IN THE HIGH COURT OF SOUTH AFRICA
BISHO

CASE NO. 701/04

In the matter between:

ELLIOT PATRIC NOMALA PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

J U D G M E N T

SANGONI J:

[1] These proceedings concern the quantification of damages suffered by the plaintiff, arising out of a motor vehicle accident on 21 April 1999, following an order by this Court on 13 March 2005 in terms of which the defendant, in its capacity as a statutory insurer in terms of the

Road Accident Fund Act was ordered to pay 80% of the damages, as proved or agreed.

[2] On 21 April 1999 the insured vehicle collided with the then 21 year old plaintiff who was a pedestrian at the time. He was rendered unconscious. He probably had what Dr Keeley refers to as post traumatic amnesia for at least 4 days. From the scene of accident he was moved to the local police station and later taken to Hewu Hospital where he received some treatment. While there he started convulsing. What was then visible was a large left temporal laceration with an underlying skull fracture. He was later, on the same day, transferred to Cecilia Makiwane Hospital where he remained till discharged to the care of his relatives on 30 April 1999. Subsequently he was treated as an out patient for epilepsy at Vosloorus and Natalspruit hospitals

[3] For the bodily injuries the plaintiff sustained he claims, as set out in the amended particulars of claim, the following: -

"2.1	Past loss of earnings	R124 926.00
2.2	Estimated future loss of earnings	R829 370.50
2.3	Estimated future medical expenses	R117 710.00

2.4 General damages R200 000.00"

[4] The defendant undertook to furnish an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 to cover the claim for future medical expenses. This arrangement is acceptable to the plaintiff.

[5] Dr Keeley, a neurosurgeon, examined the plaintiff on 15 April 2003. In his evidence he confirmed the reports he made pursuant to that examination. He found that the plaintiff sustained a significant head injury - a depressed fracture of the left parietal bone of the skull with contusion of the underlying parietal lobe of the brain. The brain was bruised in his dominant hemisphere but no focal neurological signs were observed. Dr Keeley, however, concluded that it is not unlikely that the plaintiff has sustained a degree of intellectual compromise. The scalp was sutured leaving him with a scar measuring 14 cm. The scar is moderately noticeable. Because of the brain injury he developed epileptic fits. Dr Keeley's opinion is that he will probably be a partially controlled epileptic for the rest of his life and will

accordingly require ongoing anticonvulsant medication and related management.

[6] It is common cause that prior to the accident the plaintiff was a healthy young man. He was alert and intelligent. As a result of the accident he has been "rendered to an indigent lifestyle dependent on handouts". This represents the opinion of Dr Keeley. He considers him handicapped to the point of being unemployable on the open market even as a lowly labourer. For that assertion he obviously relies on the condition of epilepsy that has the resultant intellectual compromise. He describes the condition as the one that would render him disadvantaged to compete for menial labour tasks. The plaintiff suffers from headaches at least once a week aggravated by physical activity. Within the first two months from the time of the accident it was a daily occurrence. He has poor concentration and is forgetful. The vision in his left eye has deteriorated. He is irritable.

[7] He was doing Grade 10 at school the year of the accident. At the end of that year he failed the examinations but was promoted to the next grade. He discontinued with schooling as it was realised that he would not pass because of his condition. He failed Grade 11 three

times in consecutive years. He now lives with his uncle. Up to this stage he has not sought employment and has not been employed. In view of the plaintiff's condition, being a partially controlled epileptic with limited education, Dr Keeley's view is that it will be difficult for him to obtain employment other than in a fairly sheltered capacity or by a particularly sympathetic employer. The degree of that limited employability has, however, not been established nor estimated in pecuniary terms.

