

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

CASE NO: 16384/2013

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED. YES

DATE: 14 July 2023

In the matter between:

M[...] I[...]

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Coram: Sardiwalla J

Motor vehicle Accident - Damages – motor vehicle accident – bodily injury – loss of earning capacity pre-accident academic potential – disability resulting in a reduction of 20% of earning capacity as a general labourer.

JUDGMENT

SARDIWALLA J:

Introduction:

[1] The plaintiff was a passenger injured as a result of a motor vehicle collision on 31 May 2008 along Mogogelo and M21 Road, Stinkwater, Gauteng when two vehicles collided both of which the drivers are known. At the time of the collision the plaintiff was allegedly a Grade 12 pupil at Rakgotso Secondary/High School.

[2] Liability and General damages have already been resolved as per the Offer and Acceptance in favour of the plaintiff by the defendant and the only issue for determination is the quantum of plaintiff's loss of earnings and/or capacity and in particular the plaintiff's pre-accidental educational and career progression. The parties have agreed that the plaintiff has for practical purposes been left functionally unemployable and if he were to find employment, such will be sympathetic in nature.

[3] The claim for General damages was settled and the defendant will issue a certificate to the plaintiff in terms of s17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of future medical, hospital and related expenses.

[4] It is past and future loss of income (if any) that is in issue and the contingency deduction to be applied,

[5] The plaintiff contends that he has suffered a loss of earnings or earning capacity and that a contingency deduction of 5% for past loss and 20% in respect future loss should be applied.

[6] The defendant's contention is that the opinion of the Educational Psychologist is without basis for the conclusion she arrived at and the defendant submits that the initial calculation that was done before the appointment of the Educational Psychologist was at the very least the closest to what the plaintiff will go on in life given his failure rate and the unavailability of the history of his performance at school. However, should the Court find that plaintiff has indeed suffered a loss of earning capacity then a contingency of 25% for past loss and 50% in respect of future loss of income should be applied.

[7] The legal position relating to a claim for diminished earning capacity is trite. The mere fact of physical disability does not necessarily reduce the estate or patrimony of the person injured. Alternatively, it does not follow from proof of a physical injury which impaired the ability to earn an income that there was in fact a diminution in earning capacity.¹

[8] In *Dippenaar v Shield Insurance Co Ltd*² the principle was articulated in the following terms:

“In our law, under the *lex Aquilia*, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person’s estate and the loss or impairment of that capacity constitutes a loss if such loss diminishes the estate. This was the approach in *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665 where the following appears:

“In later Roman law property came to mean the *universitas* of the plaintiff’s rights and duties, and the object of the action was to recover the difference between the *universitas* as it was after the act of damage and as it would have been if the act had not been committed (Greuber at 269). Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland.”

[9] A person’s all-round capacity to earn money consists *inter alia*, of an individual’s talents, skill, including his/her present position and plans for the future and of course external factors over which a person has no control. In *casu*, the court must calculate the total present monetary value of all that the plaintiff would have

¹ *Union & National Insurance Co Ltd v Coetzee* 1970(1) SA 295 (A) at 300A; *Santam Versekering Maatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A); *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A); *Krugell v Shield Ins. Co Ltd* 1982 (4) SA 95 (T) at 99E; *Rudman v RAF* 2003 (2) SA 234 (SCA); *Prinsloo v RAF* 2009(5) SA 406 (SE).

² 1979 (2) SA 904 (A)

been capable of bringing into his patrimony had he not been injured, and the total present monetary value of all that the plaintiff would be able to bring into his patrimony after sustaining the injury. The difference between the two (if any) will be the extent of the patrimonial loss.

[10] At the same time the evidence may establish that an injury may in fact have no effect on earning capacity, in which event the damage under this head would be nil. In order to determine therefore whether, as a result of the injury sustained, the plaintiff's earning capacity has been compromised the evidence adduced needs to be considered and evaluated in order to decide whether the onus has been discharged.

