

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 36243/08

In the matter between:

PHILLEMON KGOROSHI MATLADI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

MEYER, J

[1] The plaintiff in this action claimed the payment of compensation for his damages as a result of bodily injuries that had been sustained by him due to a head on collision that occurred on 30 November 2007 on the R25 freeway in which the plaintiff was a front seat passenger.

[2] Only the quantification of the general damages suffered by the plaintiff was in issue by the commencement of this trial on 26 November 2009. The issue of liability had been resolved. The plaintiff was entitled to 100% of his agreed or proven damages. It was further agreed that the defendant would pay the plaintiff the sum of R190, 000.00 for his loss of income and that it would provide the plaintiff with an

undertaking in terms of s 17(4)(a) of the Road Accident Fund Act¹ to pay for his future medical treatment in respect of the injuries sustained by him.

[3] No evidence was led at the trial. The content of exhibit 'A', which comprises medico-legal reports and medical records,² was common cause between the parties. Counsel for each party addressed me on the issue of the *quantum* of the plaintiff's general damages. I considered an award of R210, 000.00 to be fair and just in all the circumstances. The order which I made on 26 November 2009 included such award. These are the reasons.

[4] The plaintiff was born on 10 September 1968. The plaintiff is married to Ms. Bonso Tswana and they have two children, namely Gilvert who was born in 2003 and Mahlonono who was born in 2004.³ The plaintiff achieved standard 3 at school. His first employment position was that of a chef at the Hungry Eye Roadhouse in Dinwiddie, Germiston, where he started to work in 1993. This business had closed down by the time the plaintiff was discharged from hospital after the collision and he has been unable to find a job since then.⁴ The plaintiff was in general good health

1 See: Act No 56 of 1996.

2 See: It is entitled '*Index C: Expert Notices, Medico-Legal Reports & Expert Minute relevant hereto and Medical Records*'.

3 See: Medico-legal report of the industrial psychologist, Dr. AM Kellerman.

4 See: Medico-legal report of the orthopaedic surgeon, Dr. Louis Marais. It appears that the plaintiff has given different information to the experts regarding his career. See: Medico-legal report of Dr. Kellerman.

prior to the collision and he was not on any regular medication. There is no previous history of an operation and the plaintiff has not previously been involved in an accident.⁵ The plaintiff informed Dr. Marais that he also did not take part in any sporting or special recreational activities before the accident.

[5] The plaintiff suffered a fracture of the maxilla or jaw facial injuries and a ruptured right globe resulting in the loss of his right eye, and a whiplash injury,⁶ as a result of the collision.⁷ The plaintiff lost consciousness as a result of the accident.⁸ It is accepted that the plaintiff was hospitalised for about two months.⁹ Following upon his discharge from hospital the plaintiff did not consult any medical or paramedical practitioners.

5 See: Medico-legal report of Dr. Louis Marais. Dr. Kishen Dayal, an ear, nose and throat surgeon, also recorded in his medico-legal report that the plaintiff did not have any medical history and has never had any surgery prior to the accident in question.

6 See: An acceleration-deceleration connective tissue injury of the cervical spine.

7 It also appears from the medico-legal reports that the plaintiff complained of poor hearing on the right following the accident. Dr Kishen Dayal, an ear, nose and throat surgeon, confirms that clinically the plaintiff had a right-sided conductive hearing loss. He states in his medico-legal report that an audiogram investigation confirmed that the plaintiff had a mild conductive hearing loss on the right. His hearing loss, in the opinion of Dr. Dayal, is not as a result of the accident, but rather as a result of a condition which is unrelated to the accident. This opinion is not gainsaid.

8 See: Medico-legal report of the maxillo-facial and oral surgeon, Prof. Russel Lurie.

9 The plaintiff informed the orthopaedic surgeon, Dr. Louis Marais, that he was hospitalised for about two months. Dr. Marais states in his medico-legal report that although there was no corroboration of the dates 'there seems to be no reason to disbelieve him'.

[6] The whiplash injury. Dr. Marais records in his medico-legal report that the plaintiff presents with pain in the mid to lower cervical and upper thoracic spine. In this regard he states:

'The neck pain occurs mainly in the lower part of the neck and the upper thoracic area. It presents with a frequency of two sometimes three days a month. He has noticed that pain tends to be precipitated or aggravated by inclement weather. The pain is categorised as usually being mild, occasionally moderate. There is no reference of symptoms into the arms. There is reference into the trapezial areas particularly on the right side. Mr Matladi denies that the neck pain is associated with any headache.'

[7] Dr. Marais examined the cervical spine of the plaintiff. In this regard he states:

'Limited movements of the cervical spine were pain-free and easily performed. More extensive movements entailing coupled and cardinal motion gave rise to discomfort and, with over pressure, mild to moderate pain. Tenderness was present mainly in the lower cervical and trapezial areas bilaterally.'

