



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3181/2017

In the matter between:

MOLELEKOA PETROS MOTHABE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 07 & 10 MAY 2019

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 07 NOVEMBER 2019

Quantum of damages – Expert opinion and evaluation – Calculation of damages and comparable awards.

Introduction

- [1] The only issue to be determined in this matter is quantum of damages. An offer of settlement conceding the merits was accepted by the plaintiff. In an endeavour to prove his claim, the plaintiff adduced evidence of five (5) expert witnesses who had examined and assessed him. Apart from their oral testimonies they also compiled detailed medico-legal reports. No oral or documentary evidence was placed before me by the defendant. The parties settled the claim regarding past medical expenses in the sum of R67 663.83.

Evidence for the plaintiff

- [2] Jeanne Morland, a qualified Occupational Therapist, testified that she obtained a Bachelor of Occupational Therapy degree from the University of the Free State. After working for two (2) years at Baragwanath Hospital in Johannesburg, she went into private practice specializing in medico-legal report work. She also did work for Case Management Trust Companies post the Road Accident Fund settlement.
- [3] On 16 March 2018 she assessed the plaintiff and compiled the medico-legal report on pages 119 to 163 of the plaintiff's bundle. The plaintiff presented severe head injury, laceration to the upper left, injury to the right eye, multiple fractured ribs, pneumothorax and right tibia-fibula fracture.
- [4] The plaintiff reported that he experiences pain in his right knee and lower leg, headaches \pm twice a week and his sleep is interrupted by restlessness. He also informed her that he forgets a lot at work and even small issues like the pin code of his bank card. His wife reported that he forgets inter alia to fetch the child from creche. He is also reported to be irritable and loud. She concluded that these were consistent with what is found in persons with severe head injury.

- [5] She explained that in assessing the plaintiff she listened to what was reported to her as current problems and compared it with collateral information. The purpose was to check whether what was reported to her ties up with her observations. Accordingly, the current complaints of headaches and restlessness were consistent with the neurological damage that the plaintiff had sustained. As a result his daily living activities have been altered since the injuries. The loss of motivation and drive for self-care were sequelae of his injuries.
- [6] It was her evidence that the plaintiff was unable to function properly. During the assessment his concentration was fluctuating and displayed cognitive difficulties. The injuries have severely altered his independence and activities of daily living which includes his work. On the basis of the physical and physiological deficits suffered by the plaintiff, it was her view that he will have to retire five (5) years before the retirement age of 60 years.
- [7] On 16 May 2014 Rolene Hovsha, a qualified Clinical Psychologist conducted the psycho-legal screening assessment on the plaintiff. The purpose was to establish whether he had suffered any traumatic brain injury as a result of the accident, and if so, the sequelae thereof and his mental state and the emotional impact of the injuries. She compiled a medico-legal report starting from page 14 to 34 of the plaintiff's bundle.
- [7] On page 20 of her report she noted that the records from Annecron Hospital in Klerksdorp showed that the plaintiff suffered a head injury. Based on collateral information obtained from his wife she concluded that the plaintiff appears to have suffered an extended period of Post Traumatic Amnesia. As a result the plaintiff suffered from neurocognitive as well as physical deficits consistent with those prevalent in persons with traumatic brain injuries. She emphasised

that traumatic brain injuries was diagnosed in terms of its outcomes as opposed to initial reported severity at the time of the injury.

- [8] As a Clinical Psychologist with special interest in neuropsychology, she conducted various tests on the plaintiff. This covered attention and concentration, basic mental tracking, mental control, information processing as well as speed of information processing etc. The conclusion was that the neurophysiological assessment revealed moderate to severe deficits in the areas covered. These were absent prior to the accident.
- [9] A neurosurgeon who assessed the plaintiff namely Dr. Cyril Lewer-Allen also gave evidence and substantially confirmed the contents of his detailed report contained in pages 48 to 93 of the plaintiff's bundle. He also recorded the injuries as noted by other experts. The current problems conveyed to him were lack of concentration and memory as well as irritability and short temper.
- [10] He was extensively questioned on the absence of the Glasgow Scale Scoring. His response was that the Glasgow Scale was a management tool for casualty. It was not designed to determine the long-term outcomes or as a forecaster of intellectual functionality.
- [11] Therefore, he concluded that it was probable that the plaintiff suffered a significant brain injury rendering him less productive. This diminished his effectiveness to function independently both at the workplace and in private life. Given the head injury, it was his view that it was not curative even by surgery.
- [12] Louis Linde, an industrial psychologist, conducted an assessment with the objective to evaluate the effects of the accident and its sequelae on the employability and earning capacity of the plaintiff. He concluded that post the accident, the plaintiff has been fortunate to be employed in a sympathetic employment. It was almost imperative that

he should retire at 55 years of age. The most telling statement is that the plaintiff has suffered a severe loss of his amenities and life enjoyment.

