REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10/39870

(1) REPORTABLE: YES / NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED.

In the matter between:

SMITH, MANUEL LOUIS Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MBHA, J:

[1] The plaintiff claims damages from the defendant as the statutory insurer

in terms of the Road Accident Fund Act 56 of 1996 ("*the Act*"), arising from the bodily injuries he sustained in a motor collision that occurred on 24 April 2007 at approximately 14h20, at the intersection between Molokomme Street and the Soweto Highway in the vicinity of Noordgesicht, Soweto. At the time of the collision the plaintiff was a pedestrian and the motor vehicle that collided with him bearing registration numbers and letters VPH [....] ("*the insured vehicle*") , was being driven by Mr S Vilakazi ("*the insured driver*"). It is common cause that the plaintiff sustained the following injuries as a result of the accident:

1.1 a degloving scalp injury;
1.2 laceration above the right eyebrow and right elbow;
1.3 a dislocated right shoulder;
1.4 a fractured right tibia/fibula; and
1.5 fracture of the C5 and C6 cervical vertebra.

[2] The matter proceeded before me on the issues of liability of the defendant and general damages. The parties have conditionally settled the plaintiff's claim in respect of past and future loss of earnings in the sum of R221 694,40, and the defendant has agreed to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment or of rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor collision on 24 April 2007. This settlement is conditional upon the plaintiff successfully establishing the liability and/or negligence against the defendant.

[3] The evidence that was placed before me consists of the medico-legal reports of all the experts on behalf of both parties, as well as the joint minutes of the pre-trial meetings held by the parties' respective orthopaedic surgeons, occupational therapists and the psychologists, the MMF1 claim form, and the *viva voce* evidence of the plaintiff who was the sole witness in his case. The defendant did not call any witness to testify on its behalf.

THE PLAINTIFF'S EVIDENCE

[4] The plaintiff is currently 56 years old. He was 52 at the time of the collision. At the time of the collision he was employed as a security guard and he was working on night shift. On the night before the collision he was on duty and he knocked off work at 06h00. On arrival at home he did not sleep and he spent the next two to three hours with his cousin. At approximately 13h00 he went to join a friend at a tavern where they drank three 750 ml bottles of beer. An hour later he left the tavern and proceeded to a tuck shop which is situated across the Soweto Highway, to go and buy cigarettes. After buying the cigarettes, he walked back to the tavern along Molokomme Street in a south-northerly direction, until he got to the robot-controlled intersection at the Soweto Highway. He said when he got to the pedestrian crossing at the intersection, he saw that the robot was green in his favour and upon looking to his right he saw that there were two vehicles travelling astride each other in two lanes in an east to westerly direction.

[5] He said after he had walked halfway across the pedestrian crossing and when he was just over the first lane the robot suddenly flashed yellow and then changed to red. He said he found himself in a difficult position since the robot had now changed to green for vehicles approaching from his right including the insured vehicle which was travelling on the left lane. He said the vehicle that was travelling on the right lane was slightly ahead of the insured vehicle in the left lane and that if he had proceeded to walk straight ahead, the vehicle in that right lane would undoubtedly have collided with him since it was already swerving to its right. In the circumstances the only thing he could do was to step backwards. As he stepped backwards, he walked right into the path of the insured vehicle on the left lane which then struck him on the right side of his body. He testified that before stepping back into the insured vehicle's lane, he checked to see if it was safe to do so. He then observed that the insured vehicle was already too close to him. He confirmed that the

insured driver applied brakes to try and bring the vehicle to a stop but by then the vehicle was already too close to him. According to him, both the insured vehicle and the vehicle on the right lane were travelling at a speed of approximately 70 to 80 km/h prior to the collision.

[6] He confirmed that just before the collision occurred, the traffic light controlling his path of travel was red whilst the one that was controlling traffic approaching from his right, including the insured vehicle was green. His evidence in this respect is also corroborated by his affidavit which he submitted to the defendant.

