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JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER: 16/33039
HEARD: 19 and NOVEMBER 2018
12 APRIL 2019

In the matter between:-

M, M obo E

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

HERTENBERGER, AJ:

[1] This is an action instituted against Defendant by the Plaintiff as a result of a motor vehicle accident, which is alleged to have resulted in the Plaintiff's minor daughter suffering injuries. The matter now before me deals with the merits and quantum, though limited to the loss of earnings. The parties have agreed that the core of the matter to be determined is whether the accident upon which this claim is founded resulted in an injury to the brain, which caused epileptic seizures some years after the accident occurred. The expert evidence tendered in the matter was based on reports and in some instances on the *viva voce* evidence of selected experts. The Defendant did not produce any expert reports nor any other independent evidence and chose to

proceed simply upon evidence made available by the Plaintiff. All discovered reports were accepted and agreed by the parties.

[2] The common cause facts in this matter are briefly as follows: The Plaintiff's minor daughter, E who was 6 years old at the time of the accident was hit by a vehicle driven by Nkata Kekana whilst crossing the road as a pedestrian. E was taken to Chris Hani Baragwanath Hospital's casualty department. The first treating physician reports the injuries as: "superficial injury to the upper lip, abrasion to nose and epistaxis and abrasion to knees". No loss of consciousness was reported and the GCS¹ is recorded as 15/15. She was discharged on the same day and given mouthwash and Panado, after a medical examination along with X-rays were done. No follow-up visits took place. In December 2014 E first began experiencing epileptic seizures. Two other events are important for the purposes of determining the liability of the Defendant in this matter: In 2012 (the exact date is not recorded) E was involved in yet another pedestrian motor vehicle incident in the presence of her father. On the 28th of February 2013 at 9 years of age E was treated for an arm injury sustained whilst playing. The arm was placed in a backslab and she was discharged. In 2015 E began suffering epileptic seizures and further she experiences approximately 3 attacks of headaches in a week.

[3] I am tasked with determining whether the epileptic seizures are a result of the 2010 accident or whether any other intervening event caused them, and if so, .

[4] The Plaintiff led four witnesses, one being E's father, whilst the other 3 were expert witnesses ie. a Clinical Psychologist, an Educational Psychologist and a Neurosurgeon respectively. As already stated the parties agreed to accept all the experts' reports tendered by the Plaintiff. For the sake of completeness it is recorded that reports by the following experts were also provided: Orthopaedic Surgeon, Ophthalmologist, Ear Nose and Throat Surgeon, Industrial Psychologist, Algorithms Consultants & Actuaries.

¹ Glasgow Coma Scale

[5] The last witness, to testify was the Neurosurgeon, Dr L F Segwapa. I deal with his evidence first because the other experts are leaning on his findings in support of their own. Dr Segwapa's testimony was short, but crisp and to the point. He told the court that even in the event of a mild head injury, there was a 3% chance of developing a post traumatic injury within 3 years and whilst the risk of such injury developing after the initial 3 years was much less, it could not be excluded. Upon cross-examination Dr Segwapa was questioned about the incident of the arm fracture in 2013 and an attempt was made by Counsel for the defense to connect a (new) possible head injury to this incident. In my view, this attempt failed. There was no attempt by the Defendant to bring the 2012 incident into this context.

[6] Clinical Psychologist with a special interest in Neuropsychology, ms H Matlou, whose evidence in chief consisted mainly of a confirmation of what is contained in her report was the first witness to be called. In her view the areas of concern highlighted in her testing of E are identified as Cognitive, Psychological, Physical and Scholastic functioning. In arriving at her conclusion that the aforesaid functions have been compromised by the 2010 incident she ran a battery of tests and also considered the report of the Neurosurgeon. Whilst she was criticized for basing the biographical and pre- and post-accident functioning of E on the reports of the cousin who accompanied her to the consultation, it was not challenged that E's mother had corroborated the cousin's reports in a telephonic conversation with this witness. Again an attempt was made to imply that the two subsequent incidents (2012 and 2013) had somehow caused the current condition and further that E had always been an above average student and that this has not changed. The witness was convincing in her conclusion that there is no doubt that E is and always was an intelligent girl, however her ability to achieve her full potential post-accident has been hampered by the emotional and physical effects, such as headaches, seizures and her insecurities and emotional difficulties, including the fear of a reoccurrence of a similar accident. The aforesaid, coupled with the demands of the neurocognitive skills in the higher grades, will put her at a distinct disadvantage, which would not have been the case had the 2010 accident not occurred.

[7] An Educational Psychologist, Ms A Naiker, testified that her assisting Psychometrist, L Moseamedi, assisted her in the assessment of E, which was conducted in Xhosa, being E's first language. This dispelled the concern raised by the defense under cross-examination that there was a language-barrier, which may have adversely affected the outcome. Ms Naiker did not have the benefit of complete academic records in respect of E, despite having requested these from various sources. She however stated that despite this, she could utilize the family constellation and developmental milestones to compare the pre- and post-accident level of schooling and cognitive potential. From the post-accident academic reports, E appears to be an above average student in all subjects but for Economic Management Sciences. Upon testing, her intellectual abilities reflected a superior range of intellectual functioning. Having regard to further testing, it appears that her Potential and Educational Functioning post-accident is lower than prior to the accident. Problems that have arisen post-accident include situational anxiety and a fallout of neurocognitive functioning as a result of the accident.

[8] The court heard evidence of E's father, Mr M in respect of the 2012 motorvehicle accident. No medical records exist in respect of the accident and the father testified that there was no significant impact at the time of the collision. The clinic simply provided "ointment" and "Panado". The court had no reason to doubt the evidence of Mr M. No evidence was placed before the court to disprove his evidence and accordingly the court accepts his version of the events.

[9] I cannot find any evidence that supports a view on the balance of probabilities that the epilepsy developed as a result of the arm injury nor the second road accident and further no evidence was produced that could convince me that any other factors could have caused the epilepsy. Dr Segwapa in his evidence clearly illustrated that there was sufficient reason to believe that the epilepsy resulted from the head trauma sustained as a result of the accident in 2010 in which E sustained a direct trauma to the face. Counsel for the Defendant did not succeed in illustrating that there was an intervening cause, which resulted in the late on-set of epilepsy. In the absence of expert evidence on the part of the Defendant, I must accept the conclusion of the

[10] Accordingly I find that the Plaintiff's claim on the merits and quantum limited to loss of earnings must succeed.

[10] In the result the following order is made:

- (1) the Plaintiff's claim in respect of the merits succeeds;
- (2) the Defendant is ordered to pay the amount due in respect of the loss of earnings as determined by the actuarial calculation to the Plaintiff;
- (3) Costs of suit, including the cost of experts on the party party scale, as taxed or agreed;
- (4) Interest at a rate of 10,5% on the amount in (2) above from the 14th day after the date of this order to date of final payment;
- (5) Interest at a rate of 10,5% on the amount in (3) above from the 14th day from the receipt of the Taxing Master's Allocatur to date of final payment;

R HERTENBERGER
 ACTING JUDGE OF THE
 GAUTENG LOCAL DIVISION
 JOHANNESBURG

APPEARANCES

COUNSEL FOR PLAINTIFF:	ADV N MABENA
PLAINTIFF'S ATTORNEYS:	N.T MDLALOSE INCORPORATED

COUNSEL FOR DEFENDANT:	ADV NA MOHOMANE
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DEFENDANT'S ATTORNEYS: MALULEKE, MSIMANG & ASSOCIATES