

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION OF THE HIGH COURT, PRETORIA)**

**CASE NO: 10528/2011**

**DATE: 17 FEBRUARY 2014**

**NOT REPORTABLE**

**NOT OF INTEREST TO OTHER JUDGES**

In the matter between:

**ADV JOHAN PETRUS VAN DEN BERG N.O**

**PLAINTIFF**

**OBO JT M[...]**

and

**THE ROAD ACCIDENT FUND**

**DEFENDANT**

**JUDGMENT**

**CARELSE J:**

**[1]** The plaintiff in this matter was appointed as a *curator ad litem* on behalf of a minor child (“J[...]”). The plaintiff claims damages arising out of a motor vehicle collision which occurred on 27 April 2008. The issue of liability was settled 100% in favour of J[...]. The parties agreed to argue the issue of quantum on the reports of the various experts. I pause to mention that the defendant did not file any reports and argued on plaintiff’s expert reports. The claim falls within the ambit of the Road Accident Fund Act 50 of 1996 (The Old Act”).

**[2]** The issue of future medical expenses was settled. There are only two issues, I am required to determine in this matter. They are, plaintiff’s future loss of earnings and

general damages. Counsel for the defendant submitted that plaintiff is entitled to general damages as well as loss of earnings. It is the amount plaintiff seeks that is in dispute.

### **Background Facts**

[3] At the time of the accident J[...] was nine years' old and in grade four. He was knocked down by a taxi, driven by the insured driver. He is currently fourteen years' old and in grade seven. He is an orphan. His mother died and he was abandoned by his father. He lives with his grandmother who is eighty-two years' old. His grandmother is also taking care of seven other children.

[4] J[...] was crossing the road when he was hit by a taxi. As a result of the collision J[...] was taken to hospital where he was treated for a fracture of the tibia. He was operated on for fixation of the fracture by means of a tibia nail. A plaster of paris cast was applied twice. He received fluid therapy, physiotherapy and had to use crutches. J[...] remained in hospital for a period of six months. It bears mentioning that J[...] did not sustain any head injuries.

[5] J[...]’s injuries are not in dispute. The plaintiff’s expert Dr Shevel, a psychiatrist, in his report gave the following diagnosis of J[...]:

“CHRONIC PSYCHOLOGICAL ADJUSTMENT DIFFICULTIES (with features of intermittent depression and anxiety) SECONDARY TO PHYSICAL INJURY (fractured right tibia) AND PROBABLY AGGRAVATED TO SOME EXTENT BY PROLONGED PERIOD OF HOSPITALISATION”

Having regard to the foregoing, it appears that J[...] suffers from psychological *sequelae*.

### **Current complaints and *sequelae* of J[...]**

[6] The plaintiff submitted several expert reports mentioned herein below which are not

in dispute.

**[7]** According to Mr Wessel's, the industrial psychologist, J[...] experiences pain in his right lower leg, especially when he stands or exercises for extended periods. He also struggles to run and limps when the symptoms are aggravated. He experiences pain in both shoulders when lifting heavy objects.

**[8]** According to Dr Birrell, the orthopaedic surgeon, J[...]’s right leg is 1.5cm longer than his left which has a good chance of levelling to at least 1cm or less.

**[9]** According to Dr White, the plastic and reconstructive surgeon, J[...] has scarring of the right leg that can be improved with further surgery. He further states in his report that J[...] complains of on-going pain of the right lower leg which is aggravated by cold wet conditions.

**[10]** According to Dr Mazabow, the clinical psychologist, J[...] has poor memory. He has difficulty with concentration. As a result of which J[...] is prone to careless mistakes. J[...] suffers from depression and anxiety. He experiences post-traumatic stress disorder which has persisted over 5 and a half years. J[...] experiences learning difficulties over the past 5 years which has resulted in him repeating grades four and five.

**[11]** According to Dr Mazabow these difficulties can be attributed directly to his depression and anxiety. Dr Mazabow is of the view that children who experience chronic depression will present in declining performance in the classroom impacting on J[...]’s motivation, attention and concentration which includes behavioural and interpersonal difficulties. J[...] wets his bed, suffers with cramps and has undergone a personality change. He tires easily and his psychomotor skills are slow.

## **Future medical treatment**

[12] All the experts agree that J[...] will require the following future medical treatment particularly, long term psychotherapy. According to Mrs Purchase, the educational psychologist, J[...] will require a short course of anti-depressants for a period of two years. This should be monitored. The anti-depressants should help contain the intermittent anxiety and depression.

[13] According to Dr Shevel, J[...] has sustained a considerable loss of amenities of life. J[...]’s injuries will result in a decline in his scholastic achievements. He will require plastic surgery for his scars. This may result in him being away from school for a further two weeks.

[14] I turn to deal firstly with the issue of general damages suffered by J[...]. The defendant concedes that J[...] is entitled to general damages. However, what is in dispute is the amount. Counsel for the defendant submits that an amount of R440 000.00 is appropriate. Whereas, counsel for the plaintiff submits that an amount of R600 000.00 is appropriate.

