Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No: 2630/2001

In the matter of

MOGAMAT ISMAIL ALLIE Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT DELIVERED : 4 DECEMBER 2002

MOOSA, J:

Introduction:

[1] The mother and her unborn child plunged through the windscreen upon impact. A moment before the impact she became aware of the impending crash. She shouted in anguish to her husband who was the driver of the vehicle in which she was a passenger, but to no avail. A policeman, allegedly under the influence of alcohol, and driving a van, had rammed into their car. Earlier the police had received a complaint that a police van was being driven recklessly. The police gave chase, but the driver refused to stop and collided with the family car.

[2] The mother ruptured her placenta. The husband and their two children, aged 3 and 8 years, were dazed and shocked. They watched in horror as the mother bled to death. The husband pleaded that the policeman on the scene radio for an ambulance to be dispatched as a matter of urgency. The policeman refused to call the ambulance before his superiors arrived on the scene. The ambulance arrived 40 minutes later. It was too late to save the life of the mother and her unborn child. The mother died on the way to hospital.

[3] The father (plaintiff) suffered from moderately severe physical injuries and emotional shock and trauma. The son (“Igshaan”) and daughter (“Qudsiyyah”) suffered minor physical injuries and emotional shock and trauma. Plaintiff instituted claims against the defendant in his personal capacity and in his

capacity as father and guardian of Igshaan and Qudsiyyah. The merits of the accident are not in issue, but the quantum is. Defendant has conceded that the driver of the insured vehicle was negligent and that it is liable for the damages which plaintiff sustained in his personal and representative capacities as a result of the accident.

[4] Defendant has given an undertaking in terms of Section 17(4) of the Road Accident Fund Act, No 56 of 1996 ("the Act") to cover all future medical expenses of plaintiff and his two siblings. Defendant has acknowledged liability for past hospital and medical expenses in respect of plaintiff and his late wife amounting to R10 794,17. Defendant did not seriously challenge the evidence of plaintiff that he expended an amount of approximately R1 100,00 in respect of funeral expenses of his late wife. Plaintiff claimed R1 150,00 but no documentary proof was submitted. In the absence of defendant mounting a challenge for such expenditure, the court will allow an amount of R1 100,00 in respect of the funeral expenses. Plaintiff has not pursued the claim in respect of the costs of a caregiver and the court will not be making an order in respect thereof.

[5] The critical issues that this court is called upon to quantify are plaintiff's past loss of earnings, his future loss of earning capacity and his general damages. In

respect of the siblings it is their general damages. In support of his claim, plaintiff called certain expert witnesses. They were Dr Jaffe, an orthopaedic surgeon; Ms Andrews, an occupational therapist; Prof Steyn, an industrial psychologist; Mr Altman, a clinical psychologist and Mr Munro, an actuary. Defendant called Dr Marks, an orthopaedic surgeon; Ms Vogt, an occupation therapist; Mr Swarts, an industrial psychologist and Mr Loebenstein, a clinical psychologist.

[6] Generally speaking, there were no major differences or disagreements amongst the experts in their diagnostic assessments, prognosis and treatment of plaintiff and his siblings. Defendant's experts appeared to be more optimistic than those of the plaintiff in their prognosis. The court is of the view that the answer may lie between the pessimism of plaintiff's experts and the optimism of defendant's experts. In order to determine the answer, the court will compare and analyse the evidence of the respective experts.

Physical Injuries of Plaintiff:

[7] The physical injuries sustained by plaintiff were a fracture of the C6 vertebrae, injuries to both knees, injury to the right forearm and a chest injury. Plaintiff was hospitalised for these injuries but discharged himself prematurely to attend his wife's funeral and to see to the needs of the siblings. The C6 vertebrae fracture

has united. The residual effect of the injury is that he suffers from neck pain which is aggravated by physical effort such as driving. Dr Marks is of the view that he does not have a measured neck impairment. He has some pain which can be managed by analgesics and anti-inflammatory medication. Dr Jaffe, on the other hand, opines that the pain suffered by plaintiff indicates that there is still a problem in the neck. The court is of the view that injury of the vertebrae has left a degree of impairment which is manifested in pain and aggravated by physical effort. Although the pain can be managed by medication, it is not likely to be eradicated completely.