- [13] Gregory Whittaker, an actuary, calculated the capital value of the loss of income suffered by the plaintiff as a result of the accident. He concluded that the net compensation due to the plaintiff was the sum of R776 158.00. This was after taking into consideration the necessary contingencies.

Principles pertaining to expert evidence and the evaluation thereof

- [14] The primary contention on behalf of the defendant was that the plaintiff had not suffered a brain injury. It appears that other injuries were not disputed because no reference whatsoever was made to them. I accept that this was the only injury sustained by the plaintiff that was disputed. It is for this very reason that the plaintiff called expert witnesses to establish this aspect.
- [15] It is trite that the function of an expert witness is to assist the court in matters that the court does not have the necessary knowledge to decide. Over and above the expert opinion, the expert must be able to satisfy the court that through special skill, training and experience, the reasons for the expressed opinion are acceptable.¹ In the evaluation of such evidence, it must be determined whether and to what extent the opinion(s) is/are based on logical reasons. The emphasis is that the court must be satisfied that such an opinion has the logical basis. This means that the expert must have considered all aspects of the matter and reached a “defendable conclusion”.²
- [16] All experts called on behalf of the plaintiff corroborated each other that the plaintiff had suffered a severe brain injury. These are experts

¹ *Menday v Protea Assurance Co. Ltd* 1967 (1) SA 565 (E) at 569B

² *Michael and another v Linksfield Park Clinic (Pty) Ltd and another* 2001 (3) SA 1188 (SCA) paras 36 and 37

in their field particularly the area concerning head injuries. They are all highly skilled and acquired vast experience over a period of time. Their opinions were based on logical reasons after a thorough assessment of the plaintiff. The outcomes fitted the current complaints, medical notes and collateral information obtained from credible and reliable sources.

- [17] The plaintiff had suffered the laceration on the upper left and an injury on the right eye. The only conclusion is that some blunt force was exerted on his face to cause these injuries. To argue otherwise will be simply to deny what is an overwhelming evidence that he was injured on the head. The only arguable issue is to what extent was he injured.
- [18] The defendant did not call any expert(s) to contradict the ones referred to in the preceding paragraphs. I formed the impression that the opposition/denial was for the sake of it without any factual or legal basis. Cross-examination did not elicit anything of substance about whether the plaintiff had suffered a brain injury or not. Therefore I conclude on the basis of the evidence before me that the plaintiff suffered severe brain injury.
- [19] There is no doubt that the experts are ad idem that the plaintiff suffered cognitive and behavioural problems and must be compensated thereof. Although the defendant is vehemently opposed to it, no evidence was placed before me to the contrary. The plaintiff manifested with the following neurocognitive problems namely attention and concentration, numerical reasoning, motor speed, visual perception, poor problem-solving skills and impaired judgment.
- [20] There is no fixed method in calculating an award for general damages. It is largely the discretion that must be exercised judicially based on the facts of each case. The court in matters of this nature

must have regard to previous comparable awards, value of money and inflation among other factors. At all times the court must be fair to both sides and award just compensation to the plaintiff.³

Comparable awards for general damages

- [21] In *Du Pisanie NO (obo J G Rabe) v de Jongh*,⁴ the plaintiff presented deficits in the form of severe impairment of memory, loss of concentration, loss of insight, impulsivity, slow work pace, sleeplessness (restlessness), loss of logical thinking, impairment of executive ability, impairment of grammatical capabilities, irritability followed by violent outbursts. His social life and employability was destroyed. There were other multiple injuries like damage to the right knee and right ankle. Thring J awarded him R400 000.00 for general damages.
- [22] De Vos J in *Zarrabi v the Road Accident Fund*⁵ awarded R800 000.00 for general damages. A 30 year old trainee medical specialist had difficulties with executive functions, sustained concentration, memory, psychomotor speed and emotional control. The plaintiff was found to be unemployable as a medical doctor or specialist. She would only be accommodated in some form of employment in a sympathetic environment.
- [23] In *Wessels v Road Accident Fund*⁶ a 19 year old male apprentice mechanical engineer was awarded R350 000.00 for general damages. He suffered from regular headaches, developed amnesia and experienced elevated levels of anxiety and mood changes. This was found to be having an impact on his social life and all its facets.