[15] I have been referred to a number of cases dealing with general damages by both counsel for the plaintiff and the defendant. It must be borne in mind that no two cases are identical and the cases to which I have been referred to, serve merely as a guide (See **De Jongh v Du Pisanie N.O 2005 (5) SA 457 at page 458**).

[16] Counsel for the plaintiff referred this court to several cases *inter alia*, **Thwala v Road Accident Fund 2010 QOD D4 -1**. Plaintiff in the foregoing case suffered orthopaedic injuries where an open reduction and internal fixation was performed resulting in non-union. The plaintiff received R250 000 for general damages in 2010. The equivalent in 2014 is R 311 000. In **Nkhosi v Road Accident Fund 2009 6 QOD J 2-16** the plaintiff suffered chest injuries, rib fractures and fractures of third and fourth metacarpals of the right hand, concussion and laceration of the head. The plaintiff received R250 000 for general damages in 2009. The equivalent in 2014 is R325 000. In **Torres v Road Accident Fund QOD A4-1** The plaintiff, a twenty four old male suffered a severe diffuse brain injury, a soft tissue injury to

the neck, face and chin. Plaintiff suffered behavioural deficits associated with concentration, working memory, impulse control and abstract reasoning. This resulted in depression and adjustment disorder. He received an award of R 600 000 for general damages in 2007. In **Cordeira v Road Accident Fund QOD A4-45**, the plaintiff, a teenage boy suffered a severe primary head injury with right side hemiparesis making walking difficult and his speech was affected. He had severe neurocognitive and neuro behavioural deficits associated with poor memory, lack of energy, mental agility *inter alia*. He received an award of R 800 000 for general damages in 2010. Having regard to the foregoing cases, counsel for the plaintiff submitted that an amount of R600 000 for general damages is appropriate.

[17] Counsel for the defendant referred this court to several cases, in **De Wet AT v Road Accident Fund 2003 5 QOD E4-13 (AF)**, the plaintiff, a twenty six year labourer fractured his left tibia and fibula which resulted in a non-union. The plaintiff received R95000 in 2003, the equivalent being R163 000. In **Mautla v Road Accident Fund 2001 5 QOD B3-1 (T)** the plaintiff suffered a diffused head injury with mild brain damage. He suffered poor concentration, restlessness and bad tempers. He received R 90 000 in 2001 for general damages, the equivalent being R178 000. Having regard to the foregoing plaintiff for the defendant submitted that on the facts of this case an amount of R250 000 for the orthopaedic injuries and R190 000 for the psychological *sequelae* should be awarded. The total being R 440 000 for general damages

[18] Having regard to the foregoing cases and on the facts of this case, I am of the view that general damages in the amount of R500 000.00 is a fair and reasonable amount.

[19] Turning to the question of loss of earnings. It is not in dispute that J[...] started school in 2005 passing grade 1, 2 and 3. He repeated grade four and five. According to Dr Birrell, J[...] lost a whole year academically because of the *sequelae* of the accident.

[20] I understand counsel for the defendant's submission to be that J[...]’s scholastic ability is exaggerated and that in all probability with the necessary medical treatment J[...]

could possibly complete matric. Counsel for the plaintiff submitted that the industrial psychologist has presented two scenarios and that a fair and reasonable approach would be to find the average between the two scenarios. Counsel for the defendant submitted that such an approach could very well cater for the likelihood of an exaggeration, if any. In my view such an approach is fair and reasonable.

### **J[...]'s pre- accident work capacity**

**[21]** Dr Wessel's postulates that J[...] would have entered the working world after completing grade 12 in or about 2016. He further postulates that J[...] would have followed a period of unemployment or partial employment for an approximate period of 24 months. During this period J[...] would have been either unemployed or performed piece jobs or part-time work. According to Dr Wessel's, J[...] would probably have been remunerated between the Lower Quartile and the Median of the unskilled worker category.

**[22]** Dr Wessel's anticipates that J[...] would have worked in a temporary capacity for a further two years (2020). J[...] would probably have been remunerated between the Lower and the Median of the Semi-Skilled worker category. Thereafter, Dr Wessel's postulates that J[...] would have commenced with formal employment at the Paterson Job grade A3 level (25<sup>th</sup> percentile) by the age of forty five years. This is the first scenario. On the foregoing basis his preaccident scenario was calculated in the actuarial report which was completed by Dr Whittaker in which the two scenarios are canvassed.

**[23]** The second scenario postulates that J[...] would have remained in the informal sector. I reiterate that none of the plaintiffs expert reports are in dispute.

**[24]** Turning to scenario one contained in the actuarial report where it is postulated that J[...] would have completed grade 12 and enter the formal sector.

