

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 94282/16

In the matter between:

H[...] M[...] obo M[...] M[...] PLAINTIFF

V

THE ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

NEUKIRCHER J

1. The plaintiff is the mother and guardian of her 9 year old son who was injured when the vehicle which he, his mother, his two uncles and his father¹ were involved in a very serious accident with another vehicle. His father and two uncles were fatally injured and he and his mother survived but both suffered serious injuries.

2. The accident occurred on 11 July 2015 at +-17h30 on Keerom Reblic Road. At the time the minor child (P[...]) was almost 4years old². He was ejected from the vehicle and landed on his face. He also broke his thigh.

¹ Who was the driver of the vehicle.

² He was born on 4 August 2011

3. P[...] was taken to the Philadelphia Hospital³ and then transferred to the Midmed Hospital where he lapsed into unconsciousness and his head was operated and he was in ICU for a week. His thigh was operated on at the Louis Pasteur Hospital where he spent 2 weeks.

4. The merits were conceded by the defendant in favour of P[...] at the pre-trial meeting held on 31 July 2019.

5. The only outstanding issue is that of quantum and, in particular, the issue of general damages. The issue of loss of earnings is to be postponed *sine die*: defendant is wholly unprepared on this issue as it failed to timeously appoint any experts. Although this form of "piece-meal litigation is to be frowned upon, I am acutely aware that the defendant is litigating with public funds. It may well be (as it so often occurs), that once it has consulted an expert on this issue, the parties are able to settle without recourse to further litigation. There is also no reason not to adjudicate this question as both parties are prepared on the issues and it will greatly prejudice the plaintiff were this to be postponed, it is for that reason that the separation is deemed to be convenient and in the interest of justice I will allow the separation.

6. The defendant has admitted the plaintiffs expert reports and thus the quantum was argued on the basis of admitted facts.

7. Professor Lukhele is an orthopaedic surgeon. He recorded that P[...] had sustained a) a fracture of the right femur, b) a head injury and c) facial lacerations.

8. At Philadelphia Hospital his wounds were cleaned and sutured; at a hospital in Middelburg he was put in traction and at the Louis Pasteur Hospital an open reduction and internal fixation was performed⁴ and he was put in plaster of paris for 6 weeks. He used crutches for 6 months after his discharge. The fracture

³ Where his GCS Is recorded as 9/15 -it improved to 11/15 later that day.

⁴ A tense wire fixation of the right femur fracture was done which means that those wires will have to be removed at some stage and his pain treated conservatively.

was clinically united.

9. Phenyó sustained a degloving injury to the forehead which has left him with a disfiguring scar. X-rays of the skull did not show any skull fracture.

10. Dr Selahle is a plastic reconstructive surgeon. He noted that P[...] had the following scars:

- a) Scar 1: a 17cm scar which involves the forehead and left temporal scalp;
- b) Scar 2: a 6 x 5 cm circular scar on the left side of the forehead;
- c) Scar 3: a 2cm scar on the left upper eyelid;
- d) Scar 4: a 3cm scar on the left cheek;
- e) Scar 5: a 5cm scar on the right side of the forehead;
- f) Scar 6: a 6 x 2.5 cm scar on the occipital scalp and
- g) Scar 7: 2 scars measuring 1.5cm each on either side of the knee.

11. Although the scars have no features of hypertrophy he states that they are cosmetically unsightly and disfiguring.

12. Scars 1 - 6 (supra) can be improved by way of scar revision surgery. He has evaluated P[...]’s WPI at 15% due to the scarring.

13. According to Dr Selahle, P[...] is uncomfortable and embarrassed by the scars. He has suffered from considerable physical pain, given his injuries, and he experiences ongoing emotional pain due to the scarring.

14. Professor Mokgokong is a neurosurgeon who noted that on the day he evaluated him¹ P[...]’s complaints were (as reported by his mother) restlessness¹ headaches, hyperactivity (ADHD), memory problems and that his right knee "locks". He has not had epileptic fits but it was noted that the chance of late epilepsy developing as a result of the severe traumatic brain injury is approximately 15%.