[8] Plaintiff complained that the pain in both knees persisted. In the initial consultation with Dr Jaffe, he indicated that the right knee was fine. Dr Marks strongly recommended surgical procedure (arthroscopy) of the left knee. This procedure, according to Dr Marks, should make a big difference. Dr Jaffe was not that optimistic. He was of the opinion that plaintiff's left knee is likely to be damaged on the surface of the cartilage to the back surface of the joint. It is less likely to be improved by the suggested procedure. He was not, however, averse to the arthroscopy procedure to both knees and the necessary surgery following such exploratory procedure. Both experts suggested patellactomy as a possibility. Dr Jaffe was of the opinion that surgery could improve the condition

of both knees, but that plaintiff's left knee would continue to be impaired to a degree and might deteriorate with time.

[9] Adv **Potgieter**, who appeared on behalf of defendant, was critical of the fact that plaintiff had not yet undergone an arthroscopy procedure which, according to him, was a relatively simple procedure. Plaintiff explained that he has not undergone surgery on his knees as there was no guarantee that surgical procedure would necessarily be successful. In addition thereto, plaintiff was not in a position to afford such surgery which is estimated to be in the region of R20 000,00. Plaintiff indicated that he has no principle objection to undergoing such procedure. The court is of the view that the suggested procedure would improve the condition of his knees, but agrees with Dr Jaffe that that his left knee will not be asymptomatic even after surgery and he will continue to have pain of a mild to moderate degree on an ongoing basis. This will require analgesic and anti-inflammatory medication and probably local cortisone injections.

[10] Dr Jaffe found slightly diminished power in the right hand, but with surgery this could improve. Dr Marks found no impairment to the right elbow. The court is of the view that there is no impairment of any significant nature to the right forearm. Both experts found that this injury has healed. Dr Jaffe found that residual pain

in the chest can be treated with analgesic medication. The court finds no impairment of the chest other than residual pain which can effectively be treated with analgesics.

[11] Although the clinical findings of both Dr Jaffe and Dr Marks are substantially the same, they differ with regard to the conclusion. Dr Jaffe concludes that plaintiff remains symptomatic three years after the accident, despite the fact that his injuries have stabilised. The residual pain will impact on his performance at work and his output will be reduced, particularly when he has to do car repairs at home. This will be on a permanent basis. Dr Marks basically concluded that plaintiff has no functional impairment of sufficient magnitude arising from the physical injuries suffered by him which would warrant an inference that he is unfit to resume his pre-injury work.

[12] The court would like to point out that Dr Jaffe had seen and examined plaintiff on four occasions at intervals stretching from about six months after the accident to a few days before the trial. Dr Marks had seen and examined plaintiff only once, and that was a few weeks before the trial. The court is of the view that Dr Jaffe was in a far better position to make his assessment and findings than Dr Marks and I accordingly accept the assessment and conclusion of Dr Jaffe. Both

orthopaedic surgeons agree that plaintiff would have endured considerable pain and suffering immediately following the accident.

Psychological Injuries of Plaintiff:

[13] It is common cause that plaintiff suffered emotional shock and trauma seeing his wife with his unborn child being flung through the windscreen; watching her bleeding to death; the policeman on the scene refusing to call the ambulance until his superior had arrived on the scene and he being helpless to do anything in order to assist. This psychological sequelae were compounded by the multiple losses – the loss of the family unit, the loss of a wife and companion, the loss of an unborn son, and the loss of a mother to his siblings.

[14] Both clinical psychologists, Mr Altman and Mr Loebenstein, were **ad idem** that plaintiff was suffering from serious depressive illness arising from the emotional shock and trauma. Mr Altman termed it either dysthymia or post-traumatic stress disorder. Mr Loebenstein described it as a major depressive disorder which is in partial remission due to pastoral intervention. Both clinical psychologists recommended psychotherapy. Mr Loebenstein's prognosis is that plaintiff's psychological condition would improve considerably with psychotherapy. Mr Altman was not that optimistic. Mr Altman's prognosis is that the trauma and the

subsequent loss sustained by plaintiff has left him psychologically incapacitated. The effect thereof will be enduring and pervasive on his ability to work.

[15] Adv **Potgieter** was critical of the prognosis of both experts in the absence of the results of psychotherapy which was recommended by both experts. Adv **Potgieter** submitted that such treatment would probably have a dramatically positive effect on what work he can do. Adv **Engers** SC, on behalf of plaintiff, countered by saying that on a commonsense appraisal of the situation he will never really recover from the tragedy, but there is a reasonable chance of his condition improving with the intervention of psychotherapy. Adv **Engers** SC submitted further that Mr Loebenstein tended to be too dogmatic and unwilling to make concessions, even where these were obvious. For that reason, he submitted, the court should accept the evidence of Mr Altman as to the nature and extent of plaintiff's psychological illness where there is material conflict between his evidence and that of Mr Loebenstein. Mr Loebenstein conceded that plaintiff would never be euthymic, i e completely cured. Moreover, he agreed that the cause of the psychological injuries could never be erased from plaintiff's memory.

[16] I am of the view that the psychological condition of plaintiff will ameliorate with

psychotherapeutic intervention and medication as recommended by the clinical psychologists. However, I agree with Mr Loebenstein that his psychological condition will never be completely cured. I, however, disagree with his prognosis that plaintiff could return to the work he performed during the pre-morbid stage. I accept the prognosis of Mr Altman that plaintiff's residual psychological impairment would negatively impact on his ability to do the work he had performed during the pre-morbid stage.

[17] It is common cause that plaintiff was first seen by a clinical psychologist, Marianda Eras on 6 and 13 January 2000. At the time he was still working for the Automobile Association ("the AA") as a road repair mechanic. She recommended that he receive psychotherapeutic treatment to deal with his grief, depression and to cope with the physical and emotional demands of his work and siblings. Plaintiff testified that he could not afford such treatment. He had exhausted the medical aid's benefits and the excess was deducted from his salary at the time. He had instead sought pastoral intervention. I accept plaintiff's explanation for not seeking psychotherapeutic treatment earlier.

Loss of Earnings:

[18] At the time of the accident he was employed by the AA as a road repair

mechanic for about eight years. He had a good track record with the AA. He returned to work approximately three months after the accident. He was unable to cope with the physical and emotional demands of his work and the needs of the siblings. He tried to meet the situation by working night shift. This enabled him to be with the siblings during the day. This did not work out and he requested to be called out from home. This request was granted, but he still had to report for duty at the office of the AA. Even these arrangements with the AA proved difficult. He could not cope and resigned in January 2000. Both Dr Jaffe and Dr Marks were of the opinion that plaintiff should have been off from work for six months after the accident.

[19] The court is satisfied that a combination of factors forced plaintiff to resign from the AA. These were the demands of his work and family and the physical and psychological impairment sustained by plaintiff following the accident. Plaintiff was required to deal with members of the public who got stuck with their motor vehicles on the road because of mechanical and/or other problems. In the case of mechanical problems he had to try and diagnose the problem. It could involve examining the vehicle underneath, behind the dashboard or inside the bonnet. This would necessitate him contorting his body. In the case of a puncture or a tyre blow-out, he would be required to replace the wheel with a spare wheel.

This would entail lifting a heavy object. These physical activities could have aggravated his pain and discomfort.

[20] From a psychological point of view, he may be required to deal with members of the public who are agitated by being stuck on the road. Considerable patience and tact would be required by plaintiff to deal with such clients. It is improbable that he would have been able to cope with such situations in the light of his pain and discomfort and the fact that he himself suffered from bouts of depression. Because of plaintiff's physical and psychological impairment, it is highly unlikely that the AA would re-employ him. I am strengthened in this view by the fact that plaintiff tried to rejoin the AA, but although more than a year had elapsed, he was not successful. The inference that the AA is reluctant to re-employ him cannot, in the light of all the circumstances, be excluded. In the premises I am of the view that plaintiff was justified in resigning from the AA in January 2000. Because of his physical and psychological impairment, it is not a realistic option that he could continue to do the work that he had performed at the AA. I am fortified in this conclusion by the fact that the experts recommended light work including light driving. Such recommendation is inconsistent with the nature of the work he had done at the AA.

[21] Ms D Vogt, defendant's occupational therapist, in her initial report dated 26 August 2002, was of the opinion that plaintiff should in future perform work that is of a sedentary nature, rather than operational. This would have disqualified him from the work he had performed at the AA. This was in accord with the view of Ms J Andrews, plaintiff's occupational therapist, that he does not do strenuous physical work on an ongoing basis. Ms Vogt subsequently reviewed her opinion and in her second report which is undated, she opined that he would be in a position to resume his duties at the AA. She submitted statistics from the AA for the period 1 April to 31 August 2002 reflecting the nature of the problems that had to be dealt with by the AA Road Patrol Service. It comprised, amongst others, 1082 battery problems, 1048 flat tyres, 42 burst tyres, 1303 keys locked in car and 6811 starting problems. In the view of the court these problems would require some physical effort to attend to. I am of the opinion that Ms Vogt and the other experts of defendant are far too optimistic of plaintiff effectively resuming his employment with the AA.

