.

5.2.4 Fracture of the right clavicle.

5.2.5 Fracture of the scapula.

5.2.6 Ruptured and abdominal trauma with a liver laceration.

5.2.7 Tear of the serosa of the left colon.

5.2.8 Right pelvic ramus.

5.2.9 Soft tissue injuries of the cervical spine.

5.2.10 Dislocation of the right thumb.

5.2.11 Left shoulder.

5.2.12 Fracture of the left elbow.

[6] The medical evidence/reports confirm that he had received the following treatment:

6.1 Colon was saturated at laparotomy.

- 6.2 There was an open reduction and internal fixation of the left femur.
- 6.3 Left clavicle was due to be plated.
- 6.4 He underwent a CT brain scan the scan the results of which note a frontal infract.
- 6.5 He underwent repair of the liver and colon laceration, he became unstable during the procedure.
- 6.6 He underwent numerous surgical interventions for the orthopaedic injuries.
- 6.7 He was discharged on 5 October 2010.
- 6.8 He was re-admitted following an outpatient follow-up on 22 November 2010 in order to undergo surgery of a dislocation fracture of the right thumb.

[7] The neurologists and neuropsychologists agree that the plaintiff has also suffered brain injury which Dr Okoli (for the defendant) categorises as being in the mild range and Dr East (for the plaintiff) describes as being moderately severe. The neuropsychologists on both sides categorise the injury as traumatic.

[8] According to the neuropsychologists, the plaintiff has suffered neuropsychological impairment and has reached his recovery ceiling. Due to the risk of epilepsy setting in, which has been estimated at between 5-6%, and his current neuropsychological difficulties which has rendered him motorpsychologically retarded, his return to his pre-accident employment with Telkom would be difficult and hazardous. Both, are however, in agreement that he can return to hawking as a business. They are of the view that should he exercise this option, an assistant will be necessary. They defer to the expertise of an industrial psychologist.

[9] The occupational therapist defer to the report of an industrial psychologist on the plaintiff's prospects of employment. They agree on the following:

- 9.1 The plaintiff is presently suited for light to medium work.
- 9.2 His previous work could be categorised as medium to heavy work.
- 9.3 He will have challenges doing his pre-accident work which entailed digging holes for cables and picking up heavy objects.
- 9.4 Due to his low level of education (Grade 10) he is unsuited to perform, attain and train for sedentary or office work for which he has no experience.

9.5 According to Ms Caga the plaintiff's condition will improve to an extent that he will be able to perform sedentary, light and medium occupations once the fixatives are removed and further treatments as suggested by Dr Swartz are undertaken.

9.6 Ms Motake is of the view that the plaintiff's employment options are limited in the open labour market.

[10] The defendant did not refer the plaintiff to any expert in the following fields: Clinical psychologist, ophthalmologist and an industrial psychologist. The reports of these experts are uncontested.

[11] According to Dr P C Pierce an ophthalmologist, the problems that the plaintiff is experiencing due to blurring (eyesight) are not accident related.

[12] According to Lufune Modipa, a clinical psychologist, the plaintiff has:

12.1 Retained his planning abilities and problem solving skills of simple and practical tasks.

12.2 Moderate to severe neurocognitive deficit suggesting that he has not retained his pre-morbid intellectual capability.

12.3 A severely compromised capacity to learn and retain previously learned information.

12.4 A severely impaired/poor abstract reasoning skills and mental tracking skills.

12.5 Poor memory and concentration difficulties.

12.6 Developed and displayed mood swings, symptoms of depression and personality changes.

12.7 Reduced work capabilities.

[13] Ms Modipa deferred to an industrial psychologist to assess his future employment opportunities and loss of earning and to a psychiatrist to assess and manage his depressed mood.

[14] Dr A N Mogotsi who compiled and completed an assessment report (RAF4 form) made a determination that the Whole Person Impairment evaluation of the plaintiff is 66%.

[15] Lisa Roets an industrial psychologist after consideration of the reports of the various experts and her interview with the plaintiff and his partner concluded that the plaintiff is unsuited to perform his pre-morbid occupation. According to her, the plaintiff would, but for the accident, have continued as a general worker within the semi-skilled category.

[16] Post-morbid, Lisa Roets is of the view that the plaintiff has suffered total loss of earning and earning potential as a result of the accident. According to her, the plaintiff can be regarded as unemployable.

[17] As an informal trader the plaintiff would also struggle to sustain his business unassisted. With assistance, he runs the risk of or is vulnerable to exploitation. His ability to survive financially has been diminished.

[18] Lisa Roets in coming to the conclusion she has come to, took into consideration the physical and neurological challenges facing the plaintiff.

[19] In view of the following:

19.1 There is no challenge to the reports of Lisa Roets and the clinical psychologist L Modipa.

19.2 I have not been alerted of any discrepancy in those reports.

19.3 No suggestion has been made not to accept them or why I should not accept them.

19.4 I am satisfied subject only to the qualification I attach thereto hereafter, that I can place reliance on those reports.

[20] On behalf of the plaintiff, it was argued that I should accept the actuarial calculation which place the plaintiff's loss of earnings at R818 853,00. To arrive at this figure, the contingency deductions of 5% and 15% respectively were applied to the past and future losses. The parties are agreed about past loss of income of R111 801,00 post the deduction of contingencies and R831 826,00 for future loss of earnings before the contingency deduction.

[21] On behalf of the defendant, it was argued that I should not allow a separate claim for future loss of income, but rather to increase general damages and deal with the particular head of damages as a diminished earning capacity.