[8] Radiographs of the plaintiff's spine were done and were reported on by Dr. G M Calica on 3 August 2009. Dr. Marais expresses the opinion that '[t]he salient features recorded by Dr Calica are those of degenerative change' and that '[t]he radiological findings are commensurate with a person of Mr Matladi's age and one often comes across people with such radiological changes who have no symptoms.'

[9] Dr. Marais expresses the following opinions relating to the plaintiff's whiplash injury and his prognosis:

'From an orthopaedic point of view Mr Matladi sustained a mild acceleration-deceleration connective tissue injury of the cervical spine with minimally intrusive residual symptoms.

Neck pain as well as reference into the upper thoracic area are of course the hallmark symptoms of this condition.

Although the examinee's current symptoms are of mild intrusiveness it should be remembered that he has reached the stage of maximal medical improvement which is the point after which one anticipates no further spontaneous recovery and/or restoration of function based upon reasonable medical probability.

It should also be noted that there are no absolute criteria which allow one to predict long term outcome with certainty and certain aspects of evaluation especially imaging modalities are fraught with inadequacies in specificity, predictive value and accuracy.

Thus, if the examinee is fortunate, he will probably have mild neck symptoms for the remainder of his life. If he is unfortunate, and bearing in mind that he suffers from a dynamic rather than a static impairment, symptoms may gradually increase in frequency and severity with the passage of time and, if he is very unlucky, they may progress to a debilitating extent over a lifetime.

There is a small risk that degenerative disc disease may be precipitated as a direct result of the accident.'

[10] Dr. Marais is of the opinion that the plaintiff has sustained 'minor hidden as opposed to overt damage' to the cervical spine and that he, with reference to the method of the American Medical Association, suffers '... from a nominal 3 % (three percent) impairment of whole person function.' He '... would probably not have required absence from work for more than 2 or 3 weeks'. There is, in the opinion of Dr Marais, no permanent work disability in relation to the spine and he does not envisage permanent partial disability '... ever to exceed 5% (five percent) during Mr Matladi's occupational lifespan.' Dr. Marais expresses the opinion that '... one would have expected the accident to have caused severe pain at the outset' and that the

plaintiff, '... who has had a good cervical outcome, suffers from mild symptoms but he is not totally pain free.' There is, in the opinion of Dr Marais, a 'slight risk' of the plaintiff's neck symptoms increasing significantly with the passage of time.

[11] Dr. Marais expresses the opinion that the '[m]anagement of this type of case is generally of a long term conservative nature' and that there is '... virtually no likelihood of Mr Matladi requiring surgical treatment to his neck as a result of the accident in question.'

[12] Dr. Harold König, an ophthalmologist, refers to the plaintiff's eye injury. The eye was eviscerated. The plaintiff, in other words, has lost his right eye. The plaintiff has lost all vision on the right and this has also reduced his binocular field of vision. Patients with reduced binocular vision, in the opinion of Dr. König, tend to have more accidents, which could reduce the plaintiff's life expectancy. A secondary orbital implant was done in June 2008. This extruded. When Dr. König examined the plaintiff on 4 August 2009, he had a poor fitting ocular prosthesis. The appearance of the right orbit, in the opinion of Dr. König, is also cosmetically unacceptable. There is an empty socket syndrome on the right, which needs to be surgically corrected, and will involve an orbital reconstruction as well as a secondary intra-orbital implant. There is, in the opinion of Dr. König, a 50% chance of further tissue absorption happening and consequently a repeat of the orbital reconstruction in about three to four years time. The plaintiff will need to be fitted with a new ocular prosthesis at three to four yearly intervals.

[13] I should mention that Dr. Marais expressed the opinion that the plaintiff's whiplash injury '... pales into virtual insignificance ...' when inter alia the plaintiff's total loss of vision on the right side is considered. Prof. Lurie also states in his medico-legal report that '[t]he major injury was loss of the right eye.'

[14] The occupational therapist, Ms. Helen Hamilton, states in her report that the plaintiff's diminished vision through the loss of his right eye leads to loss of a visual field; double vision; diminished visual-perception skills including spatial relations and orientation and depth perception; difficulty with fine co-ordination tasks; fatigue and watering eyes with tasks requiring acute focus and concentration of the eyes; and a concern over the cosmetic appearance of the current ocular prosthesis and the cost of a new one. As regards his visual perceptual changes, Ms. Hamilton recommends that outpatient rehabilitation with an occupational therapist may possibly assist the plaintiff in learning to adapt to his disability.

[15] The optometrist, Ms. Venessa Niemand, examined the plaintiff and concluded that his left eye is in perfect health and visual acuity is 6/6. He does not require spectacles or other visual aids. Her opinion regarding the *sequelae* of the loss of his right eye is stated as follows in her medico-legal report:

'As a result of the accident Mr Matladi now does not have any normal binocular functions and will have problems with judging distances, climbing steps and driving. According to Borrish, monocular vs binocular vision results in a 25% decrease in the size of the visual field. Monocularity causes the absence of stereopsis from lack of comparison of retinal disparity, difficulties with eye hand coordination, clumsiness, bumping into objects.

