

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

CASE NO: 2015/02218

REPORTABLE: **NO**
OF INTEREST TO OTHER JUDGES: **NO**
REVISED.
29 June 2021

In the matter between:

LLM obo DM

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

SILG, J:

INTRODUCTION

1. The plaintiff sues as mother and natural guardian of her minor son who was injured in a motor vehicle accident on 15 October 2013 when the child was two months short of turning three years old. He is now ten and a half years old. The child had been

sitting on the pavement when a car reversed onto him and dragged him for a distance. He also lost consciousness at the time.

2. The parties have settled the merits and both past and future medical, hospital and similar expenses. The only outstanding issues are general damages and loss of future earning capacity.

3. Several of the issues concerning the factual underpinning to the general damages claim were resolved at the case management meeting of 11 March 2020; the defendant admitted the relevant hospital records and the expert reports of the plastic and reconstructive surgeon, the neurologist, the urologist and the specialist physician.

The court also ruled that the neurosurgeon and orthopaedic reports of Drs Ntimbani and Omojawa were to be excluded from the trial proceedings as was the RAF Form 4 which had been completed by the latter.

THE INJURIES

4. It is common cause that the child sustained a mild head injury with loss of consciousness as a consequence of the accident. In addition he sustained occipital abrasions, a genital injury, extensive abrasions and a degloving of his left leg with debridement. The child had however sustained an earlier head injury some 17 months earlier when he had fallen off an adult's shoulder and lost consciousness. The skull X-Ray and Cat- scan taken at the time of the first injury were both normal

THE SEQUELAE

5. The child has effectively recovered from the orthopaedic injuries. However the head injury, the genital injury as well as the permanent scarring have resulted in long term sequelae. There is a huge scar over the posterior aspect of the left thigh and a scar over the medial aspect of the other thigh. He also continues to suffer nose bleeds,

has bowel problems and suffers from nausea, and he experiences numbness in his hands and legs especially if it is cold. He is also easily fatigued

6. As a result of the injuries the child incurred post-traumatic epilepsy, suffers from impaired cognitive functions and has permanent scarring. The cognitive impairment displays itself in severe difficulties with concentration and memory. He also suffers from long term behavioural disturbances including personality changes, depression and moodiness. These have also affected his scholastic results with remedial and occupational therapy as well as psychotherapeutic intervention being recommended because of the risk of psychological deterioration. It is accepted that the child presents with significant cognitive, perceptual and psychological difficulties.

7. The educational psychologists differed as to the level of education the child would have obtained but for the accident. The plaintiff's expert contending for a Bachelor's degree while the defendant's expert claiming the attainment of not more than a Diploma / NQF 6. Post-accident the former considered that the child will reach Grade 11/NQF 3 and the latter Grade 12/Higher Certificate. Although he had not failed a year, it was accepted that in the higher levels at school he would struggle and remedial schooling was considered. There was a dispute as to whether his occupational choices would be limited. However it was accepted that both his further schooling and occupation would be affected by his emotional and psychological difficulties, behavioural issues including aggressiveness and a compromised cognitive functioning. Unless resolved epileptic seizures and headaches would also contribute to these risks.

8. The child's father attained grade 12 and worked as a security guard. He had passed away when the child was two years old. The mother attained grade 9 and is a domestic worker. It is however possible that opportunities may not have been available to them at the time but this was not explored. I am however not prepared to make findings by reference to the educational or occupational levels attained by either parent. The eldest sibling was still in grade 9 at 18 years of age while the eleven year old sibling was in grade 6 which is the expected level at that age.

9. The occupational psychologists were agreed that irrespective of the actual pre-morbid status the child has been disadvantaged in the open labour market due to his cognitive limitations post-accident and their effect on both his academic prospects and occupational choices.

10. Prior to the accident he was describes as a lively child but since then he suffers from depression, is withdrawn and is aggressive while also exhibiting feelings of guilt. He continues to experience bed wetting and has nightmares. His personality disorders affect his interaction with others. It is however accepted that this might improve if successfully treated.

11. It is accepted that he endured acute pain after the accident and that he will endure chronic pain in both thighs as well as headaches which he will continue to endure on a regular basis (reports indicate twice a week).

