

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH
(NORTH GAUTENG, PRETORIA)

DATE: 12 DECEMBER 2014

CASE NO: 12912/2008

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between.

B[...] N[...] obo A[...] N[]

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

WEBSTER J

1. The plaintiff instituted an action on behalf of her minor daughter, A[...] N[...] (“A[...]”) for damages arising from injuries she suffered in a motor vehicle accident on 21 May 2001. She was a pedestrian and was run over by a motor vehicle with registration number B[...] on the road “*leading from Idutywa to Willowvale, Eastern Cape*”. The claim as set out in paragraph 7 of the Particulars of Claim amounts to a total of R889 262 56.

2. The injuries that she sustained are fully set out in a report by an Orthopaedic Surgeon, Mr Theo Berkowitz.

He summarised the injuries as follows:

“There is a scar in the fold of the right buttock. There is no comment as to the presence of a laceration at the time of the accident on admission to Butterworth Hospital. She may have developed a pressure sore from the right of the Thomas splint which has healed with a traverse scar.

There is marked external rotation of the right femur. It has been demonstrated that excessive external rotation can result in secondary arthritic change in the hip and knee joint. I would therefore advise derotation osteotomy. I do not feel that an attempt should be made to correct the limb length discrepancy at the time. This will obviously persist and require the use of a compensatory raise to the right shoe which in a young woman is a definite cosmetic blemish.

Following this procedure she will experience extremely severe pain for approximately a week and moderate pain with occasional acute flare ups for approximately two months. She will require crutches for at least three months. Internal fixation will probably be utilised at the time of the corrective osteotomy and this will require removal when the osteotomy has consolidated approximately one and a half to two years post-surgery.

It is common for patients who have major limb fractures to experience intermittent pain almost indefinitely and allowance should be made for analgesic medication.

The appearance of the right thigh and buttock is also a major cosmetic blemish. The shortening of the right leg and associated scarring of the upper end of the soft tissues of the right thigh will, in my opinion, prevent A[...] from participating in virtually all the physical activities of her peers.

The injuries have not influenced A[...]’s life expectancy.”

3. An occupational therapist, AR Fryer, compiled a medico-legal report on the functional ability of A[...]. Certain “problem areas” were identified by the occupational therapist and are listed in the report under summary as follows:

- *“The accident interrupted her childhood*
- *She has difficulty with most mobility tasks*
- *A[...] was raised in a one parent family*
- *Her play changed to sedentary indoor games and she can no longer partake in physical games outdoors as well as sporting events at school*

- *She no longer goes to dances with her friend*
- *When the weather is cold and rainy she cannot walk the distance to school*
- *Her disability is visible and cannot be hidden by her clothes*
- *She presents with an area of loss of sensation for soft touch*
- *There is a reduction of joint range of motion and muscle strength in the lower limb.*
- *She cannot maintain a straight posture for a long time and this affects prolonged sitting endurance*
- *Compensatory gross motor and balance skills were found*
- *Mobility is affected by compromised walking due to the fact that the one leg is shorter than the other*
- *Bilateral action with the upper limbs is restricted to a small degree due to compromised balance skills*
- *Reduced physical endurance for walking, sitting and standing*
- *The claimant experiences pain in the hips, lower back and the right leg*
- *She walks with a limp and has an asymmetrical posture*
- *She has crying spells and does not like her disfigured limb*
- *Her mother endures being pitied about a disabled daughter”*

4. A Notice of Intention to Amend the Particulars of Claim dated 13 November 2009 was filed by the plaintiff’s attorney. This Notice sought to amend the total amount claimed to R3 639 926.50. An actuarial certificate dated 12 November 2009 setting out the loss of earnings calculated by the actuary, Johan Sauer, was attached to the said Notice of Intention to Amend.

5. A joint pre-trial minute was prepared by Dr HJ Van Daalen, an Industrial Psychologist, and Dr RG Holmes, an Educational and Industrial Psychologist. Counsel for the plaintiff and the defendant both referred to this joint minute during argument. Paragraph 1.1 under the heading “Employment Prospects” the following is noted in paragraph 1.1:

“1.1 *Pre-Accident*

The matter regarding A[...]’s likely pre-morbid educational and vocational prospects was considered on the basis that deference was given to the opinion held by Mr Eaton, clinical psychologist, that she did not suffer any traumatic brain injury as a consequence of her involvement in the road traffic accident of 21 May 2001.

