

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT, BHISHO)**

CASE NO: 225/08

**DATE HEARD: 19/11/2009
8/12/2009**

DATE DELIVERED: 10/12/2009

In the matter between:

L[...] T[...] L[...]

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KEMP AJ

[1] The plaintiff sued the Defendant in his representative capacity as the father and natural guardian of his son, L[...], (“the claimant”) who was born on 21 May 1995 and was 4 years old on the 11th December 1999 when he was injured in a motor vehicle accident.

[2] The Defendant eventually conceded the merits of the matter as well as the value of the general damages suffered by the claimant and that the Defendant be ordered to compensate the claimant for future medical expenses. The only issue remaining for determination related to the value of the claimant’s claim for his loss of earning capacity.

[3] The only witnesses who testified at the trial were the claimant's school teacher, as well as Mr Gideon de Kock, an Industrial Psychologist. The Defendant called no witnesses and admitted the content of the expert reports of Dr Deon le Roux, a neurosurgeon, Dr Claudio Favara, an Ear Nose and Throat surgeon, Andiswa Gowa, an occupational therapist, Zanele Khumalo, a clinical Psychologist, as well as of Mr JL Olivier, an actuary.

[4] Dr le Roux was the first expert to examine the claimant. He examined him on the 22nd February 2005. He recorded the history of the accident, as gleaned from the claimant's father and attorney, who both accompanied him to the examination, as well as from the hospital records. He noted that the claimant had been involved in a motor vehicle accident and had suffered a head injury and an injury to the left eye. He had bled from the right ear and his neurological condition was described as rousable but agitated and uncooperative on admission. He was awarded 13 on the Glasgow Coma Scale with no neurological deficit as such described. A provisional diagnosis of a base of skull fracture was made on the grounds of the bleeding from the left ear (this appears to be an error and should be a reference to the right ear). He also had a swelling of the left eye (some of the reports refer to an injury to the left eye and others to an injury to the right eye) which was only capable of being opened three days later. He was then discharged on the 17th December, some six days later, in a normal neurological condition. Dr le Roux documented the claimant's then present complaints as being excessive watering of the eyes mostly during hot weather, occasional earache, pain in both legs which could occur intermittently, although this appeared to be unrelated to the accident. He further denied any neurological symptoms such as seizures or blackouts. Dr le Roux was advised by the claimant's father that his progress at school had been extremely poor.

[5] On the basis of the history and of his examination, Dr le Roux concluded that the claimant had sustained a head injury of moderate severity, that he was disabled during the period of hospitalisation and would have

required about one month to recover from the injuries sustained and that the injuries would not have resulted in any permanent neurological disability. He concluded that there would be no loss of amenities and that the head injury would only have affected his potential schooling and potential future employment marginally, as patients without significant periods of coma or amnesia usually do not have permanent cognitive dysfunction of the brain. He was of the view that the chances of him developing post traumatic epilepsy would be around 5 percent.

[6] Dr le Roux noted that the claimant's father was a factory worker at an industrial timber site, that he left school after standard 2, and that his mother did not do any remunerative work. This information is at odds with the information supplied to some of the other experts, in particular Mr de Kock, who was informed that the claimant's father passed standard 8 and was employed as a driver on the mines and that his mother had passed matric and had worked as a seamstress.

[7] Dr Claudio Favara examined the claimant on the 26th July 2005. Once again, the claimant's father and attorney were present during the examination. Dr Favara also had sight of Dr le Roux's report. His clinical examination confirmed the diagnosis of a fracture to the base of the skull, involving the right temporal bone anterior to the otic capsule. Dr Favara also concluded that the claimant had suffered some loss of hearing in the right ear, involving frequencies above 1000 Hz, which he concluded, would contribute to his learning difficulties.