15. He noted that P[...]’s speech was fluent; he appeared to be mentally

slow but no full IQ examination was done as it was beyond the scope of the report. He noted that P[...] was very restless and hyperactive during the evaluation.

16. He is of the opinion that Phenyio's post-accident educability appears to have been compromised.

17. Mrs Maluleke is a clinical psychologist. She stated that the results revealed impairments in cognitive flexibility and psychomotor speed.

18. P[...]s CT brain scan revealed evidence of a fracture of the right temporal bone/ squames part extending into the right parietal bone with subtle haemorrhages underlying cerebral cortical and white oedema.

19. She agrees with Professor Mokgokong that P[..]'s brain injury is severe.

20. She states that:

20.1 from a neuropsychological point of view P[...]s condition caused a serious neurocognitive disorder manifesting in deterioration in cognition and higher mental processes as well as emotional and behavioural impairment;

20.2 he is hyperactive and displayed behaviour demonstrating poor self-regulation, low motivation and low frustration tolerance;

20.3 he tests revealed impairments in cognitive flexibility and psychomotor speed;

20.4 his auditory working memory has not developed relative to a good passive attention span. She opined that this is a strong indicator of impaired auditory working memory due to brain damage;

20.5 P[...] achieved low scores in virtually all subjects, which reveals mild deterioration in the functions tested. These results, together with impairments of

numerical ability evident in a low memory scale aptitude, demonstrate severe brain damage which affects cognition and higher mental processes;

20.6 he appears not to have overcome the death of his father and projective tests expressed depression.

21. Her opinion, from a purely neuropsychological point of view, is that P[...]’s condition caused a serious neurocognitive disorder manifesting in deterioration in cognition and higher mental processes as well as emotional and behavioural impairments. His condition has reached its maximum improvement level but the sequelae reveal a possibility of deterioration as he gets older and with increasing life demands.

22. She opined further that:

22.1 his condition has negative implications as regards his academic advancement and occupation as it is unlikely he will be capable of functioning independently. He would thus require placement in a suitable learning environment⁵;

22.2 given his tendency towards violence, he is at high risk of being abused and rejected by others;

22.3 he is vulnerable to be at loggerheads with law and order; and

22.4 his scarring is likely to have serious psychological repercussions and aggravate the mental problems caused by the brain damage.

23. Zethu Gumede, the educational psychologist, states that:

23.1 P[...]’s Mental Procession Composite scale score was in the below average range which suggests that he possesses an impaired level of general intellectual functioning;

⁵ This would be determined by an educational psychologist.

23.2 his overall score on the achievement scale was in the below moderate mental retardation scale, i.e. he experiences severe difficulty with reading, counting and verbal reasoning;

23.3 he performed very poorly on the Achievement subtests (verbal scale) particularly those involving reading which indicates that his verbal comprehension and verbal concept formation, short-term auditory memory, pronunciation, reading and spelling are deficient.

24. She states that, as a result, P[...] would not cope with normal education and is not suitable for mainstream education.

General damages

25. All the above experts are *ad idem* as regards P[...]’s injuries and their sequelae- he has suffered a severe brain injury which has led to severe neurocognitive deficits and a loss of amenities of life due to his headaches, hyperactivity, episodes of violence and depression.

26. His scarring has also led to severe trauma although plastic surgery will, in all likelihood, alleviate most of the scars it will not eliminate all. This operation will also result in (temporary) hospitalisation and pain.

27. The loss of P[...]’s father and uncles as a result of the accident and negligence of the insured driver is also a factor in this award. The resultant trauma and depression are a direct result of this event.

28. In assessing an award for general damages the Supreme Court of Appeal (SCA) has expressed the view that there is a tendency towards granting increased awards but that conservatism is one of the many factors to be taken into account by the court. The principle is that the award should be fair to both sides- compensation must be given to the plaintiff, but a court should *"not pour out largess*

from the horn of the plenty at the defendant's expense"⁶ .