[22] Ms Vogt quoted from the American Medical Association publication entitled **GUIDES FOR THE EVALUATION OF PERMANENT IMPAIRMENT**, 4th edition 1999 at page 15/302-304 as follows:

"Pain is subjective and cannot be measured objectively.

People tend to view pain complaints with suspicion and disbelief as with complaints and fatigue. It is impossible to understand the pain that another person is suffering. Pain evokes negative psychologic reactions, such as fear, anxiety and depression. Pain is perceived consciously and is evaluated in the light of past experience. A perceptive concept of pain includes consideration of cognitive, behavioural, environmental and ethno-cultural variables as well as patho-physiologic factors."

[23] Ms Vogt conducted a pain intensity frequency grid test and was of the opinion that the pain was minimal to slight. She described *"minimal"* to mean annoying and *"slight"* as tolerable. The effect of the particular range of pain she said, is medically documented to cause diminution in an individual's capacity to carry out some specified daily activities. All the experts were **ad idem** that plaintiff was not exaggerating or malingering his complaints. I conclude therefore that the pain suffered by plaintiff is real and although it can be managed by medication and possibly ameliorated by surgical procedures, it cannot be completely eliminated.

[24] Since resigning from the AA, plaintiff tried his hand at various jobs. He did home-

based mechanical work. This did not prove rewarding. He worked as a sales and collection representative on commission. During the period in question his commission did not even cover his petrol expenses. He worked as a general handyman, but such work was performed on a casual basis. The frequency of such work depended on contracts obtained by the member of his family who offered him such work. He also did long distance driving. None of these jobs proved to be suitable or rewarding. They can be discounted as an alternative source of generating an income for purpose of calculating loss of earnings.

[25] Presently plaintiff works for Chilwan's, driving a minibus transporting shift workers to and from work. Over a cycle of 24 hours, he drives three shifts averaging three hours per shift. In between the shifts he has a free period of approximately four hours. This enables him to rest in between the shifts. It, to some extent, compensates for the pain and discomfort experienced by him when driving. The security of this work is dependent on the duration of the contract between Chilwan's and Nampak, the employer. Plaintiff had reservations about continuing with the work on the longterm, because of his physical impairment. He started with Chilwan's on 11 July 2002. It is likely that with an arthroscopy and psychotherapy his physical and psychological impairment may sufficiently improve to enable him to cope adequately with the work he is presently doing at

Chilwan's. In that event, it is probable that he would qualify for a licence to transport members of the public (PDP licences to which Prof Steyn, the industrial psychologist, referred to in his report). In the court's view the work at Chilwan's is the most appropriate, realistic and practical benchmark to determine his loss of earnings.

[26] Plaintiff's remuneration with Chilwan's is R40,00 per round shift, which averages out to R2 400,00 per month. This is the remuneration for a casual position. If the position becomes of a permanent nature it is likely that the remuneration will improve accordingly. The court is prepared to make an allowance of a further R300,00 per month. This brings up his monthly assumed income to R2 700,00 per month. Mr Munro, the actuary, was given various scenarios and requested to calculate the past loss of earnings and project the future loss of earnings. His evidence was substantially uncontradicted. The past loss of earnings is capable of being quantified with relative ease. There is consensus between the two industrial psychologists that if the accident had not occurred, plaintiff would in all probability have continued his employment with the AA until retirement at the age of 65 years. I have already found that plaintiff was justified in resigning from the AA in January 2000 and his return to the AA was not a realistic and practical option.

[27] Mr Munro based the past loss of income on the period from the date plaintiff left the employ of the AA, i e 1 February 2000 to the date of calculation, i e 1 October 2002. The future loss of income was based on the period from 1 October 2002 until retirement at the age of 65. After making various actuarial assumptions, he capitalised the values. The past loss of income is calculated by the difference between the capital values of the past uninjured and injured incomes. The future loss of income is calculated by the difference between the capital value of the future uninjured and injured income which is assumed.