[8] Andiswa Gowa, an occupational therapist, examined the claimant on the 2nd July 2009. It appears that he was accompanied by his mother, who reported that he had been unconscious after the accident, restless, confused and agitated. She recorded that the claimant's mother had a grade 12 level of education, that she did a home economics course in 1990 and had returned to school to do her matric in 2001, that she used to sew garments from home for local customers and that she was currently doing an insurance e-marketing

course, and that the claimant's father was 51 years of age, had a grade 10 level of education and had been a mine worker at Carltonville since 2007. The claimant had three siblings, three sisters aged 2, 4 and 12. She recorded that the claimant's mother had reported a normal delivery and normal developmental milestones, with no serious injuries or illnesses reported prior to the motor vehicle accident. She noted that he had repeated grades one and five. A report from the school indicated that he had difficulty in the pronunciation of words, he understood some tasks but was very slow in class activities and always required extra time to be allocated to him. He had a very short concentration span although he was co-operative. He was short tempered and liked fighting with older children, and came from a poor family. She concluded that he was not coping with the demands of school and was a candidate for placement in a special school for children with learning difficulties. She concluded that his post-morbid work options, compared with pre-morbid, would be limited, that he would struggle to enter the open labour market and that the rate of his career progression would be significantly compromised.

[9] Zanele Khumalo, a clinical psychologist, examined the claimant on the 1st July 2009. She had sight of the Bisho Hospital records, as well as the medico-legal reports of Drs le Roux and Favara. The claimant appears to have been accompanied by his mother, who explained that passers-by in fact covered the claimant's body with a blanket after the accident, as he was not moving and they thought that he was dead, and that he was unconscious when he was taken to the Bisho hospital. He was referred to the Cecilia Makiwane Hospital thereafter. According to his mother he regained consciousness about an hour and a half after the accident.

[10] She concluded that the claimant manifested with severe impairment in basic attention and concentration, borderline to severely impaired complex attention and concentration skills, severe deficits in verbal learning and verbal memory, severe deficits in logical memory, borderline to severe deficits in working memory, variable visuo-perceptual functioning, severe deficits in

visual memory and impaired executive functions. She was of the view that evidence existed to conclude that these symptoms were as a result of a moderate to severe traumatic brain injury, diffuse in nature, secondary to closed head trauma, with specific and marked impairment in frontal lobe executive functioning, consistent with a severe traumatic brain injury. She was of the view that as ten years had transpired since the accident, that it was likely that the injuries were permanent, and that the claimant suffered from a neurocognitive disorder, depressive symptoms, behavioural and personality changes, post-accident intellectual decline and the inability to function on a social level, all of which would adversely affect scholastic functioning and future employment possibilities in the open labour market. She pointed out that although he had passed his grades, albeit after repeating two, that they had all been condoned passes, and concluded that his neuropsychological deficits would progressively worsen to such an extent that he would be unlikely to cope with high school education or to complete grade 12.

[11] The claimant's school teacher, Patiswa Gomfa testified that although she was of the view that the claimant was not a bad boy, that he struggled to concentrate, would not complete assignments timeously or at all, fell asleep in class, had a tendency to wander around the class room and also tended to fight with the other students. Once she heard that his hearing was impaired she arranged for him to move forward in the class, and although his behaviour improved once he was under her watchful eye, it appeared that the basic complaints remained. He remained a problem child.

[12] Mr Gideon de Kock, an Industrial Psychologist, examined the claimant, who was accompanied by his mother, on the 21st October 2009. He had also had sight of the medico legal reports of Zanele Khumalo, Andiswa Gowa, Drs le Roux and Favara, as well as the claimant's school reports. He had conducted the Standard Progressive Matrices assessment and the Draw – a - Person test, as well as a behavioural assessment. He explained that the claimant would experience progressively more difficulty academically, as it appeared that he had suffered a frontal brain injury. As the brain developed

from the back to the front, reaching full developmental maturity only at around 18 years of age, it would only be then that the claimant would be confronted with the full extent of the injury. Although his scholastic career had been below average, he had been able to cope post morbidly to some extent. However, the likelihood of him coping after the age of around 18 was very small. Mr de Kock explained that Dr le Roux's assessment that the claimant's neurology was basically normal after the accident was not at odds with his findings. He agreed with Dr le Roux's assessment that there were no neurological deficits in the sense of non functioning limbs or organs after the accident. He was satisfied that due to the nature of the brain injury suffered, the symptoms would not have been apparent from the type of examination conducted by Dr le Roux.