[8] Dr van Daalen an industrial psychologist also gave evidence for the plaintiff. He assessed the plaintiff on 10 May 2006. Having tested the plaintiff with a Ravin's Progressive Matrices instrument he found the plaintiff's intellectual capacity to be below average in comparison with the standard norm of workers with a Grade 8 level of education. This points, according to his opinion, to a rather severe compromise of his intellectual abilities being the result and effect of the accident. Dr van Daalen is of the view that were it not for the accident it would not be unreasonable to assume that the plaintiff would at least complete Grade 12. As regards his family background, his mother is a teacher; his older sister completed Grade 12 and is now in formal employment; the younger sister is doing Grade 6; his 17 year old

younger brother is doing Grade 8 and his girl friend is doing Grade 12. He would then be employable as a general labourer at the rate of about R65 00 a day, translating to about R1 560 a month, including one meal for each day worked. In the event the plaintiff would participate in the formal economy the prescribed scales would apply. The assumed entry level is peromnes 16 and level 12 is assumed to be the final career level. A further assumption employed by Dr van Daalen is that he would take about 5 years to move between the levels. In monetary terms he would commence with an annual salary in the region of R59 400.

[9] The parties agreed that Dr Koch prepared an actuarial report after having taken into account the different scenarios which are informed by the participation in either the informal or the formal employment, as the case may be. The report itself with calculations based on assumptions and projections, has not been made available to the court. It is only the actuarial certificate of value that forms part of the papers. Despite the initial resistance, Mr Lack, representing the defendant, eventually conceded that Dr Koch premised his certificate of value on the medico-legal report of Dr van Daalen. The certificate is purely for settlement purposes. It gives figures without showing

how they have been worked out. Dr Koch in his calculations made use of 2006 values whereas in the report it is assumed the plaintiff would start working from January 2002. As a matter of fact the claim for past loss of earnings covers the period from January 2002 until July 2006. Mr Cole representing the plaintiff countered the argument by pointing out that the values utilised are in fact current values that work back to 2002. This argument by Mr Cole appears correct.

[10] Counsel agreed that Dr Koch's certificate was admitted subject to either or both parties being at liberty to consult with him on it or to request a full report, if so advised. The defendant, as I understand the position, does not challenge the actuarial method in calculating the value of the loss but only raises the issue of the propriety of the values employed.

[11] In essence Dr Koch comes to the conclusion that an award of R80 578 for past income and an amount of R384 607 for future income would be realistic. These are figures that would apply if the plaintiff would have been employed in the informal sector. That is the first scenario. No adjustment has been made for general contingencies save that full allowance was included for early and late deaths. In the second

scenario, which is based on the plaintiff being in formal employment, the figure for past income is R263 002 and R1 951 460 for future income. These are subject to the same conditions as in the first scenario. The amended claims are based on these two last figures which represent the position while in formal employment. No regard has been paid to the figures that relate to the first scenario for purposes of working out the claims.

[12] The issues for consideration include the following:

12.1 whether with the Grade 12 qualification it would be probable for the plaintiff to find employment. Dr van Daalen acknowledges that levels of employment are high. According to him the probability to obtain informal employment in the region of Whittlesea stands at about 30%. There has been no record of statistics I was referred to in support of this view;

12.2 Dr van Daalen is of the view that if he were to migrate to the nearest large urban area, e.g. Buffalo City, the chances of obtaining employment either in formal or informal labour market would be 50%, the chances of informal employment carrying a probability that is about twice that of formal

employment. Much as it is generally accepted that the chances are more at the large centres, no concrete evidence has been led in this regard. The estimated remuneration rates at the large centres were not given;

12.3 Dr van Daalen's opinion that there is 50% chance that the plaintiff would have migrated to the large centres. This appears to be a speculation than a probability;

(*Southern Insurance Association v Bailey NO* 1984 (1) 98 AD at 113H)

1.4 notwithstanding the evidence of a potential of intellectual compromise, there is no evidence to show that the plaintiff suffered a complete loss of earning capacity and therefore unemployable in his post accident condition, if employable, regardless of the limitations there is no evidence (regarding) the probable potential earnings despite the handicaps.

12.5 whether there is sufficient motivation for preferring one scenario to the other.

