

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



CASE NO: 13131/2011
DATE OF HEARING: 15 NOVEMBER 2015

Not reportable
Not of interest to other judges

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

08/03/16
DATE


SIGNATURE

8/3/2016

In the matter between:

CLAYTON ALVIN CLEMENTS

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

J U D G M E N T

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OLIVIER AJ

[1] The only question to be decided by the Court is the quantum of the plaintiff's claim.

[2] The chronology of this action appears from the heads of argument of the plaintiff. The plaintiff was driving between Springs and Nigel when he was involved in a motor vehicle accident with an unknown driver in an unknown vehicle on 11 August 2006. He was airlifted by helicopter to hospital, where he was treated until 26 August 2006. The plaintiff suffered significant injuries, as will be described below.

[3] Summons was served on the defendant on 3 March 2011. The defendant's defence was struck out by this court on 8 March 2013 and on 18 March 2013 an order was granted in terms of which the defendant was liable for 100% of the plaintiff's proven or agreed damages. The quantum determination was postponed sine die.

[4] The matter was originally enrolled for the determination of quantum on 14 May 2014. Defendant, at this hearing, appeared and requested a postponement of the proceedings to allow it to file an application to rescind the striking-out order. The trial was postponed sine die, but the court ordered that an interim payment be made by the defendant of R 400 000. (This amount was subsequently paid by the defendant.) Defendant was ordered to file their application for the rescission of the order striking out their defence within 10 days of the order. A punitive cost order was granted against the defendant.

[5] Defendant failed to file their rescission application within the court-ordered 10 day period. A new trial date was set and the matter now serves before me.

[6] There was no appearance for the defendant due to their defence being struck out and their failure to apply for a rescission of the striking out order.

[7] The plaintiff is claiming past hospital, medical and travelling costs; future hospital, medical and related expenses; loss of earnings and earning capacity; and general damages. See particulars of claim, as amended.

[8] Medico-legal reports were obtained from the following experts:

- a. Dr Jaap Earle (neurosurgeon)
- b. Ms Elzeth Jacobs (occupational therapist)

- c. Dr J J L Heymans (Orthopaedic surgeon)
- d. Dr J Smuts (neurologist)
- e. Ms Annelies Cramer (Clinical psychologist)
- f. Mr C P J Schoeman ((Industrial psychologist)

[9] Of these, the plaintiff called Ms Cramer and Mr Schoeman (Industrial Psychologist) in order to elucidate and explain their opinions to the Court. An actuary, Mr Immerman, from Gerard Jacobson Consulting Actuaries, was later called.

[10] The injuries sustained by the Plaintiff were described by each of the experts in their reports.

[11] According to Dr Jaap Earle, the plaintiff sustained a severe head injury with stellate laceration on the scalp and a small sub-arachnoid haemorrhage. He sustained a skull fracture. As a result of his injuries the plaintiff had to re-learn how to walk and write. He suffered a severe diffuse axonal brain injury with focal components.

[12] According to Ms Jacobs, the plaintiff was in good health prior to the collision and played soccer and cycled. She identified the following problems post accident: difficulties with running and sport activities, fine motor skills problems, concentration difficulties, mild difficulty using technology, slight limp and difficulty with left hand movements. He has become socially reclusive.

[13] Dr Heymans identified the following problems: headaches, loss of memory, concentration difficulties, mood swings, weakness in his left leg. Specifically identified were anterior osteophyte formation with disc space narrowing at level C6/7, and a small chance of a discectomy anterior cervical fusion in the mid-cervical region. The plaintiff's orthopaedic symptoms should clear up should he would be able to continue with his career as an underwriter.

[14] According to the neurologist Dr Smuts, the plaintiff sustained soft tissue injuries as well as a head and brain injury. The plaintiff had left-side paralysis which affected his motor skills. He now walks with a limp, and slower. He cannot run or climb down stairs. His left arm is weaker than his right arm, making his writing slower. He suffers from memory loss (which is significant), concentration, personality changes, has become an introvert, and hates driving. On the positive side, his higher mental

functions are good, and he has improved significantly from his concussive head injury but remains with problems indicative of at least a moderate brain injury.