He suffers from decreased VA because of lack of binocular summation as well as impairment in spatial orientation from lack of kinaesthetic cues arising from convergence and accommodation.'

[16] The plaintiff required maxillo-facial and dental surgery as a result of the fracture of his maxilla or jaw that he had sustained in the collision. It appears from the medico-legal reports of Dr. Marais, of Ms. Hamilton and of Dr. Kellerman that the plaintiff suffers from residual pain in the jaw.

[17] Both counsel referred me to past awards compiled by *Corbett and Buchanan* or by *Corbett & Honey: The Quantum of Damages in Bodily Injury and Fatal Injury Cases*. The plaintiff's counsel referred me to *Southgate v Road Accident Fund*,¹⁰ *Laubscher and Another v Commercial Union Assurance Co. of S.A. Ltd (1)* (ECD),¹¹ *Prosser NO v Commercial Union Insurance Company of S.A. Ltd* (WLD)¹², *Mthembu v Minister of Law & Order* (DCLD),¹³ and to *Mdunge v Multilateral Motor Vehicle*

10 Vol. 5 at p C3.71. An award of R20, 0000.00 was made on 16 August 2001 to an adult married female in arbitration proceedings for a whiplash injury of the neck, which was typified as a mild injury.

11 Vol. 2 at p. 460. An award of R1, 250.00 was made in 1976 for a jaw fracture. A minor had sustained a fracture of the mandible in three places with *sequelae* that were much more serious than those as a result of the plaintiff's jaw fracture in the present matter.

12 Vol. 4 at p. A4-130. An award of R100, 000.00 was made on 16 November 1994 to a 33 year old person who was hospitalised for more than six months, who underwent five operations (three of them cranial), and who suffered a severe head injury, fracture of the skull, jaw, and nose with *inter alia* resultant blindness in one eye; meningitis developing; and typical frontal lobe syndrome with changed personality, including verbal aggression, lack of insight, loss of drive, initiative and ability to plan ahead or to execute tasks, and loss of concentration.

13 Vol. 4 at p I3-1. An award of R55, 000.00 was made to a 42 year old artisan on 11 September 1991 for the complete and permanent loss of vision in the right eye as a result of a shotgun pellet fired by a police officer.

Accidents Fund (NPD).¹⁴ The defendant's counsel referred me to *Mabatapasi v John* (ZHC)¹⁵ and to *Botha v Santam Beperk* (TPD).¹⁶

[18] It will serve no useful purpose to discuss each previous award in any more detail and to elaborate on the differences and similarities of each of those cases. They, on the facts and circumstances of this case, provided a general and useful yardstick that assisted me in arriving at an award '... not substantially out of general accord with previous awards in broadly similar cases.'¹⁷

14 Vol. 4 at p J2 p 145 (an award of R180, 000.00 was made on 23 September 1998 to a 28 year old unmarried scholar and part-time farm labourer who suffered multiple injuries and after-effects including that of a left upper limb which condition was equivalent to that of an amputation of the arm and shoulder joint, extensive intra- and extra-ocular injuries and irreparable damage to the retina of the left eye causing permanent loss of all useful vision in the eye and requiring safety spectacles at all times to protect the remaining right eye, and facial lacerations embracing the left upper lip, left cheek below the eye, and vertical wound extending from the left upper eyelid to the brow with significant scarring.

15 Vol 3 at p 314. An award of Zimbabwean \$ 6, 000.00 was made on 1 September 1982 for the destruction and loss of the right eye as a result of a blow with an axe that had also caused a deep laceration over the right upper eyelid and eyebrow, *inter alia* resulting in the plaintiff in that case who was left without binocular vision and who, prior to the accident was a keen participant in tennis, basketball and soccer, to have difficulty in focussing on the ball being used in these games and was left able only to play soccer at a reduced level of skill.

16 Vol 5 at p B4-39. General damages in the sum of R125, 000.00 were agreed and made an order of the court on 5 February 1997 in circumstances where a 20 month old baby, who was 8 years at the time of the trial, suffered brain damage, including damage to the frontal lobe arising from a depressed fracture of the skull; fractures of the left eye-socket and maxilla; traumatic dislocation of the left eye with resultant total loss of vision in that eye and requiring a prosthesis; soft-tissue injuries to the left eyelid, left forehead, nose bridge and left corner of the mouth; and injuries to the teeth.

17 See: *Protea Assurance Co. V Lamb* 1971 (1) SA 530 (A), at p 536A.

[19] In arriving at the conclusion that an amount of R210, 000.00 would be a fair award for the plaintiff's general damages, I took into account all the circumstances of this case, the awards made in the past, and the decreasing value of money.

P.A. MEYER

JUDGE OF THE HIGH COURT

10 June 2010