[13] The amended claim by the plaintiff is based on the assumption that the plaintiff would have migrated and upon having done so, his chances of obtaining informal employment would increase from 30% to 50%. The evidence is silent as regards the possibility or probability to obtain formal employment in the area of the applicant's home, Whittlesea. The probability would still be 50% at the large centres for obtaining formal employment. I do not subscribe, however, to the view that in order to enter the formal labour market the plaintiff would have to migrate. No case has been sufficiently made out to the effect that the remuneration rates would be significantly different as between Whittlesea and the large centres, particularly in the public sector. This aspect has not been touched upon in evidence. No estimated remuneration rates were given supposing the plaintiff would have obtained employment in the formal sector in the region of his home and what chance he would have had to obtain such employment.

[14] To me there are no compelling reasons for preferring one scenario to the other. The probabilities to enter into informal employment may be more but that does not provide adequate reasons to apply exclusively the calculations of either of the given scenarios.

[15] The issues referred to in paragraphs 12, 13 and 14 above make it difficult to rely on the actuarial calculations in assessing damages. It would entail relying on a myriad of assumptions in a situation where one is contingent upon the other. An example of such assumptions is when the plaintiff would stand a 50% chance to get absorbed into employment if he migrated to large centres. That to depend on whether he migrates and the chance to migrate being put at 50%. Though the evidence of the doctors has not been seriously challenged even as regards the assumptions and the percentage figures related thereto, there remain imponderables and uncertainties which make the actuarially based assessment of damages for loss of earnings difficult. What is worse no full actuarial report was presented by way of evidence, showing how the calculations were made. It is only the outcome of the calculations that has been placed before me meant only for settlement purposes. In general the assumptions applied are highly speculative.

[16] The basic principle in a patrimonial claim lies in the comparison of the plaintiff's 'property' before and after the commission of the wrongful act. The difference in pecuniary terms constitutes the

damages. It follows that where no consideration is given to the extent of unemployability of the plaintiff, as in the current case, the basic principle referred to above cannot be achieved. (See *Union Government (Minister of Railways) v Warneke 1911 (AD) 657 at 665: The Quantam of Damages Vol 1 4th Ed by J J Gauntlett).*

[17] In the light of the above it is appropriate in this case to make an award on the basis of fairness and reasonableness. I have to take into account, to the extent necessary, the factors referred to in evidence, including Dr Koch's figures based on the scenarios stated, to serve as broad frame of reference. I will also consider the objective and established factors such as the fact that the earning capacity of the plaintiff has been substantially reduced, albeit not completely; that the plaintiff would have worked until the age of 65 years with grade 12 qualification assumed. In *Griffiths v Mutual & Federal Insurance Co Ltd* 546F it was held:

> "In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the Court will nevertheless once it is clear that pecuniary damage has been suffered, make an award of an arbitrary, globular amount of what seems to it to be fair and reasonable, even though the result may be no more than an informed guess."

In Southern Insurance case (*supra*) it was stated at 113G that:

> "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.

[18] In my view, on the basis of available evidence, I consider an award or R96 000 for past loss of earnings and a sum of R640 000 for future loss of earnings to be fair and just.

GENERAL DAMAGES

[19] The claim for general damages in this matter denotes only non-patrimonial damages. It is standard practice that the courts rely on past awards in comparable cases to serve as a useful guide. As regards pain and suffering the relevant portion in Dr Keeley's evidence is to the effect that pain is not really a feature of the plaintiff's complaints. It is not an important factor in the assessment of these damages. The headaches which were fairly frequent soon after the accident would have to be considered. The most painful part

must have taken place in the first week or two after the injury and the plaintiff has no recollection of that. If the injured person's mind was not aware of the pain the time occurred and it cannot subsequently be recalled the injured is not entitled to receive compensation therefore. (*Sigournay v Gillbanks* 1960 (2) SA 552 (AD) at p571 : *Botha v Another v Minister of Transport* 1956 (4) SA (W)).

[20] For purposes of assessing the general damages, I consider the following

- The pain and suffering confined to attacks of headache which will likely disappear 4 years after the accident;

- The behavioural difficulties in the form of irritability and the *sequelae* thereof;

- Loss of memory and the deteriorating vision of the left eye;
- The post traumatic epilepsy and the *sequelae* following from a severe brain injury;

- The scar measuring about 14cm extending from above lateral margin of the left eye up over the temple into the *paerital* region;

- Loss of amenities of life, from an alert and intelligent young man rendered to an indigent lifestyle.