[15] Ms Cramer's report deals comprehensively with his state of mind. She also testified in court. Among other problems identified by her, the plaintiff is more irritated by noise, he is emotionally more sensitive and tearful, and he has a fear of failure and rejection. He has difficulty getting close to people, is impatient and is sensitive to criticism. He's single. Since the accident his girlfriend left him and he has had only two brief relationships. His concentration and memory have been negatively affected. He is distressed when confronted with his losses from the accident. He has lost interest in technology which he used to enjoy. He is moderately depressed. In terms of future work the following: he is likely to experience difficulty in any work setting, which would undermine any potential to do well in a management position. He is unlikely to function at his pre-accident potential. He would cope with a monotonous, structured work environment but not a stressful one which requires initiative and problem-solving. He is a very vulnerable employee, neuro-psychologically speaking. Prior to the accident he was in the high average to average range according to neuro-psychological testing, but he now has problems with narrative recall, keeping attention and so on. He can manage his own affairs but some protection of his funds would be prudent. She recommends 40 sessions of individual psychotherapy as future treatment.

[16] Mr Schoeman, the industrial psychologist, confirmed many of the diagnoses and observations of some other experts in respect of headaches, memory problems, frustration and so on. He sketched the plaintiff's educational and work history: completion of grade 12 in 2000; he then enrolled but failed to complete IT course and network administration courses for financial reasons.

[17] Mr Schoeman also testified about the plaintiff's career prospects and earning potential. His work history is described. Pre accident he was in sales for 4 years, followed by 2 or so years' unemployment. He has since returned to various sales positions and since January 2012 he has been employed, first as a sales consultant, and now as a service consultant. In 2013/4 he completed the RE5 (regulatory exam for representatives), and is presently studying towards RE 1 and a management training programme.

[18] The plaintiff's current remuneration amounts to R 204 000. Inclusive of employer's provident fund contribution, his package is R 216 400.

[19] Pre-accident the plaintiff would have reached the position of sales manager in line with Paterson level C5 at the age of 40, reaching career ceiling earnings equivalent to the upper quartile earnings on Paterson level C5.

[20] Mr Schoeman's report states the following on the plaintiff's post-accident prospects:

In the event that he continues to work in the same capacity (or similar), his income would probably progress steadily (straight line recommended) to career ceiling earnings equivalent to the upper quartile earnings on Paterson B4 (annual guaranteed package), to be reached at approximately age 45, where after further increases would probably be based on inflationary pressure. With successful completion of the RE1 (Key individual Regulatory Exam) and the 1-year management training Programme, he may be able to progress steadily to a hierarchical career ceiling equivalent to approximately Paterson C1, to be reached at approximately age 40-45. His income would progress steadily (straight line recommended) to career ceiling earnings equivalent to the median earnings on Paterson C1 (annual guaranteed package), to be reached at approximately age 50. Thereafter his income would probably increase, based on inflationary pressure.

Mr Schoeman's income prognosis took into account the reports of other experts.

[21] Mr Immerman, the actuary, also testified. He used the projections of Mr Schoeman in his calculations. He took into account retirement age, future inflation, pension benefits, taxation, mortality as well as interest.

[22] He concluded with the following 2 loss of income scenarios: without passing the IRE, the past loss would be R 275 903, while net future loss would be R 4 806 156, for a total of R 5 082 059. The second scenario, with the plaintiff passing the IRE, the past loss would be the same but the future loss would be R 4 716 882, for a total of R 4 992 785. This is based on a pre-accident contingency of 15% and a post-accident contingency of 50%.

[23] Contingencies are a notoriously vexed question. The court has a discretion in determining the applicable contingency deduction. The amount or percentage may vary based on the circumstances of the case.