[11] The plaintiff relies on the evidence of the two expert witnesses. A court's approach to expert testimony was succinctly formulated in *Michael and Another v Linkfield Park Clinic (Pty) Ltd and Another*³ where the court stated-

"[36] . . . what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of *Bolitho v City and Hackney Health Authority* [1997] UKHL 46; [1998] AC 232 (HL (E)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.

[37] The Court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The Court must be satisfied that such opinion has a logical basis, in other words, that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion' (at 241G-242B). . . .

³ 2001 (3) SA 1188 (SCA)

[40] Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingly v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the warning given at 89D-E that

'(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence.' (Emphasis added)

[12] *In Radebe v Road Accident Fund*⁴ the Court held:

'[24] The common theme is that courts must jealously protect their role and powers. Courts are the ultimate arbiters in any court proceedings. The facts that caused the expert opinions in this case are vital. It was supplied by the plaintiff.

[25] It is not for the opposing party to prove the true facts of the plaintiff's case; it is the onus of the plaintiff.

[26] Only if the expert's opinion based on the correct facts is questioned could it be expected that a countering expert should be called. It is the expertise that will then be at issue and not the accuracy of the facts on

⁴ (2457/2017) 2020 ZAFSHC (unreported)

which it is based. Counsel must identify and separate the two aspects. The argument of the actuary in this case that the failure to call an expert in the defendant's case is tantamount to a default judgment is wrong. It is not the expert's veracity that is in dispute; it is the facts on which he based his calculations. Experts must assist the court not a party to the dispute.'

[13] It is trite that it is for the court to determine the percentage of contingencies is to be applied. Contingencies is a method used to arrive at fair and reasonable compensation. The question of contingencies was dealt with in *Southern Insurance Association Ltd v Bailey N.O.*⁵:

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. Where the method of actuarial computation is adopted, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right' (*per* HOLMES JA in *Legal Assurance Co Ltd v Botes* [1963 \(1\) SA 608 \(A\)](#) at 614F). One of the elements in exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* [1980 \(3\) SA 105 \(A\)](#) at 114 - 5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.

⁵ [1984 \(1\) SA 98 \(A\)](#) at 113G and 116G-117A

It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, WINDEYER J said in the Australian case of *Bresatz v Przibil*/a [\[1962\] HCA 54](#); [\(1962\) 36 ALJR 212](#) (HCA) at 213:

'It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad.'

[14] Neurosuregon Dr J Ntimbane lists the injuries sustained by the plaintiff as:

14.1 head injury – Laceration left eyebrow;

14.2 broken teeth

[15] Neurologist Prof M Kakaza Lists the injuries sustained by the plaintiff as”

13.1 Two teeth missing un the upper jaw and 1 was lose;

13.2 Laceration on the Chin; and

13.3 Multiple abrasions on the face.

[16] Maxillofacial and Oral Surgeon Dr Molomo lists the injuries sustained by the plaintiff as:

16.1 Forehead lacerations;

16.2 Laceration upper lip; and

16.3 Fracture/avulsion right central incisors.

[17] The plaintiff, who was Grade 12 pupil prior to the accident. Post-accident he has not returned to school.

[18] Medico-legal reports have been procured by both parties. The parties agreed that the reports are what they purport to be, without admitting the truth and content thereof, unless a party objects to a particular document in writing.

[19] By agreement between the parties the joint minutes by the occupational therapists experts were handed in and their contents constitute evidence in this matter. Joint minutes were provided by the Occupational Therapists only, Ms Given Moila and Ms Nonzaliseko Arm. The following documents were considered at the time of the report compilation.

19.1 Jubilee Hospital Clinical Records;

19.2 RAF 4 form from Medical Practitioner;

19.3 Neurosurgeon report from Dr JA Ntimbani dated 12/10/2020;

19.4 Clinical Psychologist report from Ms G Bokaba dated 15/10/2020;

19.5 Maxillofacial and Oral surgeon report from DR EM Momolo dated 04/12/2020;

19.6 Educational Psychologist report from Ms M Mantsena dated 30/03/2021.

[20] At the commencement of the trial both parties handed up written heads of argument. The Plaintiff called four witnesses, two classmates (factual witnesses) and two expert witnesses. The defendant called the Acting Principal of Rakgotso High School Ms. Mate but the defendant did not lead any expert witnesses. Plaintiff's counsel submitted in the heads of argument that the only issue in dispute was the contingency to be applied in respect of loss of earnings or earning capacity and in particular to, the plaintiff's pre-accidental educational and career progression and whether he was in Grade 12, and if so, then he was destined to obtain a diploma. The Plaintiff submits that given the lack of academic history available the best evidence rule should be applied.

[21] However, defendant's counsel submitted that plaintiff had to prove whether in fact the plaintiff was at school at the time of the accident. If he was at school, his capacity to pass Grade 12 or how long it would take him to pass Grade 12. If he were to pass Grade 12 the likelihood of him joining the labour market. Lastly if he were to progress to a TVET College how long it would take him to complete the diploma. The defendant submitted that the scenario postulated by the Educational Psychologist was not the only scenario possible. The defendant submits that the two experts that led evidence for the plaintiff were not reliable witnesses in so far as they could not provide clarification to the Court on factual issues, in which instance the defendant submits that the plaintiff or his aunt should have testified to provide clarity. Therefore the evidence of the expert is not the best evidence as suggested by the plaintiff as the facts relied on by the experts and on which their opinion is based has not been proven to be correct.

[22] The defendant submits that given the fact that the plaintiff was twenty years old at the time of the accident and that there is no clear confirmation of schooling or academic record other than clear record of multiple repetition of classes it is uncertain if the plaintiff would reach a TVET College and how he would perform there. The defendant's submitted that plaintiff's injuries have not comprised his employment prospects as he has worked and earned an income. The question then is whether or not plaintiff has proved that he is entitled to an award for loss of future income.

[23] In their joint minute the Occupational Therapists note that the plaintiff suffered mild traumatic brain injury which has resulted in epilepsy. They agreed to defer to the final comment of the Specialist Neurosurgeons regarding the injuries sustained and the future management. With regards to the plaintiff capacity to work they noted that he presented with cognitive challenges which will cause significant barriers in the workplace as well as diminished functional independence in terms of occupational performance. They noted that he was unemployable during the evaluations, however that he has post-accident obtained a job as a welder but had resigned after six months. He stated that the welding flames triggered the seizures. They stated that although he had the physical capacity to work his epilepsy diagnosis would place him at risk for re-injury and it is therefore unlikely that the plaintiff could be accommodate at any future employment. The concluded that that his employability was curtailed by the accident and he was more suitable to sheltered employment and that he would find it difficult to find suitable alternative employment considering the chronic nature of his post-accident *sequelae*.

[24] A distinction has to be drawn between the facts upon which an expert's opinion are based, on the one hand, and the expert's opinion as such, on the other hand. It appears that the defendant is attacking the veracity of both these aspects of the evidence placed before court by the plaintiff.

[25] This Court is of the view that if the defendant however, if it wanted to dispute the alleged facts should have called its own experts to lead evidence specifically the occupational therapist Ms Arm who concluded the joint minute with the plaintiff's expert, to rebut the plaintiff's evidence being placed before court and the plaintiff would then have had the opportunity to challenge the evidence by subjecting the witnesses to cross-examination. However, the defendant has forfeited that opportunity. It is not open for the defendant to now attack the credibility of the witnesses.

[26] Insofar as the defendant is attempting to discredit the expert witnesses with regard to their respective opinions based on the aforesaid facts and their own respective evaluations, the defendant had the opportunity to cross-examine the said experts. It is the Court's view that the plaintiff's experts defended their respective

opinions and without having called countering expert witnesses of its own the opinion of the plaintiff's experts and the conclusion regarding the possible scenario is the only one placed before this Court. This Court cannot delve into the possibilities that other experts may have on this matter without corroboration by evidence of counter experts before this Court and all parties having the opportunity to test those possibilities.

[27] I agree that whilst the facts surrounding the plaintiff's educational background presents with certain difficulties post-accident as mentioned above, given all the facts, the lack of the school being able to corroborate his version that he was in Grade 12 at Rakgotso Secondary/High School does not present 'a bleak picture' as suggested by the defendant. The plaintiff is currently unemployed. Physically he would not be able to work to retirement age. Ms Moila and Ms Arms's views that in the employment context, the plaintiff has been rendered vulnerable in the open labour market and has been compromised in his ability to progress occupationally at his pre-accident potential, therefore cannot be disregarded especially in light of the fact that upon compiling the joint minute the defendant's occupational therapist took into consideration the report by the Educational Psychologist and if she considered the factors which the defendant raises as vital to the outcome of the joint report then she would have at the very least mentioned this in that report. However, she concurs in her report that he is not functionally employable and takes no issue with the lack of academic information that was available to the Educational Psychologist in arriving at her conclusion.

[28] I do however agree that insofar as there may be a delay of his career progress no offset has been accommodated for in that he may possibly have taken a longer period in terms of his premorbid learning vulnerabilities to pass Grade 12 and/or obtain a diploma but I am also cognisant of the fact that the diagnosis of epilepsy post-accident may also be a factor that could have attributed to a delay in the plaintiff's career progress had he returned to school. With regards to the defendant's submission that the plaintiff should have testified to provide further clarity on his academic career, I do not see how this could have assisted in taking the matter further as it is common cause at this stage that there was a lack of available information from the school itself to dispel or confirm the plaintiff's version, therefore

his evidence would not be able to disprove by the defendant in any event and I agree with the plaintiff's submission that this is the best evidence before this Court.

[29] In the defendant's view, a 50% reduction from what he would have earned produces a realistic and considered assessment however, this is not fully supported by any evidence of expert opinions as the defendant failed to call expert witnesses and therefore cannot be safely accepted. Counsel for the Fund submitted that R 3 173 865.20 would be appropriate compensation in this case.

[30] The actuarial report provided is based on the information by the industrial psychologist Dr Herbert Kanengoni that the appropriate deduction in this case would be 15% on uninjured future income. However, Plaintiff's Counsel submitted that the contingency should be 20% which given the delay that may have been caused by premorbid vulnerabilities I think is a fair estimate as it is higher than the actuarial report's schedule of calculations. Therefore, there should be a further 5% deduction from the amount on the calculation of the actuary's calculation.

[31] On the evidence before me the disabilities from which the plaintiff suffers or will suffer in the future, will, in my view, have impaired his capacity to work and I am satisfied on a balance of probabilities the plaintiff has proved that his patrimony has been diminished due to loss of earning capacity in the future resulting from his injuries and consequently has proved an entitlement to be compensated under this head of damage.

[32] **I make the following order:**

- 1. The defendant is ordered to pay the amount of R 8 285 820.20 for loss of earnings within 14 days of this judgment with interest from the date of judgment to the date of payment.**
- 2. The defendant shall pay the plaintiff's costs either as agreed or taxed including the costs of those expert witnesses whose reports the plaintiff had delivered in terms of Rule 36(9)(b) and including the costs of the preparation of joint minutes.**

SARDIWALLA J
JUDGE OF THE HIGH COURT

APPEARANCES

Date of trial : 10 October 2022

Date of judgment : 14 July 2023

Plaintiffs' Counsel : Adv.: P M LEOPENG

Plaintiffs' Attorneys : Ramokgaba Gonese Attorneys Inc.

Defendants' Counsel : MR T MUKASI

Defendants Attorneys : State Attorneys