[22] I do not agree with the latter proposal as, according to Lisa Roets, whose report I have accepted, the plaintiff has suffered and will clearly suffer future loss of earnings. In my view, the defendant's proposal can only pass muster where the plaintiff's employment history was erratic in the sense that it was interspersed with long and/or several periods of being unemployed, irregular or different jobs and fluctuating or unstable wages/salaries. Having regard to the cumulative effect of all the expert reports presented before me, I am satisfied that the plaintiff's loss of earnings is capable of computation.

[23] I am mindful of what the industrial psychologist has stated. I am also equally mindful of what Lufuno Modipa the clinical psychologist has stated

(see para 12.1 above) and what the occupational therapists have agreed on (see paragraph 9 and 9.1 hereof).

[24] Having regard to what the clinical and occupational therapist have stated I am satisfied that the plaintiff does have a limited remedial working potential in the informal sector and that he can with an assistant resume his work as a hawker. This he will be able to do once this claim is settled.

[25] Based on this determination, I am satisfied that, a contingency deduction higher than the one applied by the actuary is called for. In my view, therefore, a contingency deduction of 20% is appropriate in the circumstances of this case, regard being had to the plaintiff's residual working potential and his limited ability to earn an income. Factored in, is the fact that he will need an assistant should he return to hawking.

[26] I was referred to various cases dealing with general damages, which both parties urged me to follow in making an award. Worth noting is the fact that such previously decided cases serve only as a guide, and that no case is identical to another regard being had to the nature and extent of the injuries and the impact of such injuries on an individual. Each case has to be decided on its own merits.

[27] I have considered the following cases, in particular the injuries sustained by the plaintiffs and the awards made by the courts:

- 27.1 In *Mark Alan Roe v RAF* Case No 16157/2009 SGHC an award of R650 000,00 for general damages where the plaintiff had sustained the following injuries: comminuted fracture of the right femoral shaft, comminuted fracture of the right tibia and fibula, fracture of the patella, fracture of the left humeral shaft, a supra-intra fracture of the left distal humerus, a degloving injury over the lateral aspect of the right foot and a fracture of the upper incised teeth. The inflation adjusted amount today translates to R712 000,00. Both parties actually referred me to this case albeit for different reasons.
- 27.2 In *Smit NO v RAF* Quantum of Damages Vol 5 B4-251 an award of R600 000,00 was made for a 12 year old girl who had sustained the following injuries: fractures of the right humerus, left ulna, ankle and the pelvis and had also sustained a brain injury which resulted in her intellectual impairment and a change in personality. Today's adjusted value is R
- 27.3 In *Adlem v RAF* 2003 Quantum of Damages Vol 5 J2-14 a 17 year old girl who had sustained a head injury, multiple fractures of the upper and lower limbs, the pelvis, a degloving injury of the knee and a dislocation of the sacro-iliac joints was awarded what in today's value would be R678 000,00.

- 27.4 In *De Gorgh v Du Pisanie* NO Quantum of Damages Vol 5 J2-103 a 35 year old man who had sustained orthopaedic injuries and a frontal skull fracture which caused an extradural haematoma as a result of which he had suffered intellectual impairment and changed personality, was awarded what in today's monetary value translates to R430 000,00.
- 27.5 In *Gorres v RAF* 2007 Quantum of Damages Vol 6 at A4-1 GSJ an award translating to the present monetary value of R830 000,00 was made to a plaintiff in his late teens who had sustained the following injuries: severe brain injury, soft tissue injury to the neck, face and chin. The brain injury resulted in neuro-cognitive and behavioural deficits associated with concentration, working memory, impulse control and abstract reasoning.
- 27.6 In *Tobias v RAF* 2011 Quantum of Damages B4-65 Vol VI the plaintiff who at the time of trial was 36 years old was awarded R450 000,00 for the following injuries: diffuse axonal brain injury of moderate severity, fracture of the left proximal tibia, fracture of the right proximal tibia and anterior wedge compression fractures of the eighth and ninth dorsal vertebrae. In today's inflation adjusted amount the award is R550 000,00.

[28] From these cases, which are not very dissimilar to that of the plaintiff, it is clear that the awards range from the lowest award of R430 000,00 to R850 000,00. The injuries sustained by the plaintiff are comparable but not identical/similar to those of the other plaintiffs in the cases I have cited.

[29] Taking into consideration the range of such awards and the benchmark they have set, I am satisfied that a reasonable award for general damages suffered by the plaintiff is R720 000,00.

[30] Having regard to all that I have set out above, I am satisfied that the plaintiff has succeeded to prove that he has suffered the following damages:

30.1	General damages	R 720 000,00
30.2	Past loss of earnings	R 111 801,00
30.3	Future loss of earnings	<u>R 665 460,00</u>
	TOTAL	<u>R1 397 261,00</u>

[31] An apportionment of 90:10 should then be applied to the total damages.

[32] L Roets and L Modipa both recommended that the plaintiff's award should be protected. I endorse such a recommendation.

[33] Accordingly the order I make in favour of the plaintiff is:

1. Payment of R1 347 534,00.
- 2 The said amount shall be paid into the Trust Banking Account of Maria Phefadu Incorporated who shall retain same in an interest banking account, pending the creation of a trust in favour of the plaintiff in accordance with the provisions of the Trust Property Control Act 57 of 1988.
3. Costs.



N D TSHABALALA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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