[24] I was referred to a range of cases in this division on the determination of contingency deductions across the spectrum of injury severity. In the case of **Abel vs RAF** 2015 JDR 1879 (GJ) an adult male security officer with a moderate to severe brain injury and permanent right ear impairment, the court fixed the pre-accident contingency at 15% and the post-accident contingency at 50%. This is quite similar to the present case.

In **Rabie v Gauteng Department of Education** (Gauteng North High Court, case no 3202, unreported), the court applied a 20% pre-accident contingency and a 40% post-accident future contingency. The case concerned a learner who sustained a severe diffuse brain injury with focal components. The sequelae are similar to the plaintiff's.

[25] I agree with the proposal of a pre-accident contingency of 15%, and a post-accident contingency of 50% for future loss. A 5% contingency deduction for past loss applies.

[26] I find that basis 2 is the more probable path, working on the assumption that the plaintiff will pass the Key Individual Regulatory Exam. This means an amount of R 4 992 785.

[27] Mr Immerman estimates future medical expenses to be R 536 627 (see annexure 1 to his report). He estimates the capitalised future periods off work to amount to R 26 431.

[28] In respect of past medical expenses, in the particulars of claim the plaintiff claimed past hospital, medical and travelling costs in the amount of R 11 155.37. In the plaintiff's heads of argument, this amount is limited to R 7 286.70, which is the amount confirmed by the plaintiff under oath for past medical expenses.

General damages

[29] The final question for determination is what an apposite award would be in respect of general damages. Counsel for the Plaintiff referred me to various reported decisions of the High Court in respect of comparable injuries. It is within the discretion of the court to determine the amount to be awarded for general damages.

[30] I have considered the following cases drawn to my attention by plaintiff's counsel:

- a. **Makheta**: R 1 000 000 in 2015 -- a male, 33 years old, suffered severe head injuries resulting in permanent brain damage.
- b. **Zarrabi**: R 1 419 000 (current value) in 2006 – female, 30 years old, suffered severe orthopaedic injuries and severe brain injury.
- c. **Seme**: R 1 485 000 (current value) in 2008 – male, 36 years old, several orthopaedic injuries and a severe brain injury.
- d. **Torres**: R 994 000 (current value) in xxx – male, 24 years old, severe brain injury "with neuro-cognitive and psychological sequelae and soft tissue injury to neck and chin"

[31] I find that a proper award, taking into account all factors and the comparable cases above, specifically Torres, is the sum of R 950 000.00.

[32] Consequently, the plaintiff is awarded the following damages:

Past medical expenses: R 7286.70

Future periods off work: R26 431

Loss of earnings (on basis 2): R 4 992 785

Future medical expenses (present value): R 536 627

General damages: R 950 000

Credit for interim payment: R 400 000

R 6513129.70 – R 400 000 = R 6 113 129.70.

Costs

[33] Plaintiff wants a special costs order against the defendant. The defendant appeared at the hearing of 14 May 2014 and requested a postponement to file an application for rescission of the striking out order. But this application was never made.

[34] Plaintiff claims that the defendant delayed the finalisation of the quantum claim and unnecessarily burdened the court roll, and that the court was misled into believing that the defendant had the real intention to participate in the case.

[35] I agree with the plaintiff's submission on costs.

ORDER

[35] The defendant is liable to the plaintiff in the amount of R 6 113 129.70. This amount is to be paid directly in to the trust account of the plaintiff's attorney.

Should the defendant fail to make payment within two weeks of this order, the defendant will be liable for interest on the amount due to the plaintiff at the rate of 15.5% until final payment.

The defendant is ordered to pay the plaintiff's taxed or agreed party and party cost of suit to date hereof, as well as the costs incurred on 10 November 2015 when the matter stood down, on the High Court scale which costs will include the costs of Counsel, the costs of the reports and consultations, as well as the preparation and reservation fees, if any, of the expert witnesses, as well as the travelling and subsistence costs of the Plaintiff and the expert witnesses who attended the hearing to testify as witnesses.

A handwritten signature in black ink, appearing to read 'AJ Olivier', written in a cursive style.

OLIVIER, AJ
ACTING JUDGE OF THE HIGH COURT

08/03/16