[7] The plaintiff testified that he was rendered unconscious on impact and that he regained consciousness the following day at the Chris Hani Baragwanath Hospital where he was kept as an in-patient for approximately three weeks.

[8] His scalp laceration was managed with surtures and his left leg was placed in a plaster cast. Furthermore, various injections were administered for the pain that he was getting. He testified that presently he has intermittent pain on the lumber spine, shoulder and right lower leg. Furthermore he was now walking with a limp. He says he gets headaches two or three times a week and that his right leg has been shortened. He complains of poor memory and that his eyesight is weak. Because of his injuries and the *sequelae* thereto he can no longer play soccer and he is unable to walk for a long distance.

[9] The plaintiff testified that he has a Standard 6 qualification and that he never returned to work after the collision. His hobbies before the collision were drinking and smoking and they remained the same after the collision.

ANALYSIS OF THE EVIDENCE

[10] The following issues are common cause:

10.1 That the plaintiff had worked on a night shift on the previous day and after knocking off at 06h00 on the morning of the collision, he never went to sleep but he later went to a tavern where he consumed alcohol with his friend.

10.2 The plaintiff had walked past the insured driver's lane before the collision and was between the two lanes for traffic travelling in an east-westerly direction along the Soweto Highway when the robot turned red.

10.3 The robots controlling the plaintiff's path was red before the collision occurred.

10.4 The collision occurred in the insured driver's lane.

10.5 The plaintiff attempted to avoid colliding with the vehicle on the right lane, stepped back into the lane of the insured vehicle and then collided with the insured vehicle.

10.6 The insured driver applied brakes and tried to avoid the collision.

[11] The issue that has to be determined is whether the insured driver negligently caused the collision, and whether the plaintiff was also negligent and if so, whether such negligence was a contributory cause of the collision.

[12] The plaintiff testified that before traversing the highway he looked to his right and saw that there were two vehicles that were approaching from his right and which were travelling astride to each other along the two lanes for traffic travelling in the east-westerly direction along the Soweto Freeway. I accept his evidence that the robot was green for him before he traversed the

highway but since the robot turned to amber and to red when he was not even halfway across the highway, it follows that the robot must have been green for some time well before he started traversing the highway. If one considers that he did see the two vehicles approaching from his right, one expects him to have waited to ensure that it was safe for him to cross since he was not aware for how long the robot had been green before he got to the intersection.

[13] What is clear is that when the plaintiff was between the two lanes of traffic travelling in the east-westerly direction, he tried to avoid being hit by the car on the right-hand lane. He testified that in order to avoid this vehicle he stepped backwards into the left lane in which the insured vehicle was travelling. Clearly, on his own version the plaintiff decided to step into the path of the insured vehicle. He stated in no uncertain terms that before stepping backwards he checked and saw that the insured driver even tried to apply brakes in an attempt to avoid the collision. What I find strange is that the plaintiff never furnished any explanation why he never proceeded and run across to the other side of the highway. He never mentioned in his testimony that there was traffic coming in the opposite direction to that of the insured vehicle. The picture that emerges is that he is the one who decided to walk backwards into the path of the insured vehicle. I accordingly find that the plaintiff acted recklessly in the circumstances.

[14] One can also not exclude the possibility that the plaintiff was inebriated at the time the collision occurred. It will be recalled that he testified that he and his friend consumed three 750 ml bottles of beer. Although he says he was sober, I have noted that in the hospital records it is recorded that upon admission he had clearly consumed alcohol although he was coherent in his speech. Unfortunately the plaintiff was not cross-examined extensively on this aspect so it is difficult to assess how he was affected by the consumption of liquor at the time of the collision. The court nonetheless accepts that he was somewhat under the influence of alcohol at the time of the collision.

[15] I am however, unable to put the entire blame for the collision on the plaintiff. As it is common cause that the plaintiff was hit by the insured vehicle when he was in the middle of the two lanes, meaning that the plaintiff had already traversed the entire left lane in which the insured vehicle was travelling, this begs the question why the insured driver never saw the plaintiff before the collision. Unfortunately the defendant never called the insured driver to come and testify and furnish his version. All that was suggested to the plaintiff was that the insured driver could not avoid the collision and that the plaintiff was solely to blame therefor.

[16] It is trite law that a motorist approaching and entering an intersection while the traffic light is green for him or her must keep a diligent and proper lookout for traffic and pedestrians who are already in the intersection and who entered the intersection before the traffic light changed. Also, there is a duty not to ignore vehicles or pedestrians who are acting in a negligent manner. The position was aptly explained by Milne JP in *Cockran v Durban City Council* 1965 (1) SA 795 (NPD), at 802A-B where he stated that if a motorist enters the intersection immediately the lights become green, he may not ignore the possibility of other traffic, and by logical extension pedestrians, who entered the intersection whilst the traffic light was green for them and before it changed to red. See also *Netherlands Insurance Co of South Africa Ltd v Brummer* 1978 (4) SA 824 (A) at 833C-F; *Walton v Rondalia Assurance Corp of SA Ltd* 1972 (2) SA 777 at 780A-B.

[17] Counsel for the defendant submitted that a driver who has a green traffic light in his or her favour is required to keep a proper lookout for vehicles and pedestrians who may have disregarded the red light but is not required to make absolutely certain that it is safe to enter the intersection. Reliance in this regard was placed on the decision in *SA Eagle v Harford* 1992 (2) SA 786 (A).

[18] This contention by the defendant cannot succeed. In this case we are dealing with a situation where the plaintiff was already in the intersection and

most importantly, the robot was green for him before and at the time he traversed the highway. The principle relied upon and elucidated by the defendant, though correct, is thus not applicable to this case.

[19] In the light of what I have said above, I find that both the plaintiff and the insured driver were negligent in their respective conduct and that their negligence contributed equally to the collision. In the circumstances I find that there should be a 50:50 apportionment of negligence in respect of both parties. The plaintiff is accordingly entitled to recover 50% of his proven damages from the defendant.

QUANTUM: GENERAL DAMAGES

[20] It is a well-known fact that making an award for general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life is particularly difficult. However, certain governing principles have evolved over the years. It is now trite that when considering general damages, the court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. See *RAF v Marunga* 2003 (5) SA 164 (SCA) at 169E-F. Although courts generally recognise the necessity of making a comparison to past awards, it must always be borne in mind that there is no such thing as a case which is on all fours and that past awards serve no more than to give some indication of what sort of awards are appropriate on the facts of the particular case. Due to the difficulty in calculating an amount to be awarded for non-patrimonial damage, considerations of fairness and reasonableness always play determining roles in the assessment of such damages. Whilst fairness and reasonableness mean that the claimant must be sufficiently and properly compensated for the injury he has suffered, it also means that inordinately high awards should not unnecessarily burden the defendant. In *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 274 Trollip, JA said that in striving to determine a fair amount for general damages, the court must decide "*by the*

broadest general considerations" on an amount which it considers to be "*fair in all the circumstances of the case*". Having said so, it must however be acknowledged that generally awards presently are higher than those made in the past. Thus in *Wright v Multilateral Motor Vehicle Accident Fund*, Corbett & Honey Vol 4 XE3-36, Broome DJP said:

> **"***I consider that when having regard to previous awards one must recognise that there is a tendency for awards to now be higher than they were in the past. I believe this is to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living, and recognition that awards in the past have been significantly lower than those of most other countries.*"

[21] I have described the type of injuries the plaintiff sustained in the collision. He complains of pain in the right shoulder and the right tibia/fibula. He also states that he can no longer walk long distances or sit or stand for long periods or even run. He says he is unable to lift or carry heavy objects and that he cannot climb stairs. The plaintiff also complains that he cannot abduct his right shoulder and that he can no longer manage household chores.

[22] Dr Schnaid confirms that the plaintiff's left and right arms and his elbows are normal with a full range of movement. Although the plaintiff complains of back pain, Dr Schnaid states that on examination of the lumbar spine he found the plaintiff to have "*a normal lumbar lordosis with full range of movement*".