Past Loss of Earnings:

[28] Adv **Potgieter** submitted that an award of six months salary based on his income at the AA would be a fair amount for past loss of earnings. He based his submission on the fact that the orthopaedic surgeons suggested that it would have been reasonable for plaintiff to take six months off work following the accident to recover from his injuries. This obviously did not take into consideration the residual physical and psychological sequelae suffered by plaintiff. Adv **Engers** SC submitted that the court should accept the figures of Mr Munro, but instead of allowing a contingency of 15%, he proposed that the court should allow a contingency of 7,5%.

[29] Mr Munro calculated that plaintiff would have earned an amount of R167 400,00 from 1 February 2000 (the date when he left the employ of the AA) to 1 October 2002 (the effective date of the calculation). He obtained plaintiff's primary information from his income tax records for the period 1996 to 1999. During that period his income increased in real terms by 8% to 10% above the rate of inflation. For the period 1999 to 2002, Mr Munro projected an increase of 5% in real terms. This was a conservative estimate that he projected in relation to the income for the previous period.

[30] A contingency of 12,5% for past income in an uninjured state in my view, would be fair and equitable taking into consideration, firstly, his length of service with the AA; and secondly, the short period covered by the past loss and the likelihood that nothing untoward would have happened during that period to disrupt or end his employment with the AA. A contingency of 25% on private work seems to be in the opinion of the court, a fair percentage in view of the uncertainty and fluctuation of such work. I have allowed for additional income to that of Mr Munro in the sum of R300,00 for replacing spark plugs which he would have earned even in his uninjured state. I have also provided the sum of R10 760,00 for the casual work he performed in his injured state. In both instances, I

have allowed a contingency of 25%. In assessing the contingencies the court has also allowed for the fact that there was a duty on him to mitigate his past loss of earnings. The total past income, after allowing for contingencies, amounts to R157 200,00 in his uninjured state and R24 195,00 in his injured state. The difference is R133 005,00 and if I deduct the sum of R5 400,00 which plaintiff received for six months from the unemployment fund, the nett past loss amounts to R127 605,00.

Future Loss of Earning Capacity:

[31] Adv **Potgieter** submitted that the fairest way to compensate plaintiff for loss of future earning capacity, is to award him an amount of R100 000,00. This is approximately 10% of his gross future earnings in an uninjured state. Adv **Engers** SC submitted that a fair and reasonable amount, based on his present employment at Chilwan's, would be R648 600,00 or alternatively, R616 190,00. In assessing prospective loss, the court is virtually called upon to ponder the imponderables, yet it must do its best with the material available even, if in the result, its award might be described as an informed guess. (BOBERG : THE LAW OF DELICT, Vol 1 at p 531.) It is recognised that the trial court has a wide discretion to determine an amount which is fair to both parties, neither denying the plaintiff just compensation nor pouring out largesse from the horn of plenty at

the defendant's expense. (BOBERG : THE LAW OF DELICT, **supra** at pp 533/4.)

[32] Mr Munro arrived at a figure of R1 004 600,00 based on his uninjured income at the AA until the age of 65. Mr Munro made various actuarial assumptions. They are that plaintiff's salary would have continued to increase in real terms by 5% for a period of five years and thereafter in line with the inflation rate; that the statistical mortality tables for the period 1984 and 1986 and relating to the population group in which plaintiff falls, was applied; that figure was discounted by 2,5% per annum; that the interest rate of 10% per annum, after tax, was applied; and that the inflation rate was pegged at 7,3% per annum. Mr Munro then applied a 15% contingency to the nett figure which amounted to R853 900,00. These figures were not disputed, nor were the actuarial assumptions. The court finds them reasonable and accepts them for the purpose of determining plaintiff's future loss of income.

[33] Mr Munro projected a figure of R52 900,00 for part-time mechanical work. This approximates to between R350 to R400 per month. He applied a 25% contingency which reduced the amount to R39 700,00. These figures have also not been challenged. The court finds them reasonable and likewise accepts

them for purpose of determining plaintiff's loss of income.

[34] The court has already found that the income presently generated by die plaintiff at Chilwan's in his injured state, duly adjusted, should be used as a benchmark in order to determine his future loss of earnings. The court has also found that the adjusted amount of R2 700,00 per month would be a reasonable salary that plaintiff would earn at Chilwan's. Mr Munro has capitalised such monthly income, making certain actuarial assumptions without, however, allowing for contingencies. He arrived at a figure of R396 300,00. Adv **Engers** SC suggested a 30% contingency deduction. I am of the view that in the light of all the circumstances, contingency of 20% would be fair and reasonable. This takes into account, firstly, the fact that the security of plaintiff's job is dependent on Chilwan's contract with Nampak to shuttle workers to and from the factory; secondly, the uncertainties of the job market; thirdly, the prospect of plaintiff's reduced efficiency because of his residual sequelae becoming a problem and, fourthly, such other factors which might impact on his future ability to continue working and compete on the open market but, at the same time, making allowance for him to fall back on his private mechanical repair work and for the fact that there is a duty on him to mitigate the damages for the future loss of earning capacity.

[35] I cannot agree with Adv **Engers** SC that because of the nature of work at Chilwan's, plaintiff would not be able to do private mechanical repair work. I am of the view that plaintiff would be able to cope better with such private work, firstly, because of the flexible hours of his work at Chilwan's and, secondly, because of his remarriage, the family would not make the same demands on him as they would have made prior to such remarriage. Such additional income, however, for purpose of loss of income, would cancel each other out. The court would accordingly not take them into consideration for purpose of arriving at an award. The nett figure, after deducting a 20% contingency from the gross sum of R396 300,00, amounts to R317 040,00. The total loss of income is therefore R853 900,00 less R317 040,00 plus R7 200,00 (income from Chilwan's) which equals R544 060,00.

General Damages:

[36] General damages are, by their very nature, not capable of being measured in monetary terms. Its quantification is a matter of judicial discretion. In exercising its discretion, the court must determine a reasonable compensation which is fair and just in the peculiar circumstances of the case. **Watermeyer, JA** in **SANDLER v WHOLESALE COAL SUPPLIERS LTD** 1941 AD 194 at 199

expressed the following **dicta**:

> *"…it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."*

See also **AA MUTUAL INSURANCE ASSOCIATION LTD v MAQULA** 1978 (1) SA 805 (A) at 809B.)

[37] In making an award, the court is not bound by one or other method of calculating general damages. The court has a wide discretion. (See the headnote in **SOUTHERN VERSEKERING v CARSTENS N O** 1987 (3) SA 577 (A).) Comparative awards in other cases might be a useful guide. They may be instructive but not decisive. In **PROTEA ASSURANCE CO LTD v LAMB**

1971 (1) SA 530 (A) at 535H-536A, the following **dicta** is instructive:

> *"It should be emphasised, however, that the process of comparison* does not take the form of meticulous examination of awards made in *other cases in order to fix the amount of compensation. Nor should the process be allowed so to dominate the enquiry as to become a fetter upon the court's general discretion in such matter."*

It is settled law that psychological sequelae can be he subject of a damages claim arising from a motor accident provided that it can be established that plaintiff suffered a detectable psychological injury. (See **BESTER v COMMERCIAL UNION VERSEKERINGSMAATSKAPPY VAN SA BEPERK** 1973 (1) SA 769 (A) at 776H-777A; **BARNARD v SANTAM BPK** 1999 (1) SA 202 (SCA) at 208H-209A; **ROAD ACCIDENT FUND v SAULS** 2002 (2) SA 55 (SCA) at 61I-J.)

General Damages of Plaintiff:

[38] Adv **Engers** SC submitted that an amount of between R100 000 and R120 000 would be an appropriate award for plaintiff's general damages. In the summons plaintiff had claimed R300 000 for his general damages. I agree with Adv **Engers** SC that this amount is excessive. Adv **Potgieter** submitted that an

award of R60 000 would be fair and just. I must determine a reasonable compensation for his general damages which is fair and just in the circumstances of this case.

[39] It is common cause that plaintiff would have experienced considerable pain and suffering immediately following the accident. Both orthopaedic surgeons agree that he could have reasonably been off work for six months because of his injuries. The court has already found that the fracture of the C6 vertebrae has left a degree of impairment which is manifested in pain and aggravated by physical effort. Even after surgical procedures, he will continue to suffer pain of a mild to moderate degree to his left knee on an ongoing basis. The court found no impairment of any significant nature to the right forearm. The court also found no impairment of the chest other than occasional residual pain.