³ *Pitt v Economic insurance Co. Ltd* 1957 (3) SA 284 (D) at 287 E-F

⁴ 2002 (5B4) QOD 109 (C)

⁵ 2006 (5B4) QOD 231 (T)

⁶ 2010 (6B) QOD 6 (ECP)

- [24] Taking into consideration the average yearly inflation rate of 5.2%, an award of R400 000.00 will be approximately R965 189.00 in 2019. These are the closest cases to the matter under discussion. In this matter there were other severe injuries like pneumothorax, fracture of the leg and ribs. An award of R900 000.00 will be a just compensation and by no means at the expense of the defendant.

Calculation of past and future loss of earnings

- [25] The actuarial calculation in respect of past and future loss of earnings on behalf of the defendant were calculated at R10 098.00 and R776 158.00 respectively. The contingency of 7.5% and 5% for an injured and injured income had been taken into consideration. I am satisfied that the assumption underlying the calculation of capital values is based on sound principles. In the absence of any other evidence to the contrary, I conclude that the plaintiff must be compensated as per Actuarial calculations. The plaintiff is in a sympathetic employment and it is just a matter of time before he is pushed out. This is as a result of his injuries which have diminished his capacity to function properly.

Costs

- [26] The costs must follow the success and I do not intend to deviate from the principle. The plaintiff must not be out of pocket because of the intransigence on the part of the defendant.

Order

- [27] Therefore I make the following order:

27.1. The defendant is liable for payment to the plaintiff in the amount of **R1 753 919.83 (One million seven hundred and fifty three**

thousand nine hundred and nineteen rand and eighty three cents) in respect of the Plaintiff's claim resulting from a motor vehicle collision that occurred on **16 May 2014** calculated as follows:-

(i)	In respect of Past Medical Expenses	R 67 663.83
(ii)	In respect of Past Loss of Earnings	R 10 098.00
(iii)	In respect of Future Loss of Earnings	R 776 158.00
(iv)	In respect of General Damages	<u>R 900 000.00</u>
		<u>R1 753 919.83</u>

27.2. The defendant is ordered to furnish to the plaintiff an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the future accommodation of the plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the plaintiff arising out of injuries sustained by her in the motor vehicle collision mentioned above, in terms of which undertaking the defendant will be obliged to compensate her in respect of the said costs after the costs have been incurred and on proof thereof.

27.3. The defendant to pay the plaintiff's taxed or agreed party and party costs on the High Court scale, until date of this order, including but not limited to the costs set out hereunder:

27.3.1 The costs attendant upon the obtaining of payment of the amounts referred to in this order;

27.3.2 The reasonable preparation / qualifying / accommodation / travelling and full reservation fees and expenses (if any) of the following experts, and the costs relating to the plaintiff attending their medico legal examinations:

- 27.3.2.1 Ms R Hovsha (Clinical Psychologist);
- 27.3.2.2 Dr L Fine (Psychiatrist);
- 27.3.2.3 Dr CM Lewer-Allen (Neurosurgeon);
- 27.3.2.4 Dr A H van den Bout (Orthopaedic Surgeon);
- 27.3.2.5 Ms A Crosbie (Occupational Therapist);
- 27.3.2.6 Mr L Linde (Industrial Psychologist);
- 27.3.2.7 Mr G A Whittaker (Actuary);

- 27.3.3 The counsels' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultations with the plaintiff, the plaintiff's attorneys, the plaintiff's witnesses and the plaintiff's experts;
- 27.3.4 The attorneys' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultations with the plaintiff, the plaintiff's witnesses and the plaintiff's experts;
- 27.3.5 The travelling costs occasioned by the plaintiff and the plaintiff's witnesses to attend to necessary consultation with his attorney and expert witnesses.

- 27.4. Payment of the taxed or agreed costs shall be made within 14 (fourteen) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney;
- 27.5. No interest will accrue in respect of any of the aforesaid amounts if payment is made on or before the stipulated dates;
- 27.6 Should payment not be made in respect of any of the aforesaid amounts on or before the stipulated date(s), interest will accrue

at 10.25 % (the statutory rate per annum), compounded.

27.7. In the event that costs are not agreed the plaintiff agrees as follows:

27.7.1 The plaintiff shall serve a notice of taxation on the defendant's attorney of record; and

27.7.2 The plaintiff shall allow the defendant fourteen (14) court days to make payment of the taxed costs.

MATHEBULA, J

On behalf of Plaintiff:

Adv. J.L. Olivier

Instructed by:

McIntyre & van der Post
Bloemfontein

On behalf of Defendant:

Adv. J.S. Motloun

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