[21] I consider an award of R160 000 fair and reasonable.

COSTS

[22] The issues in this case are such that there would be no sense to depart from the principle that the successful party is entitled to costs. What is remaining is the determination as to who should pay the reserved costs occasioned by the postponement on 24 July 2006. The postponement was at the instance of the defendant. The background facts follow. On 14 July 2006 plaintiff's attorneys delivered notices of amendment and amended particulars of claim as well as notices in terms of Rule 36(9)(a) and (b). Rule 9 reads:

> "No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he shall-
>
> (a) not less than fifteen days before the hearing, have delivered notice of his intention so to do; and

> (b) not less than ten days before the trial, have delivered a summary of such expert's opinion and his reasons therefor."

[23] 24 July 2006 was allocated on 31 March 2006 as the date of hearing. The matter was accordingly set down on 17 July 2006. Obviously given the date of hearing as 24 July 2006 the notices in terms of Rule 36 were out of time. In terms of sub-rule (9)(a) the minimum number of days is 15 before the hearing for a party to deliver notice of the intention to call an expert witness and 10 days before the trial to deliver a summary of such expert's summary of opinion. That is the position unless leave of the court has been obtained. The relevant report was that of Dr van Daalen as the original report compiled by Dr Keeley had been filed much earlier.

[24] On 20 July 2006 the attorneys for the defendant addressed a letter to attorneys for the plaintiff ordering them to consider a postponement in view of the late filing of Dr van Daalen's report, particularly that –

> "…Dr van Daalen's report and note that there are certain issues raised that may well need to be supplemented by a further, independent, opinion. In this regard, we note that Dr van Daalen does not afford us his opinion as to the remuneration plaintiff may receive in the "very simple repetitive type work" the plaintiff is now able to perform or attribute any percentage to the possibility that plaintiff may find such employment."

[25] It was also pointed out that the matter was not set down in accordance with the *practice notice 30* of this division which prescribes that a matter may be set down 6 weeks prior to the allocated date of trial.

[26] When the postponement was not agreed to the defendant launched a substantive application the effect of which was to have the matter postponed. It was conceded by Mr Cole that initially there was no compliance with Rule 39 albeit, as he so submitted, the period was only out by one day. The issue raised by the defendant was not a previous one as it turns out it was a material factor considered in this judgment. The plaintiff could have negotiated an agreement on this issue with the defendant or make an application for leave of court.

[27] In the circumstances I conclude that the defendant is entitled to the costs of postponement as well as the application made therefor.

In the result I make the following order:

(a) Having deducted 20% (representing the plaintiff's apportionment of blame) the defendant is ordered to pay the plaintiff the following:

- The sum of R86 800 for past loss of earnings;
- The sum of R512 000 for future loss of earnings;
- The sum of R128 000 in respect of general damages;
- Interest on the above amounts at the rate of 15.5% per annum from the date of judgment to the date of payment.

(b) The defendant is further ordered to pay the costs of suit with interest thereon at the rate of 15.5% per annum from 14 days after taxation to date of payment.

(c) The defendant is further ordered to pay the qualifying expenses of Dr Keeley and Dr van Daalen.

(d) The defendant is directed to furnish the plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 (limited to 80% of the cost).

(e) The Plaintiff is ordered to pay the costs reserved on 24 July 2006.

C T SANGONI
JUDGE OF THE HIGH COURT

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

PARTIES: **ELLIOT PATRIC NOMALA** PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

- Registrar CASE NO: **701/04**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court: **BISHO HIGH COURT**

DATE HEARD: 9 October 2006
DATE DELIVERED: 7 December 2006

JUDGE(S): **SANGONI AJ**

LEGAL REPRESENTATIVES -
Appearances:
State/Plaintiff(s)/Applicant(s)/Appellant(s): Adv Cole
accused/defendant(s)/respondent(s): Mr D E Lack

Instructing attorneys:
- Applicant(s)/Appellant(s): Tini Mhaleni & Partners
- Respondent(s)/Defendant(s): Hutton & Cook

CASE INFORMATION -
- *Nature of proceedings* :
- *Topic*: