REPUBLIC OF SOUTH AFRICA

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

CASE NO: 49332/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

M, N Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

J U D G M E N T

MODIBA, J:

[1] The plaintiff sues the defendant for damages as a result of injuries sustained on 10 August 2014, when a motor vehicle in which the plaintiff was a passenger overturned.

[2] The merits were previously settled amicably between the parties when the defendant accepted liability for 100% of the plaintiff's agreed or proved damages.

[3] The defendant also undertook to provide the plaintiff with an undertaking in respect of future medical treatment in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.

[4] Only two issues remain for adjudication:

4.1 The quantum for general damages.

4.2 The contingency deduction to be applied to the plaintiff's post-morbid loss of income.

[5] By agreement between the parties and with leave of the court, these issues are determined on the basis of the filed expert reports without hearing oral evidence. The court allowed this approach because the opinion of experts posited in the relevant expert reports is not contentious. They stand to be admitted unless the court find the experts' findings to be irrational. Therefore, in that event, after hearing counsel for the parties and considering authorities

relied upon, the issues to be determine are primarily discretionary. The following experts of the parties recently assessed the plaintiff in October and November 2018, and filed expert reports and joint minutes:

5.1 Orthopaedic Surgeons Dr J J van Niekerk (plaintiff's) and Dr D R van der Jagt (defendant's).

5.2 Occupational Therapists Ms J Morland (plaintiff's) and Ms P Ndlhalane (defendant's).

5.3 Clinical Psychologists Dr A D Watts (plaintiff's) and Ms T Jaca (defendant's).

[6] The occupational therapists largely agree on the plaintiff's suitability for work, post-morbid. Ms Morland located her in the light work category while Ms Ndlhalane found her suitable for medium work. Pre-morbid she worked as Teacher's Assistant for sports, acts and culture subjects. This work falls in the light work category with aspects of medium work. Post-morbid, she worked as a packer temporarily, then she worked as a sales consultant. This work also falls within the light work category with aspects of medium work.

[7] The occupational therapists also agree that successful medical and therapeutic treatment including physiotherapy and biokinetics should restore the plaintiff's physical ability to resume the light with medium aspects work categories she undertook both pre- and post-morbid. They also agree that,

while she has retained work capacity, it is compromised by the combination of orthopaedic and a mild concussive brain injury with its attendant neurocognitive deficits. As a result she is less likely to be productive and more likely to require supervision. It is on this finding that the plaintiff bases her loss of support claim.

[8] Both orthopaedic surgeons agree that the plaintiff sustained a laceration to her lip and injuries to her cervical spine and to the right groin area. Dr Van der Jagt noted current complaints in respect of headaches and occasional pain in her groin. He also noted that she has problems reaching toenails on her right foot, significant loss of movement in her right hip and signs of soft injury to her cervical spine. In addition Dr Van Niekerk noted a thoracic injury, neck head and lumbar spine pain. They indicate future thoracic surgery. Both doctors qualified her for general damages under the narrative test as a result of her long-term impairment. They also attest to her ability to resume her pre-morbid work.

[9] The clinical psychologists agree that the plaintiff had no pre-existing conditions. Dr Watts noted the brain injury diagnosis by the plaintiff's neurosurgeon Dr Lewer-Allen. Ms Jaca had not seen the neurosurgeon's report when she assessed the plaintiff.

[10] In addition to the plaintiff's physical deficits as enumerated above, the clinical psychologists noted that she experiences nightmares or distressing dreams, neuropsychological deficits such as memory problems and emotional

deficits in the form of self-regulation difficulties – she is easily agitated and irritable and has mood fluctuations.

[11] Further, Dr Watts indicated that the plaintiff's neuropsychological assessment revealed mild to moderate neurocognitive impairments in speed of motor performance, immediate attention span and mental tracking, visual scanning and attention to detail, verbal learning and memory when dealing with meaningful and non-meaningful material, as well as features of a Posttraumatic Stress Disorder, features of a Somatic Disorder with Predominant Pain, and a Mood Disorder (depression) and moderate post-morbid anxiety. Ms Jaca indicated that her neuropsychological assessment revealed borderline to very superior performance in the cognitive domains evaluated, with difficulties evident within the spheres of working memory and processing speed, as well as a Posttraumatic Stress Disorder, severe depressive symptomatology and psychological distress, and severe symptoms of anxiety when travelling.

[12] These experts conclude that their neuropsychological assessment profiles are consistent with the mild traumatic brain injury identified by Dr Lewer-Allen, the Plaintiff's Neurosurgeon. They also agree that given the time which has passed since the motor vehicle collision, Maximum Medical Improvement has been reached. Whilst her condition may be subject to some amelioration with treatment, her core deficits as revealed in their respective assessment are deemed permanent. They also agree that her post-accident neurocognitive, emotional/psychological and physical problems will have a

negative impact on her vocational performance. They defer to the opinions of the Occupational Therapists and Industrial Psychologists regarding Ms M's post-accident vocational functioning.

[13] The plaintiff was also assessed by the following experts appointed at her instance. They compiled reports which were filed. Because the defendant did not have the plaintiff assessed by its counterpart experts, joint minutes for the relevant expert areas were not filed. The defendant did not oppose the admission of these reports and were admitted on that basis.

[14] When diagnosing the plaintiff of brain injury, Dr Lewer-Allen draws the distinction between the severity of the injury (injury or accident/casualty) diagnosis and the severity of the outcome (outcome diagnosis). He opines that the former may ignore subsequent deterioration of a patient in subsequent days due to the delayed effects of the chemical cascade of Diffuse Axonal Shear Injury ("*DIA*") brain injury. Therefore a GCS conducted in casualty while the patient is being ventilated and sedated and the DAI process is in delay is fallacious. Therefore, the pertinent question is not whether the plaintiff had a mild, moderate or severe head injury but whether or not the patient has *sequelae* therefrom and how it has affected her functioning post-accident. These issues fall within the competency of the neuropsychologist and industrial psychologists. The opinion of these experts, coupled with the hospital records and collateral witnesses would inform his findings in respect of the outcome diagnosis. He noted that these experts did not find neurocognitive, neuropsychological and physical deficits that did not

exist pre-morbid and were not caused by any non-accident related factor. Therefore, he concluded that the deficits were correctly attributed to the accident.

[15] Having regard to the findings of these experts, Dr Lewer-Allen concluded that in terms of the outcome diagnosis, the plaintiff sustained a mildly severe traumatic brain injury as assessed at casualty level, with a mildly severe outcome diagnosis brain injury with the majority of any intellectual challenges being accounted for on psychiatric grounds rather than by organic brain injury. The psychological challenges, which are due to the accident, may remain entrenched despite treatment. Given that both brain injury and psychogenic brain injury have a negative long-term effect on behaviour, memory and the ability to sustain employment, the difference between these two conditions is academic.

See note on page 116 para 8.2.3 re: plaintiff's disqualification under the narrative test and Judge Tsoka's judgment and order re: plaintiff's qualification for general damages.

[16] Having regard to the findings of the other experts as set out above, the Planitiff's Industrial Psychologist, Ms Roets, concludes that the plaintiff may have been compromised by the accident and that her ongoing pain, may lead to discomfort in the workplace and have a negative effect on her productivity. While Ms Morland and Ms Ndhlalane are of the view that the plaintiff should be taught how to implement joint and energy saving techniques and

ergonomic principles in her work environment, they also acknowledge that her neuropsychological and psychological difficulties as found by Dr Watts will prove to be restrictive in the workplace. The combination of her difficulties will therefore probably culminate in an employee who is less productive, less efficient, more absent and have poorer than expected interpersonal relationships, rendering her a more vulnerable and less competitive individual in the open labour market. For quantification purposes, she recommends that a higher than usual post-morbid contingency deduction be applied.

[17] She also found that the plaintiff has suffered a loss of her amenities and life enjoyment.

LOSS OF INCOME

[18] Only the plaintiff appointed an actuary who furnished a report with actuarial calculations of the plaintiff's estimated pre and post-morbid loss of income. The parties agree that an 18% contingency deduction, consistent with the authority of the seminal Road Accident Fund v Guedes[1], that ½% for each year post-morbid to retirement should be applied to determine the plaintiff's pre-morbid loss of income, is applicable.

[19] The plaintiff contents that as recommended by her Industrial Psychologist, a higher contingency deduction should be applied to her post-morbid loss of income. Her counsel submitted that a contingency deduction of

[1] 2006 (5) SA 583 (SCA).

33% would be appropriate in the circumstances. The defendant contends that a 28% post-morbid deduction ought to be applied.

[20] It is trite that contingency deductions are at the discretion of the court. To arrive at the post-morbid contingency deduction to be applied to the plaintiff's post-morbid loss of income, I was guided by the following remarks in Baily[2] regarding contingency deductions or what the court also referred to as a discount for the vicissitudes of life:

> *" They include such matters as the possibility the plaintiff may in the result have less than a normal expectation of life; …and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending on the circumstances of each case… The rate of discount account of course be assessed on any logical basis: The assessment must be largely arbitrary and must depend upon the trial judge's impression of the case."*

[21] When determining the post-morbid contingency deduction, I took into account that the defendant did not have the plaintiff assessed by her Industrial Psychologist. Therefore the defendant's aversion to the post-morbid contingency deduction sought by the plaintiff is not supported by any contrary expert opinion. Further, the defendant's Orthopaedic Surgeon found that the plaintiff sustained a thoracic injury, for which he indicated future surgery. This injury was not diagnosed by the plaintiff's Orthopaedic Surgeon. However both experts agreed to the need for future thoracic surgery.

[22] Although pre-and post-morbid, she worked on a term contract or temporary capacity, the Plaintiff was a fit netball player who worked as a sport, art and culture Teacher's Assistant. She was on the way to compete in

[2] 1984 (1) SA 94 AD.

a netball championship tournament when the collision occurred. Post-morbid she tried to play netball but discontinued due to pain. The plaintiff's Industrial Psychologist found that the plaintiff's physical and neurocognitive and neuropsychological sequelae have compromised her ability to compete in the open labour market. It is probable that her compromised status now and in the future, negatively impacts her placement prospects. Once placed, it is also probable that her compromised position will negatively impact her ability to sustain work.

[23] I therefore find that a post-morbid contingency deduction as contended for by the plaintiff's counsel is appropriate in the circumstances. In the premises, based on the actuarial calculations provided by the plaintiff's actuary, after applying an 18% pre-morbid contingency deduction and a 33% post-morbid contingency deduction, I find that the amount to be awarded the plaintiff for past and future loss of earnings is: R1, 031, 236.

GENERAL DAMAGES

[24] Dr Kaplan assessed the plaintiff to determine whether her injuries are serious in terms of the Regulations made under section 26 (1A) of the RAF Act and found that under the narrative test, the plaintiff's injuries are serious. However, the defendant rejected that finding. The plaintiff challenged that rejection as a separated issue before Tsoka J. On 15 February 2019, Tsoka J ruled that there was no valid rejection of the plaintiff's assessment for general

damages. Therefore this court determines general damages on the basis of Dr Kaplan's findings.

[25] It is trite that the award for general damages lies at the discretion of the court and that previous awards only serve as a guideline. Counsel for the parties relied on authorities that fall within what the Supreme Court of Appeal in *De Jongh V Du Pisanie*[3] referred to as the perceptible tendency towards higher awards in general damages and conservatism in awards for general damages. The court provided guidance on how to ameliorate the effect of the tendency towards higher awards in general damages when such awards are relied upon in subsequent cases. I am guided by the following remarks the court made in my approach to the authorities relied on by the parties:

"The effect of the aforementioned perceptible tendency towards higher awards for general damages is again, however, not capable of being determined with mathematical precision. It is not certain precisely when the tendency began and when it will end. It has quite possibly span class come to an end already. An award from the past to which a court refers could therefore have been made after taking the tendency into account. If the earlier decision which serves as a standard had been made after having regard to the tendency towards higher awards, the allowance of a further increase in awards can hardly be justified on the grounds of the same considerations without any additional reason. In addition, then said tendency clearly does not require the multiplication of earlier awards by a predetermined or determinable factor. In the end the tendency is only one of the considerations that the court is justified in taking into account when it, in the exercise of its discretion, refers to awards, especially in older cases, as a guideline."

[26] Relying on *Hurter v Road Accident Fund and Another*[4], the plaintiff seeks general damages in the amount of R500,000. Hurter, a 20 year old with a brain injury more severe to the plaintiff's as well as lacerations to the lower lip and facial fracturing was awarded R500,000 in 2010. Plaintiff's counsel

[3] No 2005 (5) SA 457 (SCA) at Paragraph [65] at 477D – G.
[4] (367/07) [2010] ZAECPEHC 5 (2 February 2010).

argued that given that the amount would be higher in the 2019 rand value R500,000 is a reasonable award for the plaintiff.

[27] Counsel for the defendant contended that R350, 000 is a reasonable amount to award the plaintiff. He relied on *Naude v Road Accident Fund*[5].

[28] In the unreported judgment in *van der Linde v Road Accident Fund*[6], R380, 000 was awarded to the plaintiff in respect of general damages for a permanent spine injury at C5/6 and for psychological trauma after taking into account several comparable authorities at paragraph 44 of the judgment where awards ranging between R310,000 and R331,000 were made in the 2018 rand value, hence the higher award. Unlike the plaintiffs in the compared authorities, van der Linde had psychological sequelae. Although in this case, the plaintiff like van der Linde has psychological sequelae, van der Linde's orthopaedic injuries were more severe as he had no residual work capacity whereas this plaintiff has.

[27] *Hurter* is clearly an outlier when regard is had to the authorities referred to above. It can never be regarded to have set the standard for cohort of persons with the comparable injuries that the plaintiff suffered. In the premises, I consider R370,000 to be an appropriate award for general damages.

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[5] An unreported judgment of Weiner J, handed down on 19 February 2013, Case number 35083/2009.

[6] An unreported judgment of Modiba J, handed down on 29 June 2018, Case number 19860/2016.

CONTINENCY FEE AGREEMENT

[28] The plaintiff and her attorney entered into a contingency fee agreement in terms of section 4 of the Contingency Fees Act ("the CFA") 66 of 1997 on 14 January 2015. The plaintiff's attorney deposed to an affidavit confirming the existence of the agreement, the date it was concluded, its validity as well as the fact that he has complied with his duties in terms of the CFA. The plaintiff deposed to an affidavit confirming that her attorney has explained to her the remedy at her disposal in the event that she is not satisfied with the fees charged by him. Counsel for the plaintiff handed these documents up in court with no objection of the part of counsel for the defendant. I am satisfied that the contingency fee agreement complies with the applicable statutory provisions.

[29] Counsel for the plaintiff handed in a draft order, leaving out the amounts the parties required me to rule on. Save for the amounts which I have determined based on the reasons set out above, as well as details of the expert's fees as set out in paragraph 3.1, the order I grant below is based on that draft order.

[30] In the premises, I make the following order:

ORDER

1. The defendant shall pay damages to the plaintiff in an amount of **R 1 401, 236. 12 (one million, four hundred thousand, one thousand, two hundred and thirty six rand** ("the award"), in respect of the plaintiff's claim.

2. The defendant shall furnish the plaintiff with an undertaking as envisaged in Section 17(4)(a) of the Act in respect of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision which occurred on the 10th of August 2014, after such costs have been incurred and on proof thereof.

3. The defendant shall pay the plaintiff's costs of the suit, as taxed or agreed, on a scale as between party and party, such costs to include:

3.1 the costs of expert reports, preparation, qualifying and reservation fees of the following experts where applicable:

3.1.1 Dr. B.A. Longano (Psychiatrist);

3.1.2 Dr. C.M. Lewer – Allen (Neurosurgeon);

3.1.3 Ms. J. Morland (Occupational Therapist);

3.1.4 Ms. L. Roets (Industrial Psychologist);

3.1.5 Dr. A. Watts (Clinical Psychologist);

3.1.6 Ms. M. Gaspar (Speech Therapist); and

3.1.7 Mr. G.W. Jacobson (Consulting Actuary).

3.2 the costs of counsel employed on behalf of the plaintiff.

4. In the event of these costs not being agreed, then:

4.1 the plaintiff's bill of costs will be served on the defendant's attorneys; and

4.2 the taxed bill of costs will be payable within 14 (fourteen) days after taxation.

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MS. L.T. MODIBA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARENCES

Plaintiff's Counsel:	Adv. N. Makopo
Instructed By:	A.F. Van Wyk Attorneys, Johannesburg
Defendant's Counsel:	Adv. T. Mashishi
Instructed By:	Twala Attorneys, Johannesburg
Date heard:	18 February 2019
Judgment delivered:	21 February 2019