[23] Dr Schnaid also notes that there is a fracture of the distal third right clavicle which has not united and that the modeling deformity of the lateral aspect of the proximal humerus is the *sequelae* of a fracture of the greater trochanter of the humerus. He states that an open reduction with internal fixation and bone grafting will be necessary to stabilise the clavicle as well as acromioplasty to restore shoulder movements. Dr Schnaid is of the view that

the plaintiff will experience recurrent symptoms and that depo-medrol injections will need to be inserted into the subacromial spec from time to time to alleviate pain. Furthermore, this must be followed up with physiotherapy and ant-inflammatory agents.

[24] Dr Schnaid further confirms that the plaintiff is experiencing pain in the right tibia which is due to shearing forces on the fixation screws. Furthermore, the tibial nail will need to be removed in the future as its presence weakens the bone putting it at risk for further fractures should the tibia be subjected to forces such as in a motor vehicle accident.

[25] Regarding the scar on the plaintiff's head, Dr Schnaid notes that this has healed well.

[26] Whilst the plaintiff contends that he sustained serious brain damage, this is not supported by any medical evidence. The psychologists defer to the opinion of a neurosurgeon with regard to the severity of the head injury. Unfortunately no neurosurgeon was consulted to diagnose the severity, if any, of the head injury. It is noteworthy that the MMF1 report only mentions a minor head injury. In the absence of any opinion by a neurosurgeon, I am unable to find that the plaintiff sustained a severe injury as his counsel contends. The psychologists, save for agreeing that flowing from their assessments the plaintiff did sustain a brain injury, cannot clinically vouch to this as it is clearly outside their realm. In any event, in the joint minute it is recorded that Mr Joubert, for the defendant, "*noted a possible pre-existing learning disorder*".

[27] I was referred to various cases where the claimants sustained injuries that are somewhat similar to those suffered by the plaintiff in this case. In *Bopape v President Insurance* 1990 (4) Corbett & Buchanan A4-43, the plaintiff sustained a head injury severe brain damage resulting in neurological deficits and fractures of the cervical spine and right clavicle with multiple

abrasions of the scalp. The *sequelae* in this case were in my view more severe than in the present case and the court awarded R70 000,00 which in 2010 was valued at R302 000,00, for general damages. I was also referred to the case of *Britten v Minister of Police* 1976 (2) Corbett and Buchanan vol ii 673 where the plaintiff sustained a head injury with serious consequences associated with substantial damage to the brain and nervous system, subdural haematoma, fractures of the left humerus, clavicle and five ribs and a sprained ankle. The head injury caused a complete change of personality, impaired eyesight and instability of gait. There was also a possibility of early epilepsy. The court awarded R12 000,00 which in 2010 was valued at R250 000,00.

[28] Considering the plaintiff's injuries and the *sequelae* thereto, I am of the view that an amount of R300 000,00 is a fair and reasonable compensation for the plaintiff's general damages.

[29] I have already found that there must be a 50:50 percentage apportionment of damages as the plaintiff and the insured driver were equally to blame for the collision. The plaintiff is thus entitled to recover 50% of his proven damages from the defendant.

[30] I accordingly make an order as follows:

1. The defendant is ordered to pay the plaintiff the sum of R260 847,20.

The defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996, for 50% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment or of rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor collision on 24 April 2007.

The defendant is ordered to pay the plaintiff's taxed or agreed costs of the action which costs are to include the costs of the following experts: DR E.

Schnaid, Ms S Badenhorst, Ms Sugreen and Mr Mostert.

B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

DATES OF HEARING	:	17,18 & 25 OCTOBER 2011
DATE OF JUDGMENT	:	15 DECEMBER 2011
COUNSEL FOR THE PLAINTIFF	:	D A LOUW
INSTRUCTED BY	:	McMILLAN ATTORNEYS
COUNSEL FOR THE DEFENDANT	:	M P MDALANA
INSTRUCTED BY	:	MOLEFE DLEPU ATTORNEYS