12. He did have a genital injury and he still finds it painful urinating and sometimes urinates blood. He has episodes of incontinence and there is also a concern that he may suffer erectile dysfunction, although it is too early to provide a diagnosis. This is in terms of the specialist urologist report of Dr Feilat

13. The child is acutely aware of the disfiguring scar on his thigh and plastic surgery is to be provided for.

14. His enjoyment of life is further restricted by his inability to participate actively in sport although he is able to walk, play socially and is healthy

15. Finally, according to the plaintiff's expert, the child's life expectancy is estimated to be reduced by some 15% or by 5 to 10 years whereas the defendants' expert considers it to be nominal. However all are agreed that any reduction in life expectancy

would be as a result of his epilepsy. At present he continues to experience seizures and suffers panic attacks

SUMMARY

16. The child endured acute pain and suffering as a result of the accident and now presents with serious cognitive, perceptual and psychological disabilities. While the perceptual sequelae may be ameliorated, and he will be entitled to receive treatment for them as part of the award, the cognitive impairment will impact both scholastically and occupationally. While treatment may also assist in alleviating the current psychological sequelae the limitations arising from the cognitive sequelae occasioned by the accident may result in a different range of psychological issues manifesting themselves.

17. The child sustained multiple injuries with a broad spectrum of sequelae ranging from physical to psychological, from cognitive to potentially sexually limiting. Moreover some sequelae are clearly chronic and long term while others may be alleviated, whether significantly or only to some extent by medication and surgical intervention (such as plastic surgery).

QUANTUM

18. It is not my intention to analyse in great detail cases dealing with quantum. The reason is twofold. Firstly the parties are effectively *ad idem* regarding the injuries and their sequelae, with the defendant being prepared to make concessions regarding the risk of certain long term sequelae eventuating. Secondly the parties rely on cases which generally fall within a relatively narrow band. While the plaintiff did suggest that cumulatively quantum should be assessed at R1.9 million no case or number of cases can achieve such a result even if the injuries and their sequelae were to be added up individually. The defendant produced cases such as *S v RAF* (a decision of Maier-Frawley AJ (at the time) in 2018) where the award was R600 000 for a moderate head injury which resulted in serious mood disorders, depression, impaired interpersonal relationships and a form of epilepsy with seizures; but there were no potential sexual

dysfunctional issues and the girl's pre-accident scholastic results showed that she was already experiencing learning difficulties.

19. In *M v RAF*, a 2017 decision of Moshidi J, the plaintiff also suffered serious head injuries which were more severe than in the present case. The award made was R700 000.

20. In a case involving erectile dysfunction (*Masemola v RAF* of 2017) an award of R850 000 was made but there it was accepted that the likelihood of erectile dysfunctioning in the foreseeable future would occur due to the extent of the pelvic injuries, moreover the physical injuries were of a far more serious nature than in the present case as they included injuries to the tibia and pelvis with a pubic fracture.

21. Erasmus AJ in the 2019 case of *Sohaba v RAF* was concerned with cognitive impairment and psychological sequelae. There an amount of R850 000 was awarded. There was however no issue of epilepsy or the possibility of sexual impairment.

22. In my view the best the court can do is provide for a reasonable contingency for the risk of erectile dysfunctioning.

23. In all the circumstances I consider that an appropriate award is R925 000 for general damages.

LOSS OF EARNING CAPACITY

24. The parties agreed on presenting two scenarios to the actuary. The one adopting the most favourable pre-accident scenario which would have been that the child would have received a tertiary education while the other assumes that he would have obtained a post-matric Diploma.

25. I am uncomfortable adopting either basis because there remains a contingency factor to be taken into account that he would better the lower qualification or not obtain the higher one. It is not a one or the other approach as neither party can be dogmatic as to whether or not the child will only attain a post-matric Diploma or will qualify with a degree. I say this because, to have reference to either parent's own educational or occupational history, without more, would overlook the greater disadvantages and lack of opportunities they and their own parents were likely to have suffered.

26. On the evidence before me either outcome (basis 1 or basis 2) has an equal probability of occurring.

For these reason, I will adopt a 50% contingency. The effect is that basis 1 and basis 2 will be added together and divided by two. Basis 1 yielded a net loss of R2 853 304 whereas the figure applying Basis 2 is R 3 928 009, the median being R3 390 657

ORDER

27. In the result the following order is made:

- a. R925 000 in respect of general damages for pain and suffering and loss of amenities of life:
- b. R 3 390 657 in respect of future loss of earnings and earning capacity
- c. The balance of the order will follow the draft order provided by the parties and which need not be repeated.

SPILG, J

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email. It will also be released for publication on SAFLII. The date for hand-down is deemed to be 29 June 2021.

DATE OF JUDGMENT:	29 June 2021
FOR PLAINTIFF:	Adv N Mabena NT Mdlalose Inc
FOR DEFENDANT:	Adv. H Mpe Borman Duma Zitha Attorneys