1.1.1 Having regard to the aforementioned assumptions, it was agreed that A[...] would have, but for the traumatic incident of 21 May 2001, completed a Gr 12 certificate and that she would have been encouraged to further her studies/training at either a vocational college/similar institution or technicon. Dr Van Daalen however is of the view, given her rather limited intellectual abilities, as assessed by Mr Eaton as well as by Dr Van Daalen that even with encouragement from the parents, success in such an endeavour cannot be taken for granted."

6. Paragraph 1.2.4 at page 3 of the said report reads as follows:

"1.2.4 Aiinda’s chances of obtaining employment, given her orthopaedic injuries, would only be 20 to 30% of what her chances would have been, but for the road traffic accident of 21 May 2011"

7. Two actuarial reports were obtained by the parties: Johan Sauer, the actuarial expert for the plaintiff and George Schwalb, the actuarial expert for the defendant. They are very close to each other in the end result calculations if the calculations are viewed in line with the joint minute as compiled the by two industrial psychologists. In fact, Johan Sauer’s calculations amount to a total loss of earnings (post-morbid) of R2 434 336 and that of George Schwalb to R2 430 760.

8. The two experts are not far apart: the difference between them in the final calculation being only R3 576 over a period of 17.5 years. Regard being had to the fact that the plaintiff will not be able to recover anything further from the defendant once an order is made by this court common sense which is the basis of human logic dictates that the plaintiff should not be exposed to a loss no matter how small. On this issue logic dictates that the option more favourable to the victim should be allowed: that option is that postulated by Johan Sauer.

9. Counsel for the defendant argued that a contingency of 25% should be applied to the future loss of earnings. Her submission was that it "...is the general contingency applicable to the facts...". It would appear as if her method of calculation did not take into account the findings in the joint minute of the industrial psychologists. Their consensus is that A[...]’s chances of obtaining employment are between 20 and 30%. Therefore, in my view, the contingency of 75% as applied by both the actuaries is indeed the correct percentage.

10. On the issue of general damages an amount of R350 000 was claimed. Mr Lubbe, counsel for the plaintiff, referred to the case of RAF v Marunga, 2003(5E3), QOD 1 (SCA) where the 56-year old plaintiff suffered similar injuries to that of A[...] in this case, was awarded an amount of R269 000 (updated value in 2011). Counsel for the defendant, Ms Liebel, submitted that an amount of R120 000 is reasonable taking into account the facts of this case. The court is of the considered view that in the light of the fact that A[...] was only 6 years old at the time of the accident she has a lifetime of pain to suffer from the injuries sustained during the accident. In light of the foregoing it is my considered view that an amount of R320 000 is a reasonable award with regard to general damages.

11. On 5 May 2011 an order was made by my brother, Molamu AJ, under this case number in which the first prayer reads as follows:

“1. The Defendant is ordered to pay an amount of R400 000 as an interim payment, which amount shall be paid on 28 May 2011 to the credit of the trust account of the Plaintiff’s attorneys of record, FRANS VAN WYK ATTORNEYS...”

The abovementioned amount of R400 000 should be deducted from the amounts granted in this judgment.

12. For the sake of completeness it is necessary to mention that an amount was claimed in the Particulars of Claim for future medical expenses. According to the pre-trial minute dated 14 October 2011 the following is noted under the heading Future Hospital and Medical Expenses:

“2.1 In settlement of the Plaintiff’s claim under this heading the Defendant has issued an undertaking in terms of Section 17 of the RAF legislation.”

13. It is trite law that costs should follow suit. Therefore costs are awarded to the plaintiff as set out in the order below.

14. The following order is granted:

IT IS ORDERED:

1. The defendant is ordered to pay to the plaintiff the amount of R2 354 336 calculated as follows:

Loss of earnings	R2 434 336
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<u>General damages</u>	<u>R320 000</u>
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R2 754 336

MINUS Interim payment R400 000

TOTAL AMOUNT R2 354 336

2. The defendant is ordered to pay the plaintiff's costs of suit, which costs shall include but are not limited to:

2.1 Fee of senior-junior counsel;

2.2 The reasonable, taxable reservation, preparation and qualifying fees and costs of obtaining the reports of the following expert witnesses:

2.2.1 Dr T Berkowitz;

2.2.2 Dr R G Holmes;

2.2.3 M Eaton;

2.2.4 R Fryer.

2.3 The costs of obtaining the actuarial reports of JJ Sauer.

G. WEBSTER

JUDGE IN THE HIGH COURT

Date of hearing: 18 October 2011

Counsel for the plaintiff: Adv Lubbe

Counsel for the defendant : Adv Liebel