[40] It is also common cause that plaintiff suffered a major depressive episode which is accepted as a detectable psychiatric injury. I have found that plaintiff's psychological condition will ameliorate with psychotherapeutic intervention and medication but it will not be completely cured. The court accepted plaintiff's explanation for not seeking psychotherapeutic intervention earlier. The court has made allowance for the fact that there was a duty on plaintiff to mitigate his

general damages. The court is of the view that in the light of all the circumstances, a fair and just award for the general damages of plaintiff would be an amount of R80 000.

General Damages of Igshaan:

[41] It is common cause that the physical injuries sustained by Igshaan were not very serious. He had a head and chest injury, lacerations of the lip and bruising of the knee. He was treated overnight at the hospital and discharged. According to Dr Jaffe, he would have endured moderately serious pain and suffering for a few weeks after the accident. It appears that he has not been left with permanent physical sequelae.

[42] There is a difference of opinion between the experts whether he suffered any psychological injury. Mr Altman says that he suffers from depression. This is contradicted by Mr Loebenstein. Igshaan was eight years old when he was involved in the accident. He witnessed the death of his adopted mother. Mr Altman found that Igshaan impressed as a depressed child with symptoms of listlessness and low energy. He presents with various symptoms which are the after effects of trauma. Mr Altman does not specifically make the diagnosis of depression in respect of Igshaan in his report. In evidence, however, he says

that Igshaan is clinically depressed. Mr Loebenstein is of the opinion that Igshaan does not suffer from depression. His symptoms, according to him, are indicative of grief and complicated bereavement.

[43] The onus is on plaintiff to show, on a balance of probabilities, that Igshaan suffers from some recognisable psychiatric injury. I am afraid that plaintiff has failed to discharge that onus. Although the symptoms exhibited by Igshaan are regarded as distressing, they cannot be said, with any degree of certainty, that they manifest psychological sequelae. The possibility that such symptoms are due to prolonged grief, complicated bereavement or some other cause or causes cannot be excluded. Psychotherapeutic treatment can go a long way in addressing the cause of the symptoms.

[44] Adv **Engers** SC submitted that an appropriate award in respect of Igshaan for general damages would be R60 000. Mr **Potgieter** submitted that the general damages for the children would be minimal and should not exceed R7 500. I am of the view that, as general damages, a fair and just compensation for Igshaan would be an amount of R20 000.

General Damages – Qudsiyyah:

[45] Qudsiyyah sustained a head injury, laceration of the lower lip and of the chin, swelling of the right eye and concussion. She has a scar on her chin and skin pigmentation on the right cheek. She was kept in the hospital overnight for treatment and observation. The pain and suffering would have been moderately severe for a few weeks after the accident. At the time of the accident she was almost three years old. Since the accident she developed abdominal problems which resulted in vomiting. According to the report of Marianda Eras, she also presents various emotional problems which are indicative of a severe grief reaction. It is common cause that Qudsiyyah has sustained no permanent physical injuries.

[46] The psychologists are in agreement that Qudsiyyah is not suffering from depression. She also presents symptoms which can be described as the after effects of trauma. Psychotherapeutic treatment as in the case of Igshaan could, likewise, go a long way in addressing the cause of the symptoms. Adv **Engers** SC submitted that an appropriate award for Qudsiyyah would be R40 000. Adv **Potgieter** suggested a figure of not more than R7 500. I am of the view that, as general damages, a fair and just compensation for Qudsiyyah would be an amount of R15 000.

[47] I accordingly make the following order:

1. Defendant is ordered to pay plaintiff, in his personal capacity, the sum of R763 559,17 which is made up as follows:

(a)	Funeral expenses	R 1 100,00
(b)	Past medical expenses	R 10 794,17
(c)	Loss of past income	R127 605,00
(d)	Loss of future income	R544 060,00
(e)	General damages	R 80 000,00

2. Defendant is ordered to pay plaintiff, in his representative capacity, the sum of R35 000 which is made up as follows:

(a)	Igshaan	R 20 000,00
(b)	Qudsiyyah	R 15 000,00

3. Defendant, by agreement, is ordered to furnish plaintiff with an undertaking in terms of Section 17(4) of the Road Accident Fund, No 56 of 1996, to cover all future medical expenses of plaintiff, Igshaan and Qudsiyyah.

4. Defendant is ordered to pay plaintiff's costs of suit, which shall include the qualifying expenses of plaintiff's expert witnesses.

5. Plaintiff is ordered to pay defendant's wasted costs occasioned by the application to re-open his case.

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