[13] Mr de Kock concluded that the moderate hearing loss in the right ear which the claimant suffered may have resulted in inattention, mild language delay, and mild speech problems. Neuropsychological evaluation indicated that he suffered a moderate to severe head injury of a diffuse nature, and marked frontal lobe dysfunction, that he also suffered from depression, severe personality changes, and poor functioning in the social domain. He agreed with the occupational therapy assessment that the claimant would only be physically capable of working in an unskilled manual labour capacity, probably in sympathetic employment.

[14] Mr de Kock testified that the claimant presented with poor emotional and impulsive control, depression, and severe behavioural problems, which would compromise his ability to gain or to sustain employment. From an intellectual point of view, he inferred that pre-morbidly he probably presented with not higher than average general intellectual functioning and would probably have obtained a Grade 12 education, but no tertiary level education, and would thus have been competing in the open labour market at the unskilled to semi-skilled level.

[15] Mr de Kock was of the view that post morbidly, considering the claimant's neuro-cognitive fall-out, he would probably not be able to pass

Grade 10 in mainstream schooling and would thus be unable to compete in the unskilled sector of the labour market. Mr de Kock prepared figures based on earnings in the government sector and prepared two possible scenarios, both of which he felt were equally likely. In terms of the one scenario, as a general worker, as projected by Mr Johan Olivier, an actuary, he would have earned R1 811 079 uninjured, and would now only earn R211 113 injured. Based on the other scenario, as a policeman, he would have earned R2 634 022 uninjured and also R211 113 injured. Mr Bloem, for the plaintiff, argued that I should apply a 20% contingency to the uninjured figures and a 40% contingency to the injured figures and then average both results. In the light of Mr de Kock's views that it was unlikely that the claimant would obtain employment in an injured state it is possible that an even higher contingency should have been applied to the injured earning figures, which would have in turn had the effect of increasing the award under this heading. Mr Bloem's proposal thus appears to be a little on the generous side to the defendant. Mr Bloem's argument that the average of the two scenarios be taken appears to be acceptable and was followed in the unreported judgment of *Mbola vs Road Accident Fund*¹ **where Plasket J was also presented with two equally probably scenarios and averaged the two results.**

[16] Mr Ntsaluba, for the defendant, argued that the second scenario proposed by Mr de Kock appeared to be too generous to the plaintiffs and that there was a third scenario which may have applied. He argued that the claimant, uninjured, might have remained unskilled for life, and bearing that possibility in mind, as well as the admonition by Innes CJ in *Hulley v Cox*,² that the damages should be estimated on an equitable basis and on a consideration of all the circumstances, that I should consider applying a greater contingency to the projected uninjured earnings than that argued by Mr Bloem.

[17] Mr de Kock based his projections on an uninjured expectation of only a limited progression in the ranks of the semi skilled, and as pointed out by him,

¹ Case No 625/2005 delivered on 30 October 2008 (ECD)

the difference between the earnings of a person who remained unskilled for life was not so far removed from the earnings which he projected the claimant would have earned. Mr de Kock placed the claimant at level B2 on the semi skilled ranking, with a projected income of R148 000 per annum, as opposed to the highest level of semi skilled workers at level B4, with an annual income of R215 000. The highest level of unskilled workers on the tables he worked with is A3 at an annual income of R117 000.

[18] It appears to me that Mr de Kock has carefully considered the claimant's potential and has applied what he has observed carefully, objectively and with a considerable degree of circumspection. I can see no reason why I should not accept his views with regards to the claimants employment and career prospects both injured and uninjured. As indicated above, I am of the view that Mr Bloem's concessions regarding the injured contingencies were generous, and can see no reason to criticise his view regarding the contingency figure to be applied to the uninjured figures. They certainly appear to be supported by Mr de Kock's views.

In the event, judgment is granted as follows:

- (a) The defendant is ordered to pay the plaintiff R1 651373 in respect of future loss of earning capacity.
- (b) The defendant is directed to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 to compensate him in respect of the following;
- (c) Costs are awarded against the Defendant, such costs to include the The qualifying, reservation, travelling and appearance fees, if any of Drs le Roux and Favara, and of Messrs Gowa, Kumalo, Olivier and de Kock.

² 1923 AD 234 at p245

L. D KEMP
ACTING JUDGE OF THE HIGH COURT

MATTER HEARD ON: 19 November 2009, 8 December 2009

Judgment delivered on: 4 February 2010

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