29. In *Sigourney v Gilbanks*⁷, Schrenier JA stated that there is no hard & fast rule when determining the issue of quantum "... *but some guidance is to be derived from the notion that fairness to both parties is likely to be served by a large measure of continuity in the size of awards, where the circumstances are broadly similar... [t]here emerges 'a general idea of the sort of figure which, by experience, is regarded as reasonable in the circumstances of a particular case*'

Relevant and comparable cases

30. Counsel for plaintiff submitted that an award of R2 million would be reasonable. His submission is based on the following cases:

30.1 *Torres v Road Accident Fund*⁸ the plaintiff was 20 years old at the time of his injury⁹ He suffered a severe diffuse brain injury, soft tissue injury to the neck and soft tissue injuries to his face and chin. There were significant neuro-cognitive and neuro-behavioural deficits associated with concentration, working memory, impulse control and abstract reasoning. He suffered from depression and adjustment disorder. His probable successful career in jewellery design was no longer possible and he was limited to sympathetic employment. He was awarded R600 000 - in 2019 this translates to R1.2 million;

30.2 *Herbst v Road Accident Fund*¹⁰ the plaintiff was a 34 year old anaesthetist he was a cyclist at date of accident. He suffered a severe brain damage and was permanently unemployable. He was awarded R600 000 which is R1.2 million in 2019;

⁶ *De Jongh v Du Pisane* 2005 (3) SA 434 (SCA); *Road Accident Fund v Delport* NO 2006 (3) SA 172 (SCA) which also stated that although a court is not bound by previous comparable awards, an award may not be strikingly disproportionate to prior awards without sufficient justification.

⁷ 1960 (2) SA 552 (A) at 555

⁸ 2007 6 2 QOD A4-1(GSJ)

⁹ And 24 years old at trial

¹⁰ 2007 6 QOD A4-7 (WLD)

30.3 ME v Road Accident Fund¹¹ the plaintiff was 27 years old at the date of the accident. He sustained severe head injuries and lost consciousness for a period. He also sustained as well post-traumatic amnesia, resultant brain damage, neuro-cognitive defects including impaired memory and concentration, poor mental function and persistent debilitating headaches. He also had multiple lacerations and abrasions. He was awarded R1.9 million (2018 value).

30.4 Stephenson N.O v General Accident Fire and Life Assurance Corporation Ltd¹², the plaintiff was 10 years old. He sustained permanent brain damage which reduced his intelligence quotient to about 77 and 78. His potential earning power was estimated to be +- 25 % of what it was expected to be pre-morbid. He was in a coma and suffered severe headaches which caused substantial pain for +- 6 months once he awoke. He was awarded R37 500 which in 2019 is estimated to be R2 005 000.

31. Defendant's counsel referred me to:

31.1 Mchale v Road Accident Fund¹³ the plaintiff was 10 years old with an initial GCS of 7/15 which improved eventually to 15/15. She sustained head, neck and back injuries. She had to undergo a craniotomy to drain a right temporo-parietal extradural hematoma. She suffered behavioural and neuro-cognitive changes, psychiatric changes and headaches as well as back and neck pain. She was awarded R650 000 which in 2019 is R837 132.78;

31.2 Van Zyl v Road Accident Fund¹⁴ the plaintiff was a 19 year old part time law student who sustained a severe head injury with multiple craniofacial impacts and a severe traumatic brain injury. He also sustained serious orthopedic injuries with bilateral severe tibia/ fibula fractures and multiple abrasions and bruises. He was in a vegetative state for weeks after the collision and had to undergo treatment

¹¹ (12601/2017) [2018] ZAGPHC 438

¹² 1974 (4) SA 503 (RAD)

¹³ (33835/2012 [2014] ZAGPPHC 437 (27 June 2014)

¹⁴ 2012 (6A4) QOD 138 (WCC)

and rehabilitation for 7 months after this. He was awarded R850 000 which, in 2019, equates to R 1 252 882;

31.3 Kobo K v Road Accident Fund¹⁵ the minor child was 11 years old and suffered a traumatic brain injury. He had a GSC of 6/15 when hospitalized and was intubated. He was admitted to ICU and still had amnesia. The CT scan revealed a frontal skull fracture, base of skull fracture and left blow out fracture;

31.3.1 he had a right hemiparesis and had to receive occupational and speech therapy. He lost the sight of his left eye. His risk of developing epilepsy was assessed at 5 - 10%;

31.3.2 he suffered a cervical spine injury associated with the head injury and a lumbar spine scoliosis; and

31.3.3 he also suffered intermittent headaches.

31.4 He was awarded R1.25 million which, in 2019, is R1 304 761.90.

31.5 Mngomezulu v Road Accident Fund¹⁶ the plaintiff sustained compound right tibia fibula fractures, a closed chest injury with lung contusion, a 30cm laceration of the right thigh and a moderate head injury. He was diagnosed with post-traumatic organic brain syndrome which led to neuro-cognitive difficulties and neuro-behavioural problems. He was awarded R650 000 which, in 2019, is R 1 062 000.

The Award

32. As is quite clear from the above cases, no two are the same. Some of the plaintiffs suffered injuries and sequelae more serious than P[...] and some less so.

33. When exercising my discretion regarding the award I have taken into

¹⁵ (05274/2015) (2018) ZAGPJHC 43 (9 March 2018)

¹⁶ (04643/2010) [2011] ZAGPJHC 107 (8 September 2011)

account his age at the date of the accident, the fact that he lost his father and two uncles (ie the trauma of the accident), his injuries and their sequelae.

34. Defendant's counsel submitted that an award of R1 million R1.1 million would be fair and reasonable as opposed to the award of R2 million proposed by plaintiff's counsel.

35. I am of the view that an award of R1.45 million would adequately compensate P[...] for his pain and suffering and his loss of amenities.

Costs

36. Mr Mashaba (for P[...]) submitted that given the significance of this case and the extent of damages sought the importance of the matter to plaintiff¹⁷ the costs of two counsel should be awarded¹⁸.

37. Mr Rabani (for defendant) submitted that there is nothing about this matter that warrants costs of two counsel, particularly as all the experts were in agreement regarding P[...]s injuries and sequale.

38. I agree with Mr Rabani this matter is, in my view, no different from the typical run-of-the mill RAF matter that I see so often. This view is enforced by the fact that no evidence had to be led by plaintiff as the experts were in agreement and argument was presented on the agreed facts. The only (slightly) "extraordinary" issue was the amount of general damages sought. However, on Mr Mashaba's argument and cases presented, even that was not beyond the norm.

39. Thus, I am of the view that the costs of two counsel is not warranted.

The Trust

¹⁷ Specifically, that P[...] was 3 years old, lost his father and uncles in this collision, and that his mother had to forego her employment to care for him full-time because of his Injuries

¹⁸ Also Erasmus; Superior Court Practice at B1418A

40. Mr Mashaba has pointed out that Mrs Maluleke (the clinical psychologist) has recommended that P[...]s funds should be protected. As I understood him, this was a contentious issue and thus such an order will be made.

Draft order

41. Counsel have handed up a draft order the terms of which, other than the award, have been agreed to. I have perused it and it is in order.

Order

42. Thus the order I make is as follows:

42.1 the draft order, as amended, is made an order of court.

NEUKIRCHER J

JUDGE OF THE HIGH COURT

Counsel for plaintiff: Mr Mashaba (with him Mr Risenga)

Instructed by J M Modiba Attorneys

Counsel for the Refendant: Mr Rabau

Instructed by Lekhu Wilson Attorneys

Date of hearing: 7 August 2019

Date of judgment: 26 August 2019