### **J[...]’s post-accident work capacity**

**[25]** According to Ms Brown, the occupational therapist, J[...] would be best- suited to work in a sedentary, light, medium to heavy category of work. According to Ms Purchase, the educational psychologist, J[...]’s cognitive deficiencies will probably result in increased difficulties at school. If J[...]’s cognitive difficulties are as a result of living with chronic pain and emotional trauma improvement may be expected after intervention. However, where a scholastic decline has already occurred, which it has in J[...]’s case, some permanent lags may remain.

**[26]** According to Ms Brown, J[...]’s intellectual and cognitive potential is below average. Any difficulty J[...] is currently experiencing is likely to increase as the volume of and complexity of work increases. She states in her report that J[...] is unlikely to cope in mainstream education for much longer and advises that he be placed in a remedial school. According to Ms Brown, J[...] is unlikely to pass Grade 12.

**[27]** Dr Mazabow in his report states that notwithstanding any interventions J[...]’s scholastic lag may be permanent. J[...]’s work capacity has been negatively affected. According to the various experts J[...]’s traumatic accident and his six month stay in hospital at the age of nine has led to many of J[...]’s psychological symptoms.

**[28]** In so far as the application of contingencies are concerned plaintiff conceded that contingencies apply. Plaintiff recommends the contingencies applied in its actuarial report. Before dealing with contingencies it would do well to remind ourselves that contingencies allow for the general hazards of life which include the extended period of general unemployment, possible loss of earnings due to illness, savings in relation to travel to and from work now that the accident has occurred, risk of future retrenchment as well as the general vicissitudes of life.

**[29]** When deciding on contingencies ‘the trial court exercises a discretion, and attempts to

achieve the best estimate of a plaintiff's loss' (See **Southern Insurance Association v Bailey N.O 1984 (1) SA 98.**) In so far as the contingency to be applied both counsel for the plaintiff and defendant submitted that a contingency postulated by Dr Whittaker in his report was appropriate on the facts of this case. That being so, in my view in the pre- accident scenario one a contingency of 20%, and 15% for scenario two is appropriate. Further in my view in the post- accident work capacity, a contingency of 40% be applied to both scenario one and two.

### **[30] Calculations**

#### **Scenario 1 - Grade 12 with formal sector employment**

##### **Future loss**

Value of income uninjured		R 2, 558,281
Less contingency deduction	20%	<u>(R 511,656)</u>
	Total 1	R 2,046,625
Value of income injured		R 478,003
Less contingency deduction	40%	<u>(R 191,201)</u>
	Total 2	R 286,802
Total 1		R2, 046,625
Total 2		(R 286, 802)
<b>Total net loss</b>		<b>R 1, 759,824</b>

#### **Scenario 2 - Grade 12 with informal sector employment Future loss**

Value of income uninjured		R 1, 696,055
Less contingency	15%	<u>(R 254,408)</u>
	Total 1	R 1, 441,647
Value of income injured		R 478, 003
Less contingency	40%	<u>(R 191201 )</u>
	Total2	R 286,802



Total 1	1,441,647
Total2	(R 286, 802)
<b>Total net loss</b>	<b>R 1,154,846</b>

The average between scenario one and two is an amount of R 1, 457,335 which in my view is a fair and reasonable amount for loss of J[...]’s earnings.

In the result the following is appropriate:

Loss of earnings:	<b>R1, 457,335</b>
plus General damages :	<b>R 500, 000</b>
<b>Total</b>	<b>R 1,957,335</b>

[32] Johannes Petrus Van den Berg was appointed as *curator ad litem* at a very early stage in the proceedings on behalf of the minor. At the hearing the *curator ad litem* submitted his report to me and recommended that a trust be set up in the interest of J[...]. Counsel for the defendant submitted that in principle the defendant was not opposed to the setting up of a trust, save for the issue of costs associated with the administration of a trust.

[33] It bares mentioning that the *curator ad litem* was appointed well before the finalisation of the matter. Mr Van den Berg submitted that J[...] is a minor and once he is a major he will be able to manage his own affairs. Mr Van den Berg further submitted that leaving the funds in the Guardian fund is not feasible because his grandmother who is 82 years’ old and cares for 7 other children, lives in Klerksdorp. For her to attend the offices of the Guardian Fund would prove to be costly and inconvenient.

[34] To answer Counsel for the defendant’s concerns about the issue of costs in so far as the administration of the trust is concerned Mr Van den Berg submitted that the normal fees and reasonable expenses apply. The trust is audited annually and the reports are submitted to the Master. I agree that on the facts submitted by Mr van den Berg a trust is the appropriate vehicle in which to administer the funds of J[...].

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

1. The Draft order marked X dated 17 February 2014 is made an order of court.

**Carelse J:**

**Judge of the Gauteng Division Appearances**

**For the plaintiff:**

**Adv Ferguson**

**Instructed by:**

**Adams & Adams Attorneys**

**For the defendant:**

**Adv Mphela**

**Instructed by:**

**A.